IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

RICARDO APOLLONIO, Petitioner/Defendant-Appellant.

SCWC-11-0000695

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000695; CASE NO. 1DTC-10-010161)

OCTOBER 10, 2013

CONCURRING AND DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

Defendant Ricardo Apollonio was charged with excessive speeding. Although the oral charge did not allege Apollonio's state of mind at the time of the incident, his trial counsel correctly recognized that the State was required to prove that Apollonio was, at the least, reckless, and argued at trial that the State had failed to carry that burden. Apollonio was convicted and appealed to the Intermediate Court of Appeals

(ICA), which affirmed his conviction. At no time in the trial court or in the ICA did Apollonio challenge the sufficiency of the charge. It was not until the case reached this court that, for the first time, he contended that the charge was inadequate. He does not suggest how he was prejudiced by the lack of an allegation about his state of mind. He does not, for example, argue that he would have offered different evidence had the charge alleged the requisite state of mind. Nevertheless, Apollonio contends that his conviction should be set aside.

The majority holds that these circumstances warrant vacating the conviction in the instant case. Majority opinion at 1-2. I respectfully dissent.[1] In my view, when a defendant objects to the sufficiency of a charge for the first time on appeal, an appellate court's review of such a claim is limited to plain error. In other words, in order to obtain post-conviction relief, the defendant is required to show that he or she was prejudiced by the error.[2] Here, the record clearly shows that

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[1] I concur in the majority's conclusion that the State failed to lay adequate foundation to admit the speed reading from the laser gun because the State did not establish that the accuracy of the laser gun was tested according to procedures recommended by the manufacturer or that the officer's training in operating the laser gun met the manufacturer's standards. Majority opinion at 17-24. Accordingly, because without the speed reading there was insufficient evidence to support Apollonio's conviction, I would therefore vacate his conviction on this ground and remand for trial.

[2] The majority concludes that State v. Gonzalez, 128 Hawaiʻi 314, 324, 288 P.3d 788, 798 (2012), is dispositive of this question and requires a contrary result. Majority opinion at 12-13, 12 n.9, 13 n.10. Respectfully, Gonzalez is readily distinguishable from the instant case. In Gonzalez, the defendant objected to the charge's omission of the requisite state of mind before trial commenced. 128 Hawaiʻi at 315-16, 299 P.3d at 789-90. Indeed, (continued...)

Apollonio was aware of the requisite state of mind and thus suffered no prejudice from the lack of a mens rea allegation.

I. Background

Apollonio was orally charged with Excessive Speeding as follows:

> On or about July 1st, 2010, in the City and County of Honolulu, State of Hawaiʻi, you did drive a motor vehicle at a speed exceeding the applicable state or county speed limit by 30 miles per hour or more by driving 76 miles per hour in a 35-mile-per-hour zone, thereby violating Section 291C-105, subsection (a)(1)(C)(ii) of the Hawaiʻi Revised Statutes, as you have had one prior conviction within a five-year period.

Apollonio did not object to the sufficiency of the oral charge before the district court.

A bench trial was conducted and, during closing arguments, defense counsel argued that the State failed to prove the requisite state of mind:

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[2](...continued)
this court specifically noted that the defendant objected before the trial court. See id. at 324, 299 P.3d at 798 ("In this case, as in [State v. Nesmith, 127 Hawaiʻi 48, 51, 276 P.3d 617, 620 (2012)], the defendant objected to the failure to allege the requisite state of mind at trial." (emphasis added)). In contrast, the defendant in the instant case failed to object to the lack of mens rea in the charge before the trial court and on direct appeal, and only objected in his application for certiorari.

State v. Castro, No. SCWC-30703, 2012 WL 3089722 (Haw. July 30, 2012) (SDO), and State v. Bortel, No. SCAP-12-0000392, 2013 WL 691794 (Haw. Feb. 25, 2013), upon which the majority also relies, are distinguishable for the same reason. The record in Castro shows that the defendant specifically objected to the lack of a mens rea allegation in the complaint before trial began. Similarly, the defendant in Bortel objected to the lack of a mens rea allegation at trial. 2013 WL 691794, at *2 n.7 ("In this case, as in Gonzalez and Nesmith, the defendant objected to the failure to allege the requisite state of mind at trial.").

> [T]he second argument the defense would like to make is that the State has failed to prove beyond a reasonable doubt that -- with regard to the -- [] Apollonio's state of mind. Even in this case, it is reckless. Reckless as defined under the HRS is a conscious disregard for a substantial and unjustifiable risk. The defense is not contending that -- [] Apollonio testified credibly that he looked at his speedometer, his speedometer said 60 miles per hour. This is not a negligence case. This is not anything -- again, he had to have made a conscious disregard for a substantial and unjustifiable risk. The prosecutor asked him is there any -- you know, do you assume it was working properly on that day? He answered candidly, yeah, I just assume it. And that is not -- again, rise to the level of needed -- of proving the state of mind beyond a reasonable doubt even when the state of mind is reckless. This is still a criminal proceeding. This is not a civil proceeding.
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> And so based on that, we ask that the court find [] Apollonio not guilty in these cases.

The district court found Apollonio guilty as charged. With regard to the requisite state of mind, the district court stated that "the court can infer from the circumstances that traveling at that speed, at the minimum, is reckless. So therefore, the court finds that [the] State has proved its case beyond a reasonable doubt."

Apollonio timely appealed, contending that the district court erred in admitting evidence of the laser gun reading. Apollonio did not challenge the sufficiency of the charge before the ICA. The ICA affirmed. State v. Apollonio, No. CAAP-11-0000695, 2012 WL 2894715, at *3 (Haw. App. July 16, 2012).

In his application for writ of certiorari, Apollonio challenges for the first time the sufficiency of the charge. Specifically, Apollonio argues that the ICA's SDO constituted "an

obvious inconsistency" with this court's decision in Nesmith, 127 Hawaiʻi 48, 276 P.3d 617, which was decided while Apollonio's case was pending on appeal. Apollonio also argues that the oral charge was fatally defective under Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(d) because "state of mind [was] an 'essential fact' that must be alleged in a charging document[.]" Finally, Apollonio contends that the district court lacked jurisdiction over his case because the charge omitted the mens rea allegation. However, Apollonio does not argue that he did not understand the charge against him.

The State responds that Apollonio "was clearly aware of precisely what he needed to defend against to avoid a conviction" and therefore "his constitutional rights were not adversely affected." The State notes that Apollonio's "defense was that he was never aware that he was driving his vehicle more than sixty miles per hour" and that defense counsel stated the requisite state of mind during closing argument.

II. Discussion

Apollonio did not argue in the district court or before the ICA that the charge was insufficient. If a defendant challenges the sufficiency of a charge for the first time on appeal, the charge shall be liberally construed in favor of its validity. See State v. Motta, 66 Haw. 89, 90, 657 P.2d 1019, 1019-20 (1983); State v. Wells, 78 Hawaiʻi 373, 381, 894 P.2d 70,

78 (1995); State v. Merino, 81 Hawaiʻi 198, 212, 915 P.2d 672, 686 (1996).

A. The sufficiency of a charge is not jurisdictional

Apollonio argues, inter alia, that the lack of a mens rea allegation in the charge deprived the district court of jurisdiction over his case. Apollonio's contention lacks merit.

The term "jurisdiction" means a court's "statutory or constitutional power to adjudicate" a type of case. United States v. Cotton, 535 U.S. 625, 630 (2002) (emphasis omitted); see Black's Law Dictionary 927 (9th ed. 2009) (defining "jurisdiction" as, inter alia, "[a] court's power to decide a case or issue or decree"). Article VI, section 1 of the Hawaiʻi Constitution provides, in relevant part, that Hawaiʻi courts "shall have original and appellate jurisdiction as provided by law[.]" Accordingly, the Hawaiʻi legislature sets the jurisdiction of the courts, and has done so by statute. The applicable statute here provides that

> [d]istrict courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine. They shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury.

HRS § 604-8(a) (Supp. 2011).[3]

[3] The legislature also conferred jurisdiction over certain criminal cases to Hawaiʻi circuit courts, see HRS § 603-21.5 (Supp. 2011), and family courts, see HRS § 571-14 (Supp. 2011). For example, HRS § 603-21.5 provides, in relevant part:

(continued...)

The legislature also established territorial limitations on criminal jurisdiction, providing in relevant part that "a person may be convicted under the law of this State of an offense committed by the person's own conduct or the conduct of another for which the person is legally accountable if . . . the conduct or the result which is an element of the offense occurs within this State[.]" HRS § 701-106(1)(a) (1993).

Outside of these parameters, a charging defect is not jurisdictional. Indeed, there is no language, in the constitution or Hawaiʻi statutes, that bases a trial court's jurisdiction over criminal cases on the sufficiency of a charging instrument.[4] Nevertheless, in State v. Cummings, 101 Hawaiʻi

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[3](...continued)

> (a) The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:
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> (1) Criminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court[.]

[4] HRS § 806-34 (1993) does not support the proposition that an insufficient charge is a jurisdictional defect. HRS § 806-34 provides, in relevant part, with regard to indictments:

> In an indictment the offense may be charged either by name or by reference to the statute defining or making it punishable; and the transaction may be stated with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing (if any) in respect to which the offense was committed, as are necessary to identify the transaction, to bring it within the statutory definition of the offense charged, to show that the court has jurisdiction, and to give the accused reasonable notice of the facts.

(Emphasis added).

The clause, "to show that the court has jurisdiction," does not (continued...)

139, 142-43, 63 P.3d 1109, 1112-13 (2003), this court stated that the failure of a charging instrument to state an offense is a jurisdictional defect that cannot be waived. In that case, this court held that a complaint "failed to state a material element of [driving under the influence] that the prosecution was required to prove," and that it thus failed to state an offense. Id. at 145, 63 P.3d at 1115. Accordingly, this court stated, the district court lacked subject matter jurisdiction to preside over the case. Id. The Cummings court stated that "an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity." Id. at 142, 63 P.3d at 1112. According to the Cummings court, such a defect is not "waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her, but, rather, is one of substantive subject matter jurisdiction, which may not be waived or dispensed with,

[4](...continued)
mean that the jurisdiction of the trial court depends on the sufficiency of the charge. Rather, the charge must show that the court has jurisdiction by alleging that the offense occurred within the court's territorial jurisdiction and that the crime is within the penal code. See, e.g., HRS 701-106(a)(1). Accordingly, this requirement of jurisdiction is distinct from the sufficiency of the charge.

In the instant case, the charge alleged that Apollonio violated HRS § 291C-105 by committing acts within the City and County of Honolulu, State of Hawaiʻi, and therefore adequately alleged jurisdiction.

and that is per se prejudicial." Id. at 143, 63 P.3d at 1113 (citations and quotation marks omitted).

However, a close examination of the authorities Cummings relied on calls into question its holding that an insufficient charge constitutes a jurisdictional defect. Cummings relied largely on this court's opinion in State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977), for the proposition that "the omission of an essential element of the crime charged is a defect in substance rather than of form." Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112. However, Jendrusch did not expressly state that an insufficient charge is a jurisdictional defect. Rather, Jendrusch stated that a charge lacking an essential element of the crime charged "amounts to a failure to state an offense," and characterized a conviction based upon such a defective charge as a "denial of due process." 58 Haw. at 281, 567 P.2d at 1244. Jendrusch also stated that the "[l]ack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Id. (emphasis added) (quoting Hawaiʻi Rules of Criminal Procedure Rule 12 (1960)). Thus, to the extent that Jendrusch stated that the charge failed to state an offense, this court appeared to recognize the insufficiency of the charge as distinct from a jurisdictional defect. Moreover, in setting forth the

proposition that such a defect warrants reversal even when challenged for the first time on appeal, the Jendrusch court cited federal precedent that is no longer followed since the United States Supreme Court's 2002 ruling in Cotton, 535 U.S. 625, discussed infra. See Jendrusch, 58 Haw. at 281, 567 P.2d at 1244.

Cummings also cited Territory v. Gora, 37 Haw. 1, 6 (Terr. 1944), which stated that a charge's failure to state an offense was a "jurisdictional point[.]" Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112. However, the Gora court found that the defendant abandoned that point by not arguing it on appeal, and that he waived his challenge that the charge was insufficient because he did not object to the charges in the trial court. 37 Haw. at 6. Finding that such a challenge is waivable is inconsistent with the principle that an insufficient charge is a jurisdictional defect.

The Cummings court also relied on Chief Justice Peters' concurring opinion in Territory v. Goto, 27 Haw. 65, 103 (1923), which stated, inter alia, that an indictment "is essential to the court's jurisdiction." Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112. The concurrence in part cites Ex parte Bain, 121 U.S. 1 (1887), which the United States Supreme Court expressly overruled in Cotton. See Cotton, 535 U.S. at 631. Moreover, the majority in Goto held that the alleged defectiveness of the indictment in

the case "is one which may be constitutionally waived." Goto, 27 Haw. at 74. Accordingly, on close examination, Cummings' assertion that an insufficient charge divests a trial court of jurisdiction is, respectfully, incorrect.

Moreover, this court's treatment of insufficient charge claims reflect principles contrary to the proposition that such an error constitutes a jurisdictional defect. For example, this court liberally construes and applies a presumption of validity to an allegedly deficient charge when the charge is challenged subsequent to a conviction. See, e.g., State v. Hitchcock, 123 Hawaiʻi 369, 378, 235 P.3d 365, 374 (2010); State v. Sprattling, 99 Hawaiʻi 312, 318, 55 P.3d 276, 282 (2002). This court has also held that, in determining the sufficiency of a charge, the court should examine all of the information provided to the defendant up to the time that he or she challenges the charge's sufficiency. See, e.g., State v. Treat, 67 Haw. 119, 120, 680 P.2d 250, 251 (1984) ("We think that in determining whether the accused's right to be informed of the nature and cause of the accusation against him has been violated, we must look to all of the information supplied to him by the State to the point where the court passes upon the contention that his right has been violated." (quoting State v. Robins, 66 Haw. 312, 317, 660 P.2d 39, 42-43 (1983))); Sprattling, 99 Hawaiʻi at 319, 55 P.3d at 283 ("[I]n construing the validity of an oral charge, we are not

restricted to an examination solely of the charge, but will interpret it in light of all of the information provided to the accused." (citing, inter alia, State v. Israel, 78 Hawaiʻi 66, 70, 890 P.2d 303, 307 (1995))). Such further inquiry as described in the foregoing cases contradicts the proposition that an insufficient charge constitutes a jurisdictional flaw, as a jurisdictional defect would ordinarily mandate the automatic vacating of a conviction.

Indeed, many courts have abandoned the view that an insufficient charge constitutes a jurisdictional defect. The United States Supreme Court expressly rejected the contention that defects in a charging instrument may "deprive a court of its power to adjudicate a case." Cotton, 535 U.S. at 630. At issue in Cotton was whether the omission from an indictment of a fact that enhanced the statutory maximum sentence warranted vacating the enhanced sentence, even though the defendant failed to object to the omission in the trial court. Id. at 627. The Fourth Circuit Court of Appeals held that vacating the enhanced sentence was justified on the ground that "because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, a court is without jurisdiction to impose a sentence for an offense not charged in the indictment." Id. at 629 (citation, ellipses, and emphasis omitted). The Supreme Court reversed. Id.

The Supreme Court expressly overruled its 1887 decision in Ex parte Bain, "the progenitor" of the view that a defective indictment deprives a court of jurisdiction. Id. at 629-31. The Supreme Court explained that Bain "is a product of an era in which this Court's authority to review criminal convictions was greatly circumscribed." Id. at 629. When Bain was decided, "a defendant could not obtain direct review of his criminal conviction in the Supreme Court[,]" and the "Court's authority to issue a writ of habeas corpus was limited to cases in which the convicting court had no jurisdiction to render the judgment which it gave." Id. at 629-30 (citations and quotation marks omitted). Accordingly, the Supreme Court's "desire to correct obvious constitutional violations led to a somewhat expansive notion of 'jurisdiction,' which was more a fiction than anything else[.]" Id. at 630 (citations and some quotation marks omitted). The Supreme Court concluded that "Bain's elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., the courts' statutory or constitutional power to adjudicate the case." Id. (citation and some quotation marks omitted) (emphasis in original). Having overruled Bain and "[f]reed from the view that indictment omissions deprive a court of

jurisdiction," the Supreme Court proceeded to examine the defendants' claim under plain error review.[5] Id. at 631.

Based on the foregoing, subject matter jurisdiction of the court and the sufficiency of the charge are two distinct concepts. Accordingly, an insufficient charge does not constitute a jurisdictional defect.

B. An untimely objection to the sufficiency of a charge should be reviewed only for plain error

Because a defect in a charging instrument does not divest a trial court of jurisdiction, a defendant who challenges the sufficiency of a charge is therefore subject to the same limitations as one who raises any nonjurisdictional error.[6] Therefore, where a defendant does not object to the sufficiency of the charge before the trial court, such a challenge is not

[5] Many state courts agree that defects in an indictment do not deprive a court of jurisdiction. See, e.g., Ex parte Seymour, 946 So.2d 536, 538-39 (Ala. 2006); State v. Gentry, 610 S.E.2d 494, 499-500 (S.C. 2005); State v. Ortiz, 34 A.3d 599, 603-04 (N.H. 2011); Parker v. State, 917 P.2d 980, 985 (Okla. Crim. App. 1996) ("[A]ny failure to allege facts constituting the offense raises due process questions but does not affect the trial court's jurisdiction."); State v. Barton, 844 N.E.2d 307, 413-14 (Ohio 2006) ("[F]ailure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved."); State v. Maldonado, 223 P.3d 653, 655 (Ariz. 2010) (en banc) (rejecting the suggestion that a defective information in itself deprives a court of subject matter jurisdiction); State v. Daniel, 193 P.3d 1021, 1024-25 (Or. Ct. App. 2008) (overruling prior cases and holding that a defect in an indictment is not a jurisdictional error); 5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 19.2(e) (3d ed. 2007) (recognizing that while "almost all jurisdictions continue to treat a pleading alleging the essential elements as a prerequisite for judgment of conviction[,]" most state courts have "flatly rejected earlier rulings characterizing the failure to allege all material elements as a jurisdictional defect").

[6] The majority opinion does not expressly address whether the lack of a mens rea allegation in a charge constitutes a jurisdictional defect. However, by essentially treating timely and untimely objections to a charge the same, the majority opinion effectively treats Apollonio's late objection the same as a jurisdictional challenge that cannot be waived or forfeited.

preserved on appeal. Rather, a challenge to a charge for the first time on appeal should be reviewed for plain error; that is, an appellate court may recognize the error when it "affects substantial rights of the defendant." State v. Staley, 91 Hawaiʻi 275, 282, 982 P.2d 904, 911 (1999) (citation omitted). Accordingly, the defendant would be required to demonstrate that he or she was prejudiced by the allegedly defective charge. Cf. State v. Klinge, 92 Hawaiʻi 577, 592-93, 994 P.2d 509, 524-25 (2000). In determining whether the defendant's "right to be informed of the nature and cause of the accusation against him [or her] has been violated, we must look to all of the information supplied to him [or her] by the State to the point where the court passes upon the contention that the right has been violated." Hitchcock, 123 Hawaiʻi at 375, 235 P.3d at 379 (citations and emphasis omitted).

This approach is consistent with and recognizes the underlying purpose of a charge, which is to "apprise the accused of the charges against him [or her], so that [the accused] may adequately prepare his [or her] defense, and to describe the crime charged with sufficient specificity to enable [the accused] to protect against future jeopardy for the same offense." State v. Vanstory, 91 Hawaiʻi 33, 44, 979 P.2d 1059, 1070 (1999) (internal quotation marks and citation omitted), superceded on other grounds by HRS § 134-6(c) (Supp. 2002). "[T]he sufficiency

of the charging instrument is measured, inter alia, by 'whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he [or she] must be prepared to meet[.]'" State v. Wheeler, 121 Hawaiʻi 383, 391, 219 P.3d 1170, 1178 (2009) (quoting Wells, 78 Hawaiʻi at 379-80, 894 P.2d at 76-77) (some brackets in original and some added). In other words, the charge "must be worded in a manner such 'that the nature and cause of the accusation [could] be understood by a person of common understanding[.]'" Sprattling, 99 Hawaiʻi at 318, 55 P.3d at 282 (quoting Israel, 78 Hawaiʻi at 70, 890 P.2d at 307) (brackets in original). This mandate is established in article I, section 14 of the Hawaiʻi Constitution, which requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]"

The foregoing approach would revise our current Motta/Wells post-conviction liberal construction standard, which mandates that a conviction based upon a defective charge will not be reversed "unless the defendant can show prejudice or that the indictment [or complaint] cannot within reason be construed to charge a crime." Merino, 81 Hawaiʻi at 212, 915 P.2d at 686 (citation omitted) (emphasis added). Under the approach set forth here, this court should not reverse a conviction unless the

defendant can show prejudice and that the charge cannot within reason be construed to charge a crime.

Such a revision of the liberal construction standard is appropriate given the jurisprudence that evolved since this court's adoption of the standard thirty years ago in Motta. The Motta court, in adopting the liberal construction standard, stated that it chose to adopt the rule "followed in most federal courts" and specifically cited cases in the first, second, sixth, ninth, and tenth circuit courts of appeals. 66 Haw. at 90-91, 657 P.2d at 1019-20. However, particularly following the United States Supreme Court's ruling in Cotton, all of the above federal circuits review belated challenges to the sufficiency of indictments – that is, challenges raised for the first time on appeal – only for plain error. See United States v. Troy, 618 F.3d 27, 34 (1st Cir. 2010) (stating that the defendant's failure to challenge the sufficiency of the indictment "survives the government's waiver argument" but nonetheless "constitutes a forfeiture, which confines appellate review to plain error"); United States v. Nkansah, 699 F.3d 743, 752 (2d Cir. 2012) (stating that the omission of a requisite element in the indictment is reviewed for plain error when the challenge is raised after trial, and finding that even if the omission "constitutes error that is plain, it did not impact appellant's substantial rights"); United States v. Teh, 535 F.3d 511, 515-17

(6th Cir. 2008) (reviewing claim that indictment failed to state an offense, not raised at trial, for plain error, and finding that although the indictment failed to charge an offense, the defendant was "unable to show the prejudice required to disturb his conviction"); United States v. Leos-Maldonado, 302 F.3d 1061, 1064 (9th Cir. 2002) (limiting review of an untimely objection to the sufficiency of the indictment to the plain error test and stating that "the error must be not only plain but also prejudicial"); United States v. Sinks, 473 F.3d 1315, 1320-22 (10th Cir. 2007) (upholding conviction, finding that because an element of an offense "was proven by overwhelming and essentially uncontroverted evidence, the failure to charge it does not rise to the level of plain error").

At least some state courts have also followed the United States Supreme Court's lead in Cotton and confined their review of late challenges to the sufficiency of the charge to plain error. See, e.g., Maldonado, 223 P.3d at 657 ("If a defendant does not object before trial, as occurred here, the state's failure to timely file an information will be reviewed on appeal only for fundamental error. To prevail under this standard, [the defendant] must establish that an error occurred, was fundamental in nature, and caused him prejudice."); Peay v. United States, 924 A.2d 1023, 1029 (D.C. 2007) ("[W]e conclude that plain error review is appropriate where an indictment omits

an element of the offense for which a defendant is later convicted where there has been no objection.").

Accordingly, I would hold that review of insufficient charge claims raised for the first time on appeal be limited to plain error review.

Under the plain error doctrine, "where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court." State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010). This court has held that it "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Id. (citation and emphasis omitted). In other words, the error must have prejudiced the defendant's substantial rights. See Klinge, 92 Hawaiʻi at 592-93, 994 P.2d at 524-25 (declining to find plain error where a challenged statement did not "prejudicially affect[] [the defendant's] substantial rights"); State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1303 (1986) ("In light of the inconclusive evidence against Marsh, the particularly egregious misconduct of the prosecutor in presenting her personal views on the dispositive issues, and the lack of a prompt jury instruction specifically directed to the prosecutor's closing remarks, we

hold that the prosecutor's conduct so prejudiced Marsh's right to a fair trial as to amount to 'plain error.'"); State v. Toro, 77 Hawaiʻi 340, 347, 884 P.2d 403, 410 (App. 1994) ("[E]ven where error occurs, there will be no reversal where on the record as a whole, no prejudice to appellant has resulted." (quoting State v. Nakamura, 65 Haw. 74, 80, 648 P.2d 183, 187 (1982)); see also Leos-Maldonado, 302 F.3d at 1064 ("In order to affect [the defendant's] 'substantial rights,' the error 'must have affected the outcome of the District Court proceedings.' In other words, the error must be not only plain but also prejudicial." (citations omitted)).

To determine whether a defect in a charge has prejudiced the defendant, the appellate court may consider not only the charge, but the record below. Sprattling, 99 Hawaiʻi at 319, 55 P.3d at 283. When the record shows that the defendant actually knew the charges against him or her and/or had adequate notice of the charges against him or her to prepare a defense, the defendant's substantial rights have not been impaired; that is, no prejudice occurred. See Israel, 78 Hawaiʻi at 71, 890 P.2d at 308 (agreeing that "if a defendant actually knows the charges against him or her, that defendant's constitutional right to be informed of the nature and cause of the accusation is satisfied," so long as "the record must clearly demonstrate the defendant's actual knowledge"); Hitchcock, 123 Hawaiʻi at 379,

235 P.3d at 375; Nkansah, 699 F.3d at 752 ("When notice adequate to allow [a defendant] to prepare a defense is provided, omissions in the indictment do not affect substantial rights." (quotation marks and citation omitted)).

I believe that the foregoing framework preserves a defendant's due process rights while also providing defendants an incentive to object to the sufficiency of the charge before the trial court. Indeed,

> a late challenge suggests a purely tactical motivation and is needlessly wasteful because pleading defects can usually be readily cured through a superseding indictment before trial. Additionally, the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense, because one can expect that the challenge would have come earlier were there any real confusion about the elements of the crime charged. For all these reasons, indictments which are tardily challenged are liberally construed in favor of validity.

Leos-Maldonado, 302 F.3d at 1065 (citation omitted) (emphasis added).

For the foregoing reasons, I would review late challenges to the sufficiency of a charge only for plain error, and require a showing of prejudice before vacating a conviction.

C. Apollonio was not prejudiced by the defective charge

Based on the foregoing, I would not vacate Apollonio's conviction on the ground that the charge did not allege the requisite state of mind. As stated above, Apollonio never objected to the sufficiency of the charge before the trial court

or even the ICA. Accordingly, his belated claim should be reviewed only for plain error.

Although the charge did not contain a mens rea allegation, a review of the record below clearly shows that Apollonio knew the state of mind that the State was required to prove. As stated above, defense counsel contended during closing arguments that the State failed to prove the requisite state of mind. Defense counsel argued, inter alia, that "[t]his is not a negligence case[,]" and that the State failed to prove beyond a reasonable doubt that Apollonio "made a conscious disregard for a substantial and unjustifiable risk." Such arguments by defense counsel clearly demonstrate that the defense was well aware of the requisite state of mind, despite the omission of a mens rea allegation from the oral charge.

Notably, Apollonio never alleged before the trial court, the ICA, or this court that he did not understand the nature and cause of the accusation, or that he was misled in any way. Rather, he made a conclusory argument to this court that plain error review was warranted "[i]nasmuch as the defective charge infringed upon [his] due process right to be informed of the nature and cause of the accusation against him, as well as his rights to a fair trial and complete defense[.]"

In sum, Apollonio has not demonstrated that he was prejudiced by the defective charge and thus has failed to show

how the error affected his substantial rights. Accordingly, Apollonio's insufficient charge claim, raised for the first time before this court, does not constitute plain error. I would therefore hold that his conviction should not be vacated on this ground.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama