

DISSENTING OPINION BY NAKAMURA, C.J.

This case arises out of allegations that Defendant-Appellant Bryan K.A. Muller (Muller), who was nineteen years old, sexually assaulted the complaining witness (Minor), who was twelve years old. Plaintiff-Appellee State of Hawai'i (State) indicted Muller on three counts of sexual assault of a minor who was less than fourteen years old: (1) first-degree sexual assault, for "inserting his penis into [Minor's] genital opening," in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (Supp. 2013) (Count I); (2) third-degree sexual assault, for "inserting his tongue in [Minor's] mouth," in violation of HRS § 707-732(1)(b) (Supp. 2013) (Count II); and (3) third-degree sexual assault, for "placing his hand on [Minor's] buttock," in violation of HRS § 707-732(1)(b) (Count III). After a jury trial, Muller was convicted on Count II, but acquitted on Counts I and III.

Muller challenges the sufficiency of Count II for the first time on appeal, contending that Count II was defective for failing to allege that Minor was not married to Muller. The majority acknowledges that the Motta/Wells liberal construction standard applies to Muller's untimely challenge. See State v. Motta, 66 Haw. 89, 93, 657 P.2d 1019, 1021 (1983); State v. Wells, 78 Hawai'i 373, 894 P.2d 70 (1995). Nevertheless, citing the Hawai'i Supreme Court's recent decisions in State v. Akitake, No. SCWC-29934, 2014 WL 101539 (Hawai'i Jan. 10, 2014) (SDO), and State v. Apollonio, 130 Hawai'i 353, 358, 311 P.3d 676, 681 (2013), the majority concludes that Count II was defective and that Muller's conviction on Count II must therefore be vacated.

I disagree with the majority's conclusion. Akitake and Apollonio are distinguishable because Minor's status of not being married to Muller can reasonably be inferred from the charging language. Under Hawai'i law, a minor under fourteen years old cannot legally marry. See HRS § 572-1(2) (2006). In my view,

the allegation in Count II that Minor "was less than fourteen years old" provided Muller with fair notice that Muller was not married to Minor. Accordingly, liberally construed under a presumption of validity, Count II can within reason be construed to charge a crime.

To the extent that Muller claims that his trial counsel provided ineffective assistance for failing to timely object to the sufficiency of Count II, this claim is without merit. Competent defense counsel may reasonably decline to move for dismissal of a charge where the result of a successful motion would be dismissal without prejudice and there is no impediment to the State recharging the offense. Muller has failed to show that his trial counsel was ineffective for failing to timely move for dismissal based on the sufficiency of the charge.

I.

A.

Different principles apply depending on whether or not a defendant timely challenges the sufficiency of a charge at trial. See State v. Wheeler, 121 Hawai'i 383, 399, 219 P.3d 1170, 1186 (2009).

Under the "Motta/Wells post-conviction liberal construction rule," we liberally construe charges challenged for the first time on appeal. Under this approach, there is a "presumption of validity," for charges challenged subsequent to a conviction. In those circumstances, this court will "not reverse a conviction based upon a defective indictment or complaint unless the defendant can show prejudice or that the indictment or complaint cannot within reason be construed to charge a crime."

Id. at 399-400, 219 P.3d at 1186-87 (citations and brackets omitted).

Generally, a charge which tracks the language of the statute proscribing the offense is sufficient. See State v. Cordeiro, 99 Hawai'i 390, 406, 56 P.3d 692, 708 (2002); State v. Silva, 67 Haw. 581, 585, 698 P.2d 293, 296 (1985). In Wheeler,

however, the supreme court held that this general rule does not apply when the charge uses a statutorily-defined term that departs from its commonly understood meaning to such an extent that use of the term fails to provide a defendant with fair notice of the nature and cause of the accusation. Wheeler, 121 Hawai'i at 393-95, 219 P.3d at 1180-82.<sup>1</sup>

"In determining whether an offense has been sufficiently pleaded, [the Hawai'i Supreme Court] has departed from strict technical rules construing the validity of [a] . . . charge. Rather, [the supreme court] now interpret[s] a charge as a whole, employing practical considerations and common sense." State v. Sprattling, 99 Hawai'i 312, 318-19, 55 P.3d 276, 282-83 (2002). Moreover, the supreme court has upheld a charge as sufficient under the liberal construction standard where a missing term could be implied from the matters alleged. Id. at 319, 55 P.3d at 283. In Sprattling, the supreme court held, under the liberal construction standard, that the omission of the term "bodily" did not render the assault charge, which required proof of "bodily injury," insufficient. Id. The court reasoned that the required allegation of bodily injury could be implied from the use of the word "assault," and therefore, the omission of the word "bodily" from the charge "was not so obviously defective" that the charge could not reasonably be construed to charge a crime. Id. (internal quotation marks and citation omitted).

B.

Here, both Counts II and III of Muller's indictment alleged that Muller "did knowingly subject to sexual contact,

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<sup>1</sup>Because the defendant in Wheeler timely objected to the sufficiency of the charge, the supreme court did not analyze the charge under the liberal construction rule. Wheeler, 121 Hawai'i at 400 n.19, 219 P.3d at 1170 n.19.

[Minor], who was less than fourteen years old, or did cause [Minor] to have sexual contact with [Muller.]" However, Counts II and III did not specifically allege that Minor was not married to Muller. Muller's trial counsel did not move to dismiss Counts II or III as defective for failing to allege that Minor was not married to Muller. Since Minor was twelve at the time of the alleged offenses, Minor could not have legally married Muller under Hawai'i law. See HRS § 572-1(2). As noted, after a jury trial, Muller was found guilty on Count II, but was acquitted on Counts I and III.

Muller was charged in Counts II and III with third-degree sexual assault, in violation of HRS § 707-732(1)(b). Unlike HRS § 707-732(1)(c) (which applies to minor victims between fourteen and sixteen years old), the language of HRS § 707-732(1)(b) does not specify that a requirement of the offense is that defendant "is not legally married to the minor[.]" HRS § 707-732(1)(b) and (1)(c) provide:

(1) A person commits the offense of sexual assault in the third degree if:

. . . .

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person; [or]

(c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor[.]

(Emphases added.)

Although the language of HRS § 707-732(1)(b) does not specify a requirement that the defendant and the minor victim were not legally married, HRS § 707-700 (Supp. 2013) defines "sexual contact," as

any touching, other than acts of "sexual penetration", of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

(Emphasis added.) And in State v. Arceo, 84 Hawai'i 1, 15, 928 P.2d 843, 857 (1996), the Hawai'i Supreme Court identified as one of the material elements of HRS § 707-732(1)(b) "that [the defendant] was aware that the [m]inor was not married to him (i.e., the requisite knowing state of mind with respect to the attendant circumstance implicit in "sexual contact," . . .)[.]"

Nevertheless, the structure of HRS § 707-732(1)(b) and HRS § 707-732(1)(c) demonstrates that in establishing the HRS § 707-732(1)(b) offense, the Hawai'i Legislature believed that the minor victim's status of not being married to the defendant could be inferred and assumed from the minor victim's age of less than fourteen years old. This makes sense because under Hawai'i law, a minor under fourteen years old cannot legally marry. See HRS § 572-1(2). Other jurisdictions have held that reasonable inferences can be drawn from evidence of the tender age of a victim of sexual assault who is a minor to prove the essential element that the victim was not married to the defendant. See State v. May, 109 P. 1026, 1027 (Wash. 1910) (evidence that victim was under fourteen years old); State v. Twyford, 186 N.W.

2d 545, 526 (S.D. 1971) (evidence that victim was twelve at time of crime); State v. Shuck, 661 P.2d 1020, 1021 (Wash Ct. App. 1983) (evidence that victims were in ninth grade at time of trial); State v. Wade, 766 P.2d 811, 815 (Kan. 1989) (evidence that victim was five years old and thus could not possibly be married).

"[E]mploying practical considerations and common sense," Sprattling, 99 Hawai'i at 319, 55 P.3d at 283, and applying the liberal construction standard, I conclude that Minor's status of not being married to Muller could reasonably be inferred from the allegation that Minor was "less than fourteen years old." Thus, Count II can within reason be construed to charge a crime. See Motta, 66 Haw. at 91, 657 P.2d at 1020. Muller did not suffer any prejudice from the claimed charging deficiency since he obviously was not married to Minor. Accordingly, in my view, Count II was sufficient under the liberal construction standard.

C.

Akitake and Apollonio, which the majority cites in holding that Count II was defective, are distinguishable. Unlike Count II, the mens rea and public-road element missing from the charges in Akitake and Apollonio could not be inferred from the charging language. Therefore, Akitake and Apollonio do not require dismissal of Count II.

Hawai'i Rules of Penal Procedure Rule (HRPP) Rule 7(d) states that "[t]he charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged." In my view, even if the public-road element was not specifically alleged, a charge alleging that the defendant was driving a vehicle on the H-1 Freeway while under the influence of an intoxicant would be sufficient. This is because the proof of the alleged fact of driving on the H-1 Freeway would establish

the public-road element. Similarly, in this case, proof of the alleged fact that Minor was under fourteen years old would establish, or at least permit a fact-finder to reasonably infer, that Minor was not married to Muller. See May, 109 P. at 1027; Twyford, 186 N.W. 2d at 526; Shuck, 661 P.2d at 1021; Wade, 766 P.2d at 815. I believe that under the liberal construction standard, which presumes the validity of the charge, the allegations in Count II were sufficient to state the offense.

II.

To the extent that Muller claims that his trial counsel provided ineffective assistance for failing to timely object to the sufficiency of Count II, I reject that claim.

The Hawai'i Supreme Court has held that the appropriate remedy where the defense timely objects to a defective charge is dismissal without prejudice. See State v. Gonzalez, 121 Hawai'i 128 Hawai'i 314, 324, 288 P.3d 788, 798 (2012). Muller does not suggest that if Count II had been dismissed without prejudice, the State would have had any difficulty in recharging him with an indictment alleging that he was not married to Minor at the time of the alleged offense. In my view, even assuming that Count II would have been dismissed without prejudice if a timely motion challenging the sufficiency of the charge had been made, Muller has not shown that his trial counsel was ineffective for failing to make such a motion.

There are a number of valid reasons why competent defense counsel may decline to move for dismissal of a charge where the dismissal is without prejudice and there is no impediment to the State recharging the offense. A successful motion for dismissal in this situation would most likely only delay, and not end, the prosecution. Therefore, competent defense counsel may believe that no advantage would be gained by seeking dismissal. In addition, the delay resulting from the

dismissal and subsequent recharging of the offense may serve to benefit the State, providing it with additional time to secure evidence to bolster its case. The delay may work to the defendant's disadvantage, where the defense is prepared to proceed to trial with evidence it believes will exonerate the defendant.

For example, in this case, Muller was charged with violating HRS § 707-732(1)(b) by engaging in sexual contact with Minor, who was less fourteen years old, in both Counts II and III. Neither of these counts alleged that Minor was not married to Muller. Presumably, if Muller successfully moved to dismiss Count II based on this alleged deficiency, the trial court would also have dismissed Count III, since the material charging language was the same for both counts. However, the defense obtained Muller's acquittal on Count III. The defense also obtained Muller's acquittal on Count I for first-degree sexual assault, the most serious offense charged. Thus, Muller apparently reaped some benefit from avoiding delay and proceeding to trial. Defense counsel, familiar with the strengths and weaknesses of both the State's case and Muller's case, may have reasonably concluded that any possible benefit to Muller in seeking the dismissal without prejudice of Count II did not outweigh the risks of a delay in the prosecution. It is clear that Muller was not, in fact, married to Minor, who was twelve at the time of the offense, and that the State could easily prove that Muller and Minor were not married. At trial, Minor testified that she had never been married.

In addition, the Motta/Wells liberal construction standard would be rendered superfluous if the failure of defense counsel to timely move for dismissal without prejudice of an insufficient charge automatically constitutes ineffective assistance. There would be no occasion to apply the Motta/Wells

standard. A defendant whose trial counsel failed to timely move for dismissal of the charge would simply argue on direct appeal (or in an HRPP Rule 40 petition) that trial counsel was ineffective for failing to timely move for dismissal, and thereby avoid the application of the liberal construction standard.

Muller has the burden of demonstrating ineffective assistance of counsel. State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). Based on the record in this appeal, Muller had not satisfied his burden of showing that his trial counsel provided ineffective assistance in failing to timely move for dismissal of Count II as insufficient.

III.

For the foregoing reasons, I respectfully dissent.<sup>2</sup>

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<sup>2</sup>I do not address other issues raised by Muller on appeal that the majority did not decide.