

CONCURRING OPINION BY NAKAMURA, C.J.

In my view, a defendant should be required to show plain error when the defendant fails to object to the sufficiency of the charge in the trial court and raises the issue for the first time on appeal. See State v. Stone, No. 30059, 2012 WL 3791886, at *12-13 (Hawaii App. Aug. 31, 2012) (Nakamura, C.J., concurring and dissenting). To show plain error, the defendant should be required to demonstrate that he or she was prejudiced by the alleged deficiency in the charge. See id. In this case, Defendant-Appellant Jacob A. Hargitt (Hargitt), who was represented by counsel, did not object to his excessive speeding charge in the trial court, and he challenges the charge for the first time on appeal. Hargitt does not show that he was prejudiced by the failure of the charge to allege the required mens rea.

However, under existing and controlling precedent, even absent any prejudice, Hargitt is entitled to have his conviction overturned if he can show that the charge "cannot within reason be construed to charge a crime." State v. Motta, 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983). Based on State v. Nesmith, 127 Hawaii 48, 276 P.3d 617 (2012), I conclude that Hargitt's excessive speeding charge cannot within reason be construed to charge a crime. Accordingly, I concur in the result reached by the majority.

Craig H. Nakamura