

DISSENTING OPINION BY NAKAMURA, C.J.

Plaintiff-Appellee State of Hawai'i (State) charged Defendant-Appellant Matthew C. Lockey (Lockey) with harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2012),^{1/} as follows:

On or about the 22nd day of February, 2011, in the City and County of Honolulu, State of Hawaii, MATTHEW C. LOCKEY, with intent to harass, annoy, or alarm Courtney Lockey, did strike, shove, kick, or otherwise touch Courtney Lockey in an offensive manner or subject Courtney Lockey to offensive physical contact, thereby committing the offense of Harassment, in violation of [HRS § 711-1106(1)(a)].

At trial, the State introduced evidence that during an argument, from a distance of about four feet, Lockey threw a plastic water bottle that was full at Courtney Lockey, who was his wife, hitting her in the face and causing pain and swelling.

In my view, charging the harassment offense in the disjunctive provides better and fairer notice than charging in the conjunctive. State v. Codiamat, No. CAAP-11-0000540, 2012 WL 3113898, at *3-6 (Hawai'i App. July 31, 2012) (SDO) (Nakamura, C.J., concurring). However, as I acknowledge in my concurring opinion in Codiamat, existing precedent of the Hawai'i Supreme Court provides that disjunctive pleading of alternative ways to commit an offense renders the charge defective. Id. at *3-4. Although I believe this precedent should be reexamined and overturned, see id. at *3-6, based on the existing precedent, I agree with the majority that the harassment charge was defective, in that it charged the alternative means of committing the HRS § 711-1106(1)(a) offense in the disjunctive.

^{1/} HRS § 711-1106(1)(a) provides:

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

However, unlike in Codiamat, the State argues that Lockey waived his claim that charging in the disjunctive rendered the charge defective (hereinafter, the "disjunctive pleading claim") by not raising it in a timely manner as required by Hawai'i Rules of Penal Procedure (HRPP) Rule 12 (2007).^{2/} In my view, Lockey waived his disjunctive pleading claim under HRPP Rule 12.

I.

HRPP Rule 12 provides in relevant part:

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

. . . .

(2) defenses and objections based on defects in the charge (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

. . . .

(c) Motion date. Pretrial motions and requests must be made within 21 days after arraignment unless the court otherwise directs.

. . . .

(f) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, within the time set by the court pursuant to section (c), or within any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Immediately before the commencement of trial, Lockey orally moved to dismiss the charge based on his disjunctive pleading claim. In response to Lockey's oral motion, the State argued that the pretrial motions deadline had expired and that Lockey's motion was untimely. The Family Court of the First Circuit (Family Court) denied Lockey's motion. Lockey did not

^{2/} In Codiamat, the State did not argue or contend that Codiamat's motion to dismiss the harassment charge for disjunctive pleading was untimely, and accordingly, this court did not address that issue.

dispute in the Family Court, and does not dispute on appeal, that his oral motion was made after the motions deadline and that the motion was untimely.

HRPP Rule 12(b)(2) provides an exception to the motions deadline for objections to a charge that are based on the failure to show jurisdiction or the failure to charge an offense. A motion raising these objections can be made "at any time during the pendency of the proceedings." Id. The critical question in this appeal therefore becomes whether Lockey's disjunctive pleading claim is a claim that the charge is defective because it fails to show jurisdiction or charge an offense. In my view, Lockey's disjunctive pleading claim is not a claim that qualifies for the motions deadline exception.

II.

As recently indicated by the Hawai'i Supreme Court's decision in State v. Nesmith, 127 Hawai'i 48, 276 P.3d 617 (2012), not all defects in a charge are jurisdictional. Justice Acoba's concurring and dissenting opinion reads the majority opinion in Nesmith as concluding that deficiencies in a charge that are based on the failure to allege an element of the offense are jurisdictional, but that non-element deficiencies are not necessarily jurisdictional. Nesmith, 127 Hawai'i at 66, 276 P.3d at 635 (Acoba, J., concurring and dissenting) (reading the majority opinion as concluding "that a state of mind is a 'fact' that must be included in an HRS § 291E-61(a)(1) charge for due process purposes only, but not an element of HRS § 291E-61(a)(1) that must be included in the charge for purposes of jurisdiction." (brackets omitted)); see State v. Shyanguya, No. 29655, 2012 WL 2383726, *3-4 (Hawai'i App. June 25, 2012) (memo. op.) (applying the distinction between jurisdictional and non-jurisdictional defects in a post-Nesmith case).

Here, the harassment charge against Lockey alleges the necessary element(s) to establish a violation of HRS § 711-

1106(1)(a)^{3/} as well as the applicable mens rea. Lockey's disjunctive pleading claim is not a claim that the harassment charge fails to allege the elements of the offense or to show jurisdiction. Nor is it a claim that the harassment charge fails to state an offense. Lockey does not contend that the charge is insufficient to state an offense, but rather that the disjunctive pleading leaves him uncertain about which alternative means, which each state the offense, he must defend against. In other words, Lockey does not contend that the allegation in the charge that with the requisite intent, he "did strike, shove, kick, or otherwise touch [his wife] in an offensive manner" fails to state an offense. Lockey also does not contend that the allegation in the charge that with the requisite intent, he did "subject [his wife] to offensive physical contact" fails to state an offense. He simply argues that the charge was defective because the two alternative means of committing the offense were linked with an "or" instead of an "and."^{4/}

The harassment charge was based on Lockey's single act of allegedly throwing a full plastic water bottle at his wife, at close range, hitting her in the face and causing pain and swelling. This alleged act clearly falls within both of the alternative means of violating HRS § 711-1106(1)(a): (1) "[s]trik[ing] . . . or otherwise touch[ing] another person in an offensive manner" or (2) "subject[ing] the other person to offensive physical contact[.]" Lockey does not show that he was prejudiced by the disjunctive pleading in this case. Under these circumstances, I would hold that Lockey waived his disjunctive

^{3/} It appears that the HRS § 711-1106(1)(a) offense only requires proof of a conduct element and the applicable mens rea.

^{4/} HRPP Rule 12(b)(2) was modeled after Federal Rule of Criminal Procedure (FRCP) Rule 12(b)(2), which was subsequently renumbered as FRCP Rule 12(b)(3)(B). Under the parallel FRCP Rule 12, courts have concluded that an objection to a charge as duplicitous (alleging more than one offense in a single count), which is analogous to Lockey's disjunctive pleading claim, was waived when it was not timely raised. *E.g., United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997); *United States v. Price*, 763 F.2d 640, 643 (4th Cir. 1985).

pleading claim by failing to raise it in a timely manner, as required by HRPP Rule 12.

III.

The State presented substantial evidence at trial that Locky acted with the intent to harass, annoy, or alarm his wife when he threw the water bottle at her face. Therefore, I would also reject Locky's argument that the State failed to present sufficient evidence that he acted with the requisite intent to prove the harassment charge, and I would affirm his conviction.

IV.

For the foregoing reasons, I respectfully dissent.

Craig H. Nakamura