

CONCURRING OPINION BY NAKAMURA, C.J.

I filed a dissenting opinion in State v. Muller, No. CAAP-10-0000225, 2014 WL 444230 (Hawai'i App. Jan. 31, 2014) (SDO), cert. denied, No. SCWC-10-0000225, 2014 WL 1758391 (Hawai'i Apr. 29, 2014), in which Muller was similarly charged with knowingly engaging in sexual contact with a minor, "who was less than fourteen years old[,] " without an allegation that Muller and the victim were not married. In Muller, I concluded that under the liberal construction standard, the charge could within reason be construed to charge a crime, and therefore, Muller's conviction should not be vacated. Id., 2014 WL 444230, at *2-5 (Nakamura, C.J., dissenting). However, in this case, unlike in Muller where Muller challenged the sufficiency of the charge for the first time on appeal, Defendant-Appellant Corazon D. Constantino (Constantino) raised a timely pre-trial objection to the sufficiency of the indictment in the circuit court. Accordingly, the liberal construction standard does not apply.

It appears that under existing Hawai'i Supreme Court precedents and the circumstances of this case, the circuit court should have dismissed the indictment based on Constantino's timely objection to the sufficiency of the charges in the indictment. But see State v. Wade, 766 P.2d 811, 814-16 (Kan. 1989) (allegation in charge that the victim of sexual assault was five years old was sufficient to allege essential element of non-marriage where the defendant's marriage to the victim was a legal impossibility). Moreover, because Constantino did not validly waive indictment to the uncharged offense of third-degree sexual assault by strong compulsion, in violation of Hawaii Revised Statutes § 707-732(f) (2014), his no-contest plea to that offense was invalid. See Hawai'i Rules of Penal Procedure Rule 7(c) and 7(f) (2012). Therefore, I concur in the decision to vacate the amended judgment and to remand the case with instructions to dismiss the case without prejudice.

Craig H. Nakamura