

CONCURRING OPINION OF ACOBA, J.

Although it is said that the crime or crimes intended need not be alleged, I believe it is preferable that the crime or crimes a defendant purportedly intended to commit in entering a motor vehicle be alleged in the charging document in a prosecution for unauthorized entry into motor vehicle (UEMV), Hawai'i Revised Statutes (HRS) § 708-836.5 (Supp. 2000), or that a bill of particulars as to such crimes be freely granted.

I.

In applying the UEMV statute, the reference to analogous case law concerning the burglary statutes, HRS §§ 708-810 (1993) and 708-811 (1993), is apt, inasmuch as the only express distinction between the offenses is that the former pertain to motor vehicles and the latter to buildings. The gravamen of the burglary and the UEMV offenses is the intent to commit a crime against a person or property. Thus, although "the crime alleged . . . is that of intentionally entering or intentionally remaining unlawfully on the described premises[,]. . . what makes that act the crime of burglary [or UEMV] . . . is the intent to commit a crime against a person or property rights." State v. Robins, 66 Haw. 312, 314, 660 P.2d 39, 41 (1983). As the facts indicate, in objecting to the elements instruction in this case, the defense argued, in part that, "there's no actual charge [of] Assault in the Third Degree in

this case," apparently referring to the absence of an allegation of the specific "crime against a person or property" involved.¹ The defense thus raises an issue previously considered in connection with identical statutory language employed in burglary prosecutions.

While this court has indicated that, "under our [burglary] statutes[,]" "the particular crime intended to be committed" is not "an essential element which must be alleged," id. at 315, 660 P.2d at 41, it was acknowledged that, "[n]evertheless, the majority of courts in various jurisdictions passing upon whether the crime of burglary has been sufficiently alleged . . . have upheld timely challenges to the sufficiency of indictments where the specific crime intended to be committed has not been alleged." Id. Those jurisdictions that require the prosecution to plead the crime a defendant intended in committing a burglary, explain that such information is needed in order to place a defendant on complete notice of the charges against him or her. See, e.g., Lanier v. State, 733 So.2d 931, 936 (Ala. App. 1998) ("Absent an allegation in Lanier's indictment charging first-degree burglary that Lanier intended to commit a specific

¹ It is unclear whether the defense sets forth two grounds in opposition to the elements instruction or a single, alternate contention: the first ground as quoted in the text, supra, "and [the second,] that this is not the kind of case that this particular offense was made for[;] . . . [UEMV] should apply more to breaking into vehicles to steal property within it or for carjackings" (emphasis added); or that the defense's reference to the lack of an assault charge was intended to support its view that the UEMV statute applied only to intended property crimes.

crime while in the Lawson's basement, Lanier was not put on notice of the crime of which he was accused and which he had to defend against.").

Despite the fact that such "holdings are treated as a general rule in compendiums of the law dealing with the subject," Robins, 66 Haw. at 315, 660 P.2d at 41 (citations omitted), this court decided that, "[i]nasmuch as we have here an indictment specifying all the necessary elements to constitute the crime of burglary, . . . the lack of an allegation of the specific crime intended to be committed," id. at 315, 660 P.2d at 41-42 (citation omitted), did not violate the constitutional provisions relating to grand jury indictments.² See id. However, Robins viewed as "[t]he much more difficult question . . . whether an indictment which does not set forth the crime intended to be committed by the accused violates his [or her] right . . . 'to be informed of the nature and cause of the accusation.'" Id. at 315, 660 P.2d at 42 (quoting U.S. Const. amend. VI, Haw. Const. art. I, § 14);³ see also State v. Daly, 4 Haw. App. 52, 54, 659 P.2d 83, 85 (1983) (explaining that, for an indictment to be valid, it must, inter alia, "'apprise[] the defendant of what he

² The fifth amendment to the United States Constitution and article I, section 10 of the Hawai'i Constitution state, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]"

³ The United States Constitution, amendment VI, and article I, section 14 of the Hawai'i Constitution state that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]"

[or she] must be prepared to meet'" (quoting Russell v. United States, 369 U.S. 749, 763-64 (1962)); State v. Jendrusch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977) (finding complaint defective because it "fail[ed] to meet the requirement that an accused must be informed of the nature and cause of the accusation against him [or her]" (internal quotation marks and citation omitted)).

As to that question, this court observed that, on appeal, the appellate court "must look to all of the information supplied to [the defendant] by the State to the point where the court passes upon the contention that his [or her] right has been violated," Robins, 66 Haw. at 317, 660 P.2d at 42-43, and that, "on the record [(there),]" there was "no violation of the right to be informed." Id. This court noted, however, that, "given the evidence presented to the grand jury," id. at 317 n.3, 660 P.2d at 43 n.3, it saw "no reason" why "the prosecutor should have been reluctant to go ahead and specify that theft was the intent." Id. In a caveat to its holding, Robins cautioned that there may be "cases in which a general allegation such as that used here[,]" combined with a deviation in theory from that presented to the grand jury[,]" will result in a claim of unfair surprise and prejudice," in which event, "[s]uch cases will have to be dealt with on a case[-]by[-]case basis." Id. at 317 n.4, 660 P.2d at 43 n.4

If, indeed, the crime intended is apparent from the grand jury transcript, I also see no reason why, as Robins indicated, the prosecution should not specify the crime intended. A general allegation invites "unfair surprise[] and [resulting] prejudice." Id. at 315-16, 660 P.2d at 42. Moreover, resort to the record is an indirect method of ascertaining the crimes supposedly intended and may give rise to disputed issues of whether the record adequately and sufficiently provided such notice. Additionally, a search of the record for such information places an unnecessary burden not only on the parties, but also on the trial court that must initially make such a determination, and on the appellate courts, as it did in Robins.

II.

Obviously, the failure to prove the intent to commit a crime in a motor vehicle, beyond a reasonable doubt, must result in an acquittal of the charge of UEMV. Conceivably, in limited situations, such a failure may result in a finding of simple trespass, which is a violation and not a crime. In this regard, the significance of identifying the crime(s) the prosecution purports was or were intended to be committed is prompted by the dissenting opinion of Justice Ramil, which maintains that the overlapping coverage under both the second degree burglary statute, HRS § 708-811, and the UEMV statute, in cases involving

vehicles used for lodging, evinces an ambiguity requiring resort to legislative history, see dissent at 4, which, in turn, is consistent with Defendant's position. See supra note 1.

A person who enters or remains unlawfully in or on premises commits simple trespass. See HRS § 708-815 (1993).⁴ "Premises" includes "any building." HRS § 708-800 (1993). As Justice Ramil points out, the definition of "building" in HRS § 708-800 includes not only structures ordinarily thought of as buildings, but also, "any vehicle" used for lodging. See dissenting opinion at 4. Governed by the definitions section of HRS § 708-800, the terms used for burglary offenses as stated in HRS §§ 708-810 and 708-811, and for the UEMV statute as stated in HRS § 708-836.5, share a common construction.

The general reference to "motor vehicle" in HRS § 708-836.5(1), then, would arguably bring within its purview "any vehicle . . . used for lodging." HRS § 708-800. Because "building" includes, by definition, a vehicle used for lodging, one who enters such a vehicle is potentially subject to a charge of UEMV. However, if no crime is committed in the vehicle and the intent to commit a crime is not proven, the defendant would be subject only to the violation offense of simple trespass,

⁴ HRS § 708-815 reads:

Simple trespass. (1) A person commits the offense of simple trespass if the person knowingly enters or remains unlawfully in or upon premises. (2) Simple trespass is a violation.

i.e., unlawfully entering "premises," that is, a vehicle falling within the definition of a "building."

By way of illustration, a person who breaks into a camper may be charged with UEMV. His or her claim that entry was not for the purpose of committing a crime, but to seek shelter, may entitle him or her to a lesser included instruction⁵ on simple trespass. See, e.g., State v. Williams, 6 Haw. App. 17, 18, 708 P.2d 834, 835 (1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree. . . . The primary difference between burglary in the first degree and criminal trespass in the first degree is the presence or absence of an intent to commit in the building a crime against a person or against property rights."). As where a vehicle not used for lodging is involved, in this situation too, the defendant would have to know what crimes the prosecution claims the defendant intended to commit in order to properly

⁵ HRS § 701-109(4) (1993) determines whether an offense is a lesser included offense of another. It explains that

[a]n offense is so included when . . . [i]t is established by proof of the same or less than all the facts required to establish the commission of the crime charged[.]

(Emphasis added.)

As stated supra, a person commits simple trespass by "knowingly enter[ing] or remain[ing] unlawfully in or upon premises." HRS § 708-815. "'Premises' includes any building and any real property," HRS § 708-800; and "'[b]uilding' includes any structure, and . . . any vehicle . . . used for lodging of persons therein." Id. Conceivably, therefore, a person may be guilty of simple trespass by knowingly entering or remaining unlawfully in a vehicle used as lodging. Thus, simple trespass is a lesser included offense of UEMV if a defendant accused of UEMV broke into a vehicle used for lodging, such as a mobile home or camper.

prepare for trial and to defend against the offense of UEMV. Thus, the dissent highlights the importance in UEMV prosecutions of determining the crime against the person or property alleged to have been intended by a defendant.

III.

In the event the prosecution chooses not to specify the crimes intended, trial courts should freely grant bills of particulars for identification of such crimes. See State v. Balanza, 93 Hawai'i 279, 286, 1 P.3d 281, 288 (2000) ("A trial court has the discretion to order a bill of particulars, and it must exercise this discretion in consideration of the purpose of a bill of particulars, which is to help the defendant prepare for trial and to prevent surprise." (Emphasis added.) (Citing State v. Reed, 77 Hawai'i 72, 78, 881 P.2d 1218, 1224 (1994).)).

Although Robins noted that "a bill of particulars is discretionary with the judge under Rule 7(a), Hawai'i Rules of Penal Procedure,"⁶ 66 Haw. at 316, 660 P.2d at 42, the failure to grant such a motion in the event a question as to the nature of a general allegation arises would amount, in my view, to an abuse

⁶ The rule regarding bills of particulars is now set forth in the Hawai'i Rules of Penal Procedure Rule 7(g), which states:

(g) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days of arraignment or at such other later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

of discretion. As Robins suggested, the intent to commit a crime against a person or property distinguishes burglary or, in this case, UEMV. In charging UEMV, the prosecution must have discerned a rational basis in the facts for inferring an accused's intent to commit certain crimes and, therefore, should be required to designate such crimes.