IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellee, v.
SAMUEL WALKER, also known as Samuel Ahsan, Defendant-Appellant

NO. 29659

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 08-1-0586)

SEPTEMBER 30, 2011

FUJISE AND LEONARD, JJ, WITH NAKAMURA, C.J., DISSENTING.

OPINION OF THE COURT BY FUJISE, J.

Defendant-Appellant Samuel Walker also known as Samuel Ahsan (Walker) appeals from the January 26, 2009 judgment of conviction entered by the Circuit Court of the First Circuit[1] (circuit court) for, in Count 1, Habitually Operating a Vehicle Under the Influence of an Intoxicant (HOVUII) in violation of Hawaii Revised Statutes (HRS) § 291E-61.5 (2007 & Supp. 2010)[2];

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[1] The Honorable Michael A. Town presided.

[2] HRS § 291E-61.5 states in relevant part as follows:

§291E-61.5 Habitually operating a vehicle under the influence of an intoxicant. (a) A person commits the

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offense of habitually operating a vehicle under the influence of an intoxicant if:

(1) The person is a habitual operator of a vehicle while under the influence of an intoxicant; and

(2) The person operates or assumes actual physical control of a vehicle:

(A) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

(B) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;

(C) With .08 or more grams of alcohol per two hundred ten liters of breath; or

(D) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

b) For the purposes of this section:

"Convicted three or more times for offenses of operating a vehicle under the influence" means that, at the time of the behavior for which the person is charged under this section, the person had three or more times within ten years of the instant offense:

(1) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for a violation of this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5;

(2) A judgment on a verdict or a finding of guilty, or a plea of guilty or nolo contendere, for an offense that is comparable to this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5; or

(3) An adjudication of a minor for a law or probation violation that, if committed by an adult, would constitute a violation of this section or section 291-4, 291-4.4, or 291-7 as those sections were in effect on December 31, 2001, or section 291E-61 or 707-702.5;

that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside prior to the instant offense shall not be deemed prior

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in Count 2, Operating a Vehicle after License and Privilege have been Suspended or Revoked for Operating a Vehicle Under the Influence of an Intoxicant in violation of HRS § 291E-62(a)(2) (2007); and in Count 3, Consuming or Possessing Intoxicating Liquor While Operating a Motor Vehicle in violation of HRS § 291-3.1 (2007). On appeal, Walker challenges the judgment with regard to Count 1 only.

The dispositive issue raised in this appeal is the sufficiency of the HOVUII charge where it fails to include the definition of a "habitual operator of a vehicle while under the influence of an intoxicant" (habitual operator).

A circuit court's determination of whether or not a charge sufficiently alleges the elements of an offense is subject to de novo review on appeal. State v. Wheeler, 121 Hawaiʻi 383, 219 P.3d 1170 (2009). Walker first objected to the charge prior to the verdict and therefore the liberal construction rule does not apply. "Our adoption of this liberal construction standard is limited to construing indictments, when the issue is only raised *after* trial." State v. Motta, 66 Haw. 89, 94, 657 P.2d 1019, 1022 (1983) (footnote omitted).

In Count 1, Walker was charged as follows:

> On or about the 17th day of April, 2008, in the City and County of Honolulu, State of Hawaii, SAMUEL WALKER, also known as SAMUEL AHSAN, a habitual operator of a vehicle while under the influence of an intoxicant, did operate or assume actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, thereby committing the offense of Habitually Operating a Vehicle Under the Influence of an Intoxicant, in violation of Sections 291E-61.5(a)(1) and 291E-61.5(a)(2)(A) of the Hawaii Revised Statutes.

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[2](...continued)

> convictions for the purposes of proving the person's status as a habitual operator of a vehicle while under the influence of an intoxicant.
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> A person has the status of a "habitual operator of a vehicle while under the influence of an intoxicant" if the person has been convicted three or more times within ten years of the instant offense, for offenses of operating a vehicle under the influence of an intoxicant.

The minimum requirements for a criminal charge are set by statute.

> **Sufficiency of averments as to offense and transaction.** 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.
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> Averments which so charge the offense and the transaction shall be held to be sufficient.

HRS § 806-34 (1993). Although the statute was written using the permissive "may," the Hawaiʻi Supreme Court has construed HRS § 806-34 to set forth mandatory requirements for a charge. State v. Stan's Contracting, Inc., 111 Hawaiʻi 17, 31, 137 P.3d 331, 345 (2006) (HRS § 806-34 . . . , states that an indictment must set forth the details of the transaction involving the defendant) (emphasis added). The court tied the requirements of the "details of the transaction" of HRS § 806-34 to article I, section 14 of the Hawaiʻi Constitution, protecting the accused's right "to be informed of the nature and cause of the accusation." Id. (internal quotation marks omitted). The Hawaiʻi Supreme Court also construed as mandatory, the allegation of facts establishing jurisdiction. Stan's Contracting, 111 Hawaiʻi at 32, 137 P.3d at 346 ("jurisdiction of the offense charged and of the person of the accused is a fundamental and indispensable prerequisite to a valid prosecution") (internal quotation marks omitted) quoting Adams v. State, 103 Hawaiʻi 214, 221, 81 P.3d 394, 401 (2003).

HRS § 806-34 treats the requirements for identification of the offense separately from requirements for the description of the transaction. The identification of the offense under HRS § 806-34 is satisfied by reference to the statute defining the offense. ("In an indictment the offense may be charged either by name or by reference to the statute defining or making it

punishable.") HRS § 806-34 requires that the description of the transaction (1) identifies the transaction; (2) brings the transaction within the definition of the offense; (3) shows that the court has jurisdiction; and (4) gives notice of the facts to the accused. The statute's reference to the definition of the offense appears to be a requirement alleging the elements of an offense. Since the allegation of a criminal offense cognizable under the laws of the State is a jurisdictional requirement (see HRS § 603-21.5(1) (Supp. 2010)[3] and HRS § 604-8 (Supp. 2010)[4])

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[3] HRS § 603-21.5 provides,

> **General.** (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;
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> . . . .
>
> (b) The several circuit courts shall have concurrent jurisdiction with the family court over:
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> (1) Any felony under section 571-14, violation of an order issued pursuant to chapter 586, or a violation of section 709-906 when multiple offenses are charged through complaint or indictment and at least one other offense is a criminal offense under subsection (a)(1);
>
> (2) Any felony under section 571-14 when multiple offenses are charged through complaint or indictment and at least one other offense is a violation of an order issued pursuant to chapter 586, a violation of section 709-906, or a misdemeanor under the jurisdiction of section 604-8; [and]
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> (3) Any violation of section 711-1106.4[.]

[4] HRS § 604-8 provides:

> **Criminal, misdemeanors, generally.** (a) District 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.

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items 2 and 3 appear to be requirements of jurisdiction. See also State v. Kekuewa, 114 Hawaiʻi 411, 424, 163 P.3d 1148, 1161 (2007), abrogated on other grounds as recognized by Loher v. State, 118 Hawaiʻi 522, 193 P.3d 438 (App. 2008). ("In other words, an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect[.]"). Therefore, the factual description of the transaction has a jurisdictional component and is in addition to the requirement of giving the defendant "reasonable notice of the facts." HRS § 806-34.

Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(d) reflects a similar distinction between the requirements for the description of the offense charged and the facts giving rise to the charge. With respect to the identification of the charge, HRPP Rule 7(d) requires that "[t]he charge shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law[.]" With respect to the description of the transaction, HRPP Rule 7(d) requires that "[t]he charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged." The general rule is codified in HRS § 806-26 (1993), which provides that the use of a statutorily defined term is sufficient to convey its statutorily defined meaning:

> The words and phrases used in an indictment shall be construed according to their usual acceptation, except words and phrases which have been defined by law or which have acquired a legal signification, which words and phrases shall be construed according to their legal signification and shall be sufficient to convey that meaning.

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. . . .

> (b) The district court shall have concurrent jurisdiction with the family court of any violation of an order issued pursuant to chapter 586 or any violation of section 709-906 when multiple offenses are charged and at least one other offense is a criminal offense within the jurisdiction of the district courts.

However, compliance with the requirements for identification of the charge under HRS § 806-34 and HRPP Rule 7(d) does not necessarily satisfy the requirements for the allegation of the transaction, as citation to the statute would not cure the failure to allege an element of an offense. State v. Elliott, 77 Hawaiʻi 309, 312, 884 P.2d 372, 375 (1994). Where the statute employs generic terms that do not convey the specifics of what the prosecution must prove, a charge in the language of the statute may be insufficient. See e.g., State v. Cummings, 101 Hawaiʻi 139, 143, 63 P.3d 1109, 1113 (2003) (charge of Driving Under the Influence under HRS § 291-4(a)(1) (Supp. 1998) that did not include defendant was under the influence "in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty" was fatally deficient).

In Wheeler, 121 Hawaiʻi at 395, 219 P.3d at 1182, the court relied in part on HRS § 806-31 which requires that the accusation be comprehensible to a person of "common understanding."

> **Indirect allegations**. No indictment or bill of particulars is invalid or insufficient for the reason merely that it alleges indirectly and by inference instead of directly any matters, facts, or circumstances connected with or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding.

HRS § 806-31 (1993).[5] In Wheeler, the Hawaiʻi Supreme Court held that "[t]he use of the phrase 'operate' did not provide adequate notice to Wheeler that the State was required to prove that his operation of the vehicle occurred on a public way, street, road, or highway." Wheeler, 121 Hawaiʻi at 395, 219 P.3d at 1182.

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[5] HRS § 806-31 is consistent with the general rule that words of a statute are to have their commonly understood meaning. HRS § 1-14 (2009):

> **Words have usual meaning**. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.

Just as the word "operate" does not suggest operation on a public road, "habitual operator" does not convey the narrow definition that the person charged had three prior convictions within the previous ten years. See HRS § 291E-61.5(b). The word "habitual" is defined as "of the nature of a habit; fixed by or resulting from habit . . . ." Random House Webster's Unabridged Dictionary 856 (2d ed. 2001). The word "habit" is defined as "an acquired behavior pattern regularly followed until it has become almost involuntary[.]" Id. Black's Law Dictionary defines "habitual" as "[c]ustomary; usual" as the primary definition and "[r]ecidivist" as a secondary definition. Black's Law Dictionary 779 (9th ed. 2009).

State v. Mita, 124 Hawaiʻi 385, 245 P.3d 458 (2010), is not to the contrary. In Mita, the offense in question was "Animal Nuisance" as defined by the Revised Ordinances of Honolulu (ROH) § 7-2.2[6] and 7-2.3[7]. Mita was issued a citation

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[6] ROH § 7-2.2 provides, in pertinent part,

> "Animal nuisance," for the purposes of this section, shall include but not be limited to any animal, farm animal or poultry which:
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> (a) Makes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one-half hour or more to the disturbance of any person at any time of day or night and regardless of whether the animal, farm animal or poultry is physically situated in or upon private property;
>
> (b) Barks, whines, howls, crows, cries or makes any other unreasonable noise as described in Section 7-2.4(c) of this article; or
>
> (c) Notwithstanding the provisions of HRS Section 142-75 or any other applicable law, bites or stings a person.
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> "Animals," unless provided otherwise, include but are not limited to those animals that are customary and usual pets such as dogs, cats, rabbits, birds, honeybees and other beasts which are maintained on the premises of a dwelling unit and kept by the resident of the dwelling unit solely for personal enjoyment and companionship, such as, without

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which was described as follows:

> The citation, signed "Wanda Mita[,]" stated that Mita "[d]id on/or about this 3 day of June Yr 08 at about 1940-2050 did own, harbour or keep (animal description): Boxers Name Roxy/Obie Color Brown . . . at (location): [Mita's residence address] and did commit the offense of: . . . animal nuisance-Sec.: 7-2.3 Barking Dog[.]" Additionally, the citation had a section entitled "Officer's Report" which stated that "Mita was issued a Barking 3rd citation. She was already issued a previous Barking 2 warning citation."

Id., 124 Hawaiʻi at 386, 245 P.3d at 459. At trial, the prosecution presented the following oral charge:

> On or about June 3rd, 2008, in the city and county of Honolulu, state of Hawaii, you as the owner of an animal, farm animal, or poultry engaged in animal nuisance as defined in section 7-2.2, thereby violating section 7-2.3 of the Revised Ordinances of Honolulu.

Id. Mita challenged the charge at trial, arguing that under State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977), she was entitled to know what conduct, prescribed in ROH § 7-2.2, she was accused of violating. Mita, 124 Hawaiʻi at 387, 245 P.3d at 460. The Hawaiʻi Supreme Court distinguished Wheeler as follows:

> In Wheeler, the defendant was orally charged with operating a vehicle under the influence of an intoxicant (OVUII). 121 Hawaiʻi at 386-87, 219 P.3d at 1173-74. The charge tracked the language of the relevant statute, HRS § 291E-61, and alleged that the defendant "did operate or assume actual physical control of a motor vehicle while under the influence of alcohol . . . ." Id. However, the charge did not further include the definition of the term "operate," which was defined in HRS § 291E-1 as "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway . . . ." Id. at 391, 219 P.3d at

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[6](...continued)
limitation, for a hobby, for legal sporting activities and for guarding of property; excluding aviary game birds and fish as defined in the Hawaii Revised Statutes.

[7] ROH § 7-2.3 provides, in pertinent part,

> **Animal nuisance--Prohibited.**
>
> It is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance as defined in Section 7-2.2; provided, however, that it shall not be deemed to be animal nuisance for purposes of this article if, at the time the animal, farm animal or poultry is making any noise, biting or stinging, a person is trespassing or threatening trespass upon private property in or upon which the animal, farm animal or poultry is situated, or for any other legitimate cause which teased or provoked said animal, farm animal or poultry.

> 1178 (emphasis in original). This court held that HRS § 291E-1 establishes an attendant circumstance of the proscribed conduct, i.e., that the offense of OVUII occur on a public way, street, road, or highway. Id. at 392-93, 219 P.3d at 1179-80. Therefore, since the location of the proscribed conduct established by HRS § 291E-1 was an attendant circumstance, this court held that it was an essential element of the offense of OVUII that should have been included within the charge against the defendant. Id. (citing HRS § 702-205 (1993)).[7]
>
> This court emphasized that although the charge tracked the language of the statute, the term "operate" as used in HRS § 291E-61 "is neither 'unmistakable' nor 'readily comprehensible to persons of common understanding'" and therefore did not provide the defendant with fair notice of that aspect of the charge. Id. at 394-95, 219 P.3d at 1181-82 (citation omitted). Specifically, this court concluded that the common understanding of the term "operate" "does not geographically limit where the conduct must take place." Id. at 394, 219 P.3d at 1181. Therefore, merely including the term "operate" in the charge, without providing the defendant with notice that his conduct must have occurred "upon a public way, street, road, or highway," was insufficient. Id. Additionally, this court recognized that "none of the other information in the charge provided [the defendant] with fair notice of that element" where, for example, the charge "did not contain any specification of where the alleged offense occurred, other than it took place in the City and County of Honolulu." Id. at 395, 219 P.3d at 1182.
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> There are two significant factors present in the instant case that were not present in Wheeler, thus making it readily distinguishable: (1) the definition of "animal nuisance" in ROH § 7-2.2 does not create an additional essential element of the offense; and (2) in any event, the definition of "animal nuisance" is consistent with its commonly understood meaning and therefore Mita had fair notice of the offense charged. Thus, the oral charge against Mita, which tracked the language of ROH § 7-2.3, sufficiently alleged all of the essential elements of the offense of animal nuisance.
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> _____
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> [7] HRS § 702-205 provides: "The elements of an offense are 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)."

Mita, 124 Hawaiʻi at 390-91, 245 P.3d at 463-64.

On the other hand, the charge of HOVUII is essentially a recidivist offense and virtually the only difference between it and the offense of Operating a Vehicle Under the Influence of an Intoxicant (OUVII) under HRS § 291E-61 is the number of previous convictions required for an HOVUII conviction. The term "habitual," or even "habitual operator," does not convey the

specificity of the term for HOVUII purposes. Thus, it does not qualify as a term used as commonly understood. HRS § 806-31.

Moreover, although discussed in different contexts, the Hawaiʻi Supreme Court has determined on a number of occasions that the prior convictions for OVUII is an attendant circumstance, and thus is an additional element of the offense.

Thus, in State v. Ruggiero, 114 Hawaiʻi 227, 239, 160 P.3d 703, 715 (2007), the Hawaii Supreme Court held that:

> Inasmuch as we conclude, supra, that a prior conviction, as described in HRS § 291E-61(b)(2) (Supp. 2003), is an elemental attendant circumstance, intrinsic to the offense of operating a vehicle under the influence of an intoxicant, it was necessary that Ruggiero's prior conviction be alleged in the charging instrument and proven at trial as preconditions to his present conviction of operating a vehicle under the influence of an intoxicant for the second time within five years, in violation of HRS § 291E-61(a) and (b)(2).

Similarly, in State v. Domingues, when determining whether the present HOUVII statute was a re-enactment of the predecessor statute, HRS § 291-4.4(a), the court held that the language "during a ten-year period the person has been convicted three or more times for a driving under the influence offense[,]" included as an element of the offense in HRS § 291-4.4(a) but removed from the provision defining the offense and placed into the sentencing provisions of HRS §291E-61, retained its character as an attendant circumstance. 106 Hawaiʻi 480, 487, 107 P.3d 409, 416 (2005) (internal quotation marks omitted). The court went on to note,

> Indeed, "[a]n offense under [HRS § 291E-61(b)(4)] is a class C felony," . . . entitling a defendant to a jury trial, whereas the offenses described in HRS §§ 291E-61(b)(1) through 291E-61(b)(3) would appear to be petty misdemeanors, as to which no right to a jury trial would attach. See id. If the prefatory language of HRS §§ 291E-61(b)(1) through 291E-61(b)(4) were mere "sentencing factors" that the prosecution was not obliged to allege and prove to the trier of fact, as Domingues suggests, then defendants charged with HRS § 291E-61 offenses would have no idea what the particular offense was that they were charged with committing or whether they were entitled to a jury trial.

Id. at 487 n.8, 107 P.3d at 416 n.8.

A charge must state all the essential elements of an offense. Wheeler, 121 Hawaiʻi at 391, 219 P.3d at 1178; Elliott, 77 Hawaiʻi at 311, 884 P.2d at 374 citing State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977) ("In Jendrusch, we held that the failure to allege an essential element of an offense made a charge 'fatally defective.'"). This requirement is not necessarily satisfied by a reference to or recitation of the statute. See State v. Israel, 78 Hawaiʻi 66, 73-74, 890 P.2d 303, 310-311 (1995). Proof beyond a reasonable doubt that Walker was a "habitual operator of a vehicle while under the influence of an intoxicant" as that phrase might be understood given the words usual meaning (see HRS § 1-14 (2009)), would not necessarily result in a conviction. A conviction would only lie upon proof that Walker "has been convicted three or more times within ten years of the instant offense, for offenses of operating a vehicle under the influence of an intoxicant" as prescribed in HRS § 291E-61.5(b). Thus, the three prior convictions are attendant circumstance elements of the offense. See Ruggiero, 114 Hawaiʻi at 239, 160 P.3d at 715.

Since proof of each element of the offense is required for a conviction (HRS § 701-114(1)(a)), the proof of three or more convictions within the previous ten years is an element of the offense and therefore should have been included in the charge.

Therefore, we vacate the January 26, 2009 judgment of the Circuit Court of the First Circuit in Count 1 and remand the case with instructions to the circuit court to dismiss Count 1 without prejudice.

On the briefs:

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