OPINION OF ACOBA, J., CONCURRING IN PART WITH RAMIL, J. AND DISSENTING TO THE DECISION OF MOON, C.J.

Chief Justice Moon's opinion adopts and incorporates the initial position of Justice Ramil that the first circuit court committed plain error in failing to submit an instruction to the jury on the meaning of "entry" in Hawai'i Revised Statutes (HRS) § 708-836.5 (Supp. 2001). Inasmuch as Justice Ramil's position set forth the ultimate majority result, I believe his opinion should have announced the majority disposition in this case. Accordingly, I concur in Justice Ramil's opinion with respect to vacating the judgment of conviction and remanding the case to the circuit court for new instructions to the jury. I disagree with the view that, in light of the arguments raised by Defendant-Appellant Gary Faria (Defendant), Plaintiff-Appellee State of Hawai'i (the prosecution) was not required to specify the crime it charged Defendant intended to commit upon entry of the vehicle. See plurality opinion at 16-18.

I.

Because the term "entry" is ambiguous, each juror could have had a different view of its meaning, thereby depriving Defendant of a unanimous verdict. See State v. Yamada, 99 Hawai'i 542, 562, 57 P.3d 467, 487 (2002) (Acoba, J., concurring) ("Criminal defendants are entitled to a unanimous verdict under the Hawai'i Constitution and pursuant to court rule."); see also State v. Miyashiro, 90 Hawai'i 489, 499, 979 P.2d 85, 95 (App.

1999) (holding that if the jurors cannot agree unanimously on the affirmative defense of entrapment, "no unanimous verdict can be reached as to the charged offense because some jurors would vote for conviction and others for acquittal"). In the absence of an instruction as to the term entry in HRS § 708-836.5, the jury could have erroneously convicted Defendant if it believed the dispersion of mace into the vehicle constituted a prohibited entry. The jurors could have rendered such a verdict even if (1) they believed Defendant's testimony that his body did not enter the vehicle, or (2) that, because of conflicting testimony, the prosecution failed to prove beyond a reasonable doubt that any part of Defendant's body or the can of mace protruded into the complaining witness's vehicle. The possibility that this occurred is supported by the jury's two inquiries -- one, as to whether the "mace entering the car constitutes entry by the person spraying," (emphasis added) and second, as to "what . . . [is] the range (distance) that this mace can spray?"

II.

Defendant also maintains that it was error to instruct on assault in the third degree inasmuch as "the indictment was silent as to assault being the predicate act, and before and during the trial during the taking of evidence and argument of counsel, . . . assault [was not] mentioned as the predicate crime." Consequently, he argues, "[t]he defense could not prepare to defend the case against a moving target." I believe

we will continue to be beset with arguments and thus, appeals, on the failure of the prosecution to designate the crime it believed a defendant intended to commit in entering a motor vehicle.

In that regard, the evidence submitted by the prosecution potentially supported two separate offenses, assault in the third degree as was ultimately decided by the circuit court, or harassment. Assault in the third degree is committed if a person "[i]ntentionally, knowingly, or recklessly causes bodily injury to another person." HRS § 707-712 (1993). Harassment is committed if a person, "with intent to harass, annoy, or alarm any other person, . . . [s]trikes shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]" HRS § 711-1106(1)(a) (Supp. 2001).[1] Because the evidence supported more than one crime, a trial, as Defendant intimates, devolves into one of gamesmanship.

Under the procedure followed by the court, identification of the crime ultimately to be disclosed to the jury is withheld and determined only after the evidence is adduced. This may result in trial by ambush. It is wholly at

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[1] Both of these offenses are petty misdemeanors. Thus, while either offense could be charged, the prosecution chose instead to charge a violation of HRS § 708-836.5, which raised the conduct involved from a petty misdemeanor punishable by a maximum term of thirty days in jail, to five years in prison, because the crime arguably involved entry into a vehicle. While such a charging practice falls within the broad language of HRS § 708-836.5, it is inconsistent with the purpose of the statute as expressed in the legal reports, see State v. Lagat, 97 Hawai'i 492, 503, 40 P.3d 894, 905 (2002) (Ramil, J., dissenting) ("[A]lthough the language of [HRS 708-836.5] is clear on its face, the statutory scheme and stated legislative intent are clearly at odds with the statute's application in [defendant's] case.").

odds with the basic premise in our law that a criminal defendant be apprised of the basis for the charge against him or her in order to properly defend. See State v. Vanstory, 91 Hawai'i 33, 44, 979 P.2d 1059, 1070 (1999) ("[T]he purpose of an indictment is to apprise the accused of the charges against him, so that he may adequately prepare his defense, and to describe the crime charged with sufficient specificity to enable him to protect against future jeopardy for the same offense." (Citation and internal quotation marks omitted.)); State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) ("[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." (Citation and internal marks omitted.)).

That fundamental premise was said to be satisfied in State v. Robins, 66 Haw. 312, 660 P.2d 39, reconsideration denied, 66 Haw. 679, 660 P.2d 39 (1983), although the crime was not alleged, because in that case this court said that, "on the record [there]," there was "no violation of the right to be informed." Id. at 317, 660 P.2d at 42-43. A Robins analysis is wholly lacking in this case, and the claim of prejudice raised by Defendant is simply dismissed by the conclusory statement of the plurality "that the predicate offense for [unauthorized entry into motor vehicle (UEMV)] was assault." Plurality opinion at 17. But, "[i]n 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." State v. Lagat, 97 Hawai'i 492, 503, 40 P.3d 894, 905 (2002) (Acoba, J., concurring). "A general allegation [which does not specify the crime intended to be committed] invites unfair surprise and resulting prejudice." Id. at 501, 40 P.3d at 903 (internal quotation marks, brackets, and citation omitted).

Even if "the record" in Robins showed the defendant was "informed," "resort to the record is an indirect method of ascertaining the crimes supposedly intended" to be committed. Id. This approach "may give rise to disputed issues of whether the record adequately and sufficiently provided such notice." Id. And, "a search of the record for such information places an unnecessary burden not only on the parties, but also on the trial court . . . , and on the appellate courts, as it did in Robins." Id. We should join the majority of jurisdictions that require that the crime be specified. See id. at 500, 40 P.3d at 902 ("[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." (Quoting Robins, 66 Haw. at 315, 660 P.2d at 41.) (Brackets and ellipsis points omitted.)).

Thus, on remand, I would require that the prosecution designate the crime as to which it had decided Defendant intended to commit when it charged him. Anything less compromises the

fundamental fairness and truth finding function of a criminal trial. See State v. Haanio, 94 Hawai‘i 405, 415, 16 P.3d 246, 256 (2001) ("Our courts are not gambling halls but forums for the discovery of truth . . . ." (Citation and internal quotation marks omitted.)).