OPINION BY REIFURTH, J.,
CONCURRING IN PART, AND DISSENTING IN PART

I concur in part and dissent in part from the majority's decision. While I would affirm the Family Court's amended judgment with respect to Defendant's convictions on Counts 7, 16 and 17, I would vacate the amended judgment with respect to the convictions on Counts 8-15 (including the consecutive one-year sentence for Defendant's conviction on Count 13) and 18-25, and remand the case for further proceedings.

I. BACKGROUND

The State's complaint consists of twenty-five counts. The language in each count is identical, except for the date of the alleged violation, and provides in relevant part:

> On or about the [date], in the City and County of Honolulu, State of Hawaii, [Defendant], did intentionally or knowingly violate the Protective Order . . . filed on the 15th day of September 2008, by the [Family Court], pursuant to Chapter 586 of the Hawaii Revised Statutes, thereby committing the offense of Violation of an Order for Protection in violation of Section 586-5.5 and Section 586-11(a)(3) of the Hawaii Revised Statutes.

Each count in the complaint states the following dates of violation:

Count 1:	10/19/09	Count 14:	11/06/09
Count 2:	10/19/09	Count 15:	11/06/09
Count 3:	10/19/09	Count 16:	11/07/09
Count 4:	10/19/09	Count 17:	11/08/09
Count 5:	10/19/09	Count 18:	11/06/09
Count 6:	10/19/09	Count 19:	11/06/09
Count 7:	10/22/09	Count 20:	11/06/09
Count 8:	11/06/09	Count 21:	11/06/09
Count 9:	11/06/09	Count 22:	11/06/09
Count 10:	11/06/09	Count 23:	11/07/09
Count 11:	11/06/09	Count 24:	11/07/09
Count 12:	11/06/09	Count 25:	11/07/09
Count 13:	11/06/09		

At trial, the State introduced exhibits in support of nineteen of the counts (Counts 7-25): a specific corresponding exhibit for each of Counts 7, 16, and 17; eight voice mail messages dated November 6, 2009 relating to Counts 8-15; and eight text messages sent on November 6 and 7, 2009 relating to Counts 18-25. The exhibits consisted of:

(1) eleven compact disks, identified by date and, with a single exception, by time, of voice mail messages left by the Defendant on the work telephone of the Complaining Witness ("CW") on October 22 (1 message), November 6 (8 messages), November 7 (1 message) and

November 8, 2009 (1 message); and

(2) copies of eight text messages, identified by date, sent by the Defendant to CW's cellular telephone on November 6 (5 messages) and November 7, 2009 (3 messages).

Although each count in the complaint indicates the date on which an alleged violation occurred, the time at which it occurred was not included, and the prosecution did not explain which messages related to which counts.

In closing argument, the State tied Counts 7-25 to the evidence of nineteen incidents that supported those counts. For all counts except Count 7 (Exhibit 23), Count 16 (Exhibit 14) and Count 17 (Exhibit 13), however, the correlation was non-specific (to a group of exhibits) rather than specific (to a single exhibit):

> Okay. So we're talking about 25 counts of Violation of an Order for Protection. We know that they fall into two categories - voice mails and text messages. The voice mails would be your first 17 counts, Counts 1 to 17. The text messages would be your next eight counts, Counts 18 to 25.
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> Now, let's look first at the voice mails. The voice mails are grouped in terms of the dates of incident. Counts 1 through 6 are from October 19, 2009; Count 7 is from October 22; Counts 8 to 15 are November 6; Count 16 from November 7; and Count 17 is from November 8.
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> Now, you listened to the voice mails. These voice mails are also associated with these dates. Exhibit 23 is the voice mail from October 22; Exhibit[s] 15 to 22 are from November 6; Exhibit 14 is from November 7; Exhibit 13 is from November 8.
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> Switching now to the text messages. Counts 18 to 25, they are also grouped in terms of the dates of incident. Counts 18 to 22 are from November 6; Counts 23 to 25 are from November 7. For each of these text messages there are exhibits. Exhibits 5 through 9 are the text messages from November 6; and Exhibits 10 to 12 are the text messages from November 7.

Compounding the problem, the Family Court did not explain that the jurors needed to unanimously agree on which incident supported which count.

II. DISCUSSION

The problem here stems from the prosecution's decision to charge Defendant with twenty-five counts of violating a protective order on five different days in October/November 2009, without specifying which exhibit/incident pertained to sixteen of

the twenty-five counts.[1/] Counts 7, 16 and 17 were single incidents, alleged to have occurred on different dates, and were supported by a single exhibit each. As a result, a specific unanimity instruction was not required to proceed on those three counts, and I concur with the majority's decision to affirm as to each of them.

Counts 1-6 were unsupported by any exhibits, and the jury subsequently acquitted Defendant as to those charges. The sixteen remaining counts are supported by sixteen exhibits, reflecting conduct over two days in November, 2009. When, as here, multiple counts are charged as having occurred within a specific time frame, and the prosecution does not make it clear which incident corresponds to which count, any one of those actions might support conviction on any one count.

The danger is that without a unanimity instruction nothing prevents individual jurors from concluding that different conduct supports conviction on any particular count. For example, Juror 1 might conclude that Exhibit 15 (voice mail received November 6, 2009 at 1:00 p.m.) supports conviction on Count 8 and that Exhibit 16 (voice mail received November 6, 2009 at 1:25 p.m.) supports conviction on Count 9, while Juror 2 does not believe that Exhibit 15 supports a conviction at all, but that Exhibit 16 supports a conviction on both Counts 8 and 9. Under those circumstances, Defendant is denied his constitutional right to a unanimous verdict on Count 8[2/] under article I, sections 5 and 14 of the Hawai'i Constitution.[3/]

[1/] "[As] a general rule, the precise time and date of the commission of any given offense is not a material element of the offense within the framework of the [Hawai'i Penal Code.]" *State v. Arceo*, 84 Hawai'i 1, 14, 928 P.2d 843, 856 (1996). The issue here, though, is not whether the charge itself satisfies scrutiny, but whether, in light of the manner of the charge and the prosecution's failure to inform the jury which conduct constituted which violation, the Family Court's failure to issue a specific unanimity instruction does.

[2/] Defendant did not raise the constitutional/unanimity objection below. Insofar as Defendant challenges the Family Court's failure to provide a specific unanimity instruction to the jury, however, we would consider the issue for plain error. *State v. Mundon*, 121 Hawai'i 339, 350, 219 P.3d 1126, 1137 (2009) (quoting *Arceo*, 84 Hawai'i at 33, 928 P.2d at 875 (1996)).

[3/] "The right of an accused to a unanimous verdict in a criminal prosecution, tried before a jury in a court of this state, is guaranteed by article I, sections 5 and 14 of the Hawai'i Constitution." *Arceo*, 84 Hawai'i

The Family Court took pains to instruct the jury on each of the Complaint's twenty-five counts and directed the jury, as to each count, that they needed to agree unanimously on their verdict. What the Family Court did not do, however, was provide the jury with sufficient information so that the jurors could know what they were convicting the defendant of or what the prosecution had to prove in order to secure a conviction under Counts 8-15 and 18-25.

The Hawai'i Supreme Court has not specifically addressed whether, when multiple counts are supported by an equal number of exhibits, a unanimity instruction is necessary unless the prosecution elects the specific act upon which it is relying to establish the conduct element of each charged offense. The court has, however, considered related issues in analogous circumstances. In *Arceo*, for instance, the court considered whether, when separate and distinct culpable acts are subsumed within a single count, and any one of which could support a conviction thereunder, there was such a requirement. The court held:

> In our view, the logic of *Petrich*, *Covington*, *Aldrich*, *Brown*, and the line of federal decisions arising out of *Echeverry* is cogent, compelling, and ineluctable. Accordingly, we hold that [in the circumstances described above] the defendant's constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

84 Hawai'i at 32-33, 928 P.2d at 874-75.

The instant case is different, presenting separate and distinct culpable acts in support of the same number of separate and distinct counts alleging the same offense, with each act potentially supporting any one of the multiple counts for which it is offered in support. Nevertheless, the logic of *Arceo* requires its extension here. The prosecution needed to elect which incident supported which count, or the Family Court needed

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at 30, 928 P.2d at 872.

to afford a specific unanimity instruction requiring unanimity as to the conduct that constitutes the violation.

That a specific unanimity instruction is a constitutional imperative under the circumstances is made clear under the rationale adopted in *State v. Auld*, 114 Hawai'i 135, 157 P.3d 574 (App. 2007) and *State v. Mundon*, 121 Hawai'i 339, 219 P.3d 1126 (2009). In *Auld*, the defendant was charged with two counts of Terroristic Threatening in the First Degree ("TT1"). At trial, the prosecution adduced evidence of several persons that the defendant had threatened, as well as multiple acts by the defendant, that served as the basis for the two counts of TT1. No specific unanimity instruction was given with respect to which persons were threatened in which count, and the jury convicted the defendant on both counts of TT1. This court held that a unanimity instruction should have been given as to the persons threatened. *Auld*, 114 Hawai'i at 143-44, 157 P.3d at 582-83. More specifically, we stated that, because both the indictment and the jury instructions identified multiple possible victims and there was no instruction requiring unanimity as to the persons threatened, each of the jurors could have based his or her determination of guilt on a finding of multiple victim alternatives. Allowing each juror multiple victim choices and not requiring that all jurors agree on a single one, "violates the rule requiring a unanimous jury regarding the person(s) threatened, which was necessary to prove the offense charged." *Id.* at 144, 157 P.3d at 583.

In *Mundon*, the defendant was charged with two identical counts of TT1, but convicted on only one of the counts. During the trial, the prosecution adduced evidence of what the prosecution contended were two separate acts of TT1. The jury, however, was never informed as to which act served as the basis for which count of TT1. The Supreme Court held that because it was possible that some jurors might have concluded that Mundon committed TT1 when he used the knife in the truck and others might have concluded that he committed the offense when he and the complainant were struggling with the knife in the sand, that "there may not have been a unanimous verdict as to Mundon's

conviction for TT1." *Mundon*, 121 Hawai'i at 355, 219 P.3d at 1142. Accordingly, the court held that, to "'correct any potential confusion' in this case, a specific unanimity instruction should have been given 'to ensure [that] the jury underst[ood] its duty to unanimously agree to a particular set of facts.'" *Id.* (brackets in original) (quoting *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983)).

The majority contends that the rationale of *Arceo*, *Auld* and *Mundon* falls short in the current case because, although presented with multiple identical counts and multiple instances of conduct, the jury (i) was presented with the same number of counts and instances of conduct (thus differentiating it from *Auld*) and (ii) convicted Defendant on each count (thus differentiating it from *Mundon*). Those distinctions, however, do not affect the critical similarities between the cases: that the jury did not understand its duty to unanimously agree to a particular set of facts; and that absent a specific conduct-related unanimity instruction, jurors were free to convict Defendant without agreeing on the conduct that warranted conviction. As a result, a specific unanimity instruction should have been given. In the absence of a prosecutorial election or a specific unanimity instruction, it was plainly erroneous to convict the Defendant on Counts 8-15 and 18-25.

As to the convictions on Counts 8-15 and 18-25, it is unclear which incident(s) any individual juror thought supported a conviction. As a result, and in the absence of an election by the prosecution explaining which exhibits supported which counts, Defendant was entitled to a specific unanimity instruction from the Family Court, requiring that the jurors agree on the basis for conviction on each of those counts.

In sum, I would affirm the amended judgment as to the convictions related to Counts 7, 16 and 17, and I would vacate the amended judgment with respect to the convictions on Counts 8-15 and 18-25 and remand the case for further proceedings.

Lawrence M Reifurth