CONCURRING OPINION BY NAKAMURA, C.J.

I agree with the result reached by the majority, but write separately to explain my analysis.

I.

A.

Plaintiff-Appellant State of Hawaiʻi (State) charged Defendant-Appellant June-June Mas Abdon (Abdon) by indictment with first-degree sexual assault. Because the complaining witness (CW) was a minor at the time of the charged offense, the six-year statute of limitations was tolled until the CW turned eighteen years old. The indictment alleged the date on which the CW became eighteen, and at trial, the State presented undisputed evidence of the date of the CW's eighteenth birthday. The record also contains undisputed evidence -- namely, the filed indictment -- that the indictment was found on April 24, 2012, prior to the running of the statute of limitations. The State, however, did not present evidence at trial of when the indictment was found.

Abdon does not dispute that his prosecution was commenced within the statute of limitations. He contends that his conviction must nevertheless be reversed because the State did not introduce evidence at trial of when the indictment was found, which Abdon claims constitutes a failure to comply with Hawaii Revised Statutes (HRS) § 701-114(1)(e) (1993). Abdon argues that in order to comply with HRS § 701-114(1)(e), the State must present evidence at trial proving (1) when the offense was committed (i.e., when the limitations period began running), (2) any period that the statute of limitations was tolled, and (3) when the prosecution was commenced (i.e., when the limitations period stopped running). I do not agree. In my view, the State is not required to present evidence at trial of the incontestible, judicially-known date of when the prosecution was commenced and the limitations period stopped running.

B.

HRS § 701-114(1)(e) provides that "[f]acts establishing that the offense was committed within the time period specified in [HRS] section 701-108" must be proved beyond a reasonable

doubt." Under HRS § 701-108 (Supp. 2013), when a prosecution is commenced and the limitations period stops running is always an indisputable, judicially-known event. HRS § 701-108(5) provides that "[a] prosecution is commenced either when an indictment is found or a complaint filed, or when an arrest warrant or other process is issued[.]" All of these events are subject to incontestible judicial notice and involve actions undertaken or supervised by the court, such as the court's filing or issuing of documents.

It would make no sense for the Legislature to require the State to present evidence to the jury, and the jury to make a finding, regarding such incontestable, judicially-known events. Accordingly, I construe the HRS § 701-114(1)(e) provision "[f]acts establishing that the offense was committed within the time period specified in [HRS] section 701-108" as imposing on the State the requirement of proving when the limitations period began to run, which is the day after the offense was committed, and any period that the limitations period is tolled after it begins running.[1] I do not construe this provision as requiring proof of when the prosecution was commenced and the limitations period stopped running. Because the date on which the prosecution was commenced is always known and indisputable, proof of when the limitations period began to run (and any tolling period) will necessarily serve to establish whether the offense was committed within the limitations period.

This interpretation of HRS § 701-114(1)(e) comports with how the provision has been construed and applied by practitioners and trial courts over the years. As the Circuit Court noted, in the "normal situation," where no tolling of the limitations period is at issue, "all that's required is [proof of] the date of the offense. . . . The date of the charging

[1]HRS § 701-108(4) states that the "[t]ime starts to run on the day after the offense is committed[,]" and HRS § 701-108(6) sets forth when the limitations period is tolled.

instrument is never sent to the jury. It's never part of the elements of the offense that they have to find beyond a reasonable doubt." The Hawaiʻi Standard Jury Instructions Criminal (HAWJIC) confirms the Circuit Court's observations. These pattern jury instructions require the State to prove beyond a reasonable doubt the date on which the charged offense was committed, which is when the limitations period began to run.[2] The pattern jury instructions do not require the State to prove when the prosecution was commenced, i.e., when the limitations period stopped running.

My interpretation of HRS § 701-114(1)(e) is also consistent with how the Hawaiʻi appellate courts have apparently applied the provision. In State v. Correa, 5 Haw. App. 644, 650, 706 P.2d 1321, 1325 (1985), this court held that the failure to instruct the jury on venue and the timeliness of the prosecution was harmless error because there was "uncontradicted and undisputed evidence in the record that the offenses occurred on November 24, 1982 in Pearl City, Oahu." We did not refer to any evidence regarding when the prosecution had commenced in our harmless error analysis. In State v. Iuli, 101 Hawaiʻi 196, 207, 65 P.3d 143, 154 (2003), the Hawaiʻi Supreme Court cited Correa with approval in rejecting Iuli's claim that the jury instructions were insufficient in failing to instruct the jury as to venue, jurisdiction, and timeliness. Without referring to any specific evidence presented to the jury regarding when the prosecution had commenced, the supreme court held that "where uncontradicted and undisputed evidence of timely prosecution, jurisdiction, and proper venue is contained in the record, the trial court's failure to instruct the jury is harmless beyond a reasonable doubt." Id.

[2]The standard HAWJIC formulation is to require proof that the offense was committed "on or about" a specified date.

C.

Here, the limitations period began to run the day after the offense was committed in 1997, but the limitations period was also immediately tolled until the CW turned eighteen. See HRS §§ 701-108(4) and (6)(c). The indictment against Abdon alleged the date that the CW turned eighteen, and the State presented undisputed evidence at trial of the date of the CW's eighteenth birthday. The indictment was filed in the Circuit Court, and the indictment indisputably shows that the indictment was found and filed within the six-year limitations period. Indeed, Abdon specifically acknowledges that his prosecution was commenced "before the six year time limitation period expired[.]" I conclude that under HRS § 701-114(1)(e), the State was not required to present evidence at trial of when Abdon's prosecution was commenced, and that Abdon is not entitled to have his conviction overturned based on the State's failure to present such evidence at trial.

D.

1.

I further conclude that Abdon waived his rights under HRS § 701-114(1)(e) by failing to raise a statute of limitations objection to the institution of his prosecution before trial.

The United States Supreme Court has observed that the statute of limitations is not directed at the defendant's guilt or innocence of criminal conduct:

> [A]lthough the statute of limitations may inhibit prosecution, it does not render the underlying conduct noncriminal. . . . A statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution.

Smith v. State, 133 S. Ct. 714, 720 (2013).

The Hawaiʻi Supreme Court has stated: "[T]he protection of a statute of limitations does not constitute a fundamental right under the United States Constitution or the Hawaiʻi Constitution, but rather, a mere statutory act of grace that the

sovereign state has conferred in order to limit its right to prosecute criminal offenders." State v. Timoteo, 87 Hawaiʻi 108, 113, 952 P.2d 865, 870 (2003) (citing State v. Russell, 62 Haw. 474, 479, 617 P.2d 84, 88 (1980)). In Hawaiʻi, the statute of limitations is not jurisdictional and can be waived by a criminal defendant. Id. at 114, 952 P.2d at 871. In addition, unlike proper venue, which is a constitutional right that can only be waived with the "consent of the accused" under the Hawaiʻi Constitution, statutes of limitations are not constitutional protections, but merely "statutory acts of grace[.]" Id. at 116, 952 P.2d at 873 (internal quotation marks and citation omitted). The Hawaiʻi Supreme Court has held that defendants can effectively waive the requirements of HRS § 701-114(1)(e) "without giving their express consent through an on-the-record colloquy." Id.

Accordingly, in Timoteo, the supreme court held that the defendant waived the statute of limitations for a time-barred lesser included offense by requesting an instruction on that offense. Id. In State v. Adams, 103 Hawaiʻi 214, 223-27, 81 P.3d 394, 403-07 (2003), the supreme court held that the defendant waived the statute of limitations by pleading no contest to time-barred offenses.

2.

Based on these Hawaiʻi precedents, which do not require an express waiver of statute of limitations protections, I would hold that Abdon waived the protections of HRS § 701-114(1)(e) by failing to raise a statute of limitations objection to his prosecution before trial.

Under the Hawaiʻi Constitution, the Hawaiʻi Supreme Court has the "power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." Haw. Const. art. VI, § 7. Pursuant to this constitutional power, the supreme court promulgated Hawaiʻi Rules

of Penal Procedure (HRPP) Rule 12(b) (2007), which provides in relevant part:

> 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:
>
> > (1) defenses and objections based on defects in the institution of the prosecution; [and]
> >
> > (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)[.]

(Emphases added.) Under HRPP Rule 12(f) (2007), "[f]ailure by a party to raise defenses or objections . . . which must be made prior to trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

Based on the plain language of HRPP Rule 12, Abdon was required to raise any statute of limitations objection, an "objection[ ] based on defects in the institution of the prosecution[,]" before trial. Abdon did not object to his prosecution on statute of limitations grounds before trial or allege any cause for failing to do so. Accordingly, I conclude that Abdon waived any statute of limitations claim.

E.

The outcome would be the same if the statute of limitations is properly characterized as a defense. Although the language of HRS § 701-114(1)(e) implies that the State has the affirmative burden (both production and persuasion) of proving "[f]acts establishing that the offense was committed within the time period specified in [HRS] section 701-108[,]" a related provision of the Hawaiʻi Penal Code defining the "elements of an offense" suggests that the statute of limitations was intended to be a defense. HRS § 702-205 (1993) defines the "elements of an offense" as "such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as: (a) Are specified by the definition of the offense, and (b) Negative a defense (other than a defense

based on the statute of limitations, lack of venue, or lack of jurisdiction)." (format altered; emphasis added). In addition, the Hawaiʻi Supreme Court has specifically referred to the statute of limitations as a defense. State v. Stan's Contracting, Inc., 111 Hawaiʻi 17, 33, 137 P.3d 331, 347 (2006) ("[T]he statute of limitations is a waivable affirmative defense."). If the statute of limitations is a defense, then the defendant has the burden of producing some evidence to support the defense before the trial court is required to instruct on it. See State v. Lee, 90 Hawaiʻi 130, 140, 976 P.2d 444, 454 (1999). Here, Abdon presented no evidence (and no evidence was presented by the State) to support a claim that Abdon's prosecution was time barred or to support an instruction on a statute of limitations defense.

II.

Abdon requested, and the State agreed, that an instruction on the lesser included offense of third-degree sexual assault be given to the jury. The Circuit Court, however, refused to instruct the jury on the lesser included offense. I agree with the majority that the Circuit Court erred in refusing to instruct on the lesser included offense. I also conclude that the error in this case was not harmless beyond a reasonable doubt.