CONCURRING OPINION OF WATANABE, J.

I concur with the Majority that the trial court did not commit plain, reversible error when it instructed the jury as to the elements of sexual assault in the first degree (Counts 1, 3, and 4), sexual assault in the third degree (Counts 2 and 5), and kidnapping (Count 6).

However, I am troubled by the ramifications of the Majority's conclusion that there was "no need to specify, in advance of trial or in the jury instructions, the separate and distinct act in question in each sexual assault count" that Defendant was charged with. In my opinion, Defendant was entitled to know the specific conduct underlying each sexual assault count so that he could adequately prepare for trial.

The record reveals that the trial court did not give the jurors a specific unanimity instruction that all twelve of them had to agree, for each count Defendant was charged with, that the same underlying criminal conduct had to be proved beyond a reasonable doubt. Additionally, during closing arguments, the deputy prosecutor for the State confused the acts underlying each sexual assault count or mixed up the counts.[(1)] Therefore, it is impossible for us to determine on appeal what specific conduct formed the basis for each sexual assault count Defendant was convicted of.

I realize that the Hawaii Supreme Court recently held that a unanimity instruction is only necessary where "(1) at trial, the prosecution adduces proof of two or more separate and distinct culpable acts; and (2) the prosecution seeks to submit to the jury that only one offense was committed[,]" State v. Valentine, ___ Hawaii ___, ___, 998 P.2d 479, ___ (2000), and in this case, the complainant testified to three sexual penetrations and two grabs of her breast, which accounts for all of the sexual assault counts that Defendant was charged with. Moreover, since the jury returned guilty verdicts as to all of the sexual assault counts, any error caused by individual jurors considering different instances of culpable conduct for each count is probably harmless.

If the jury had acquitted Defendant or reached an impasse on a particular count, however, we would never know whether the jurors had unanimously determined guilt as to the other counts based on the same underlying conduct, unless the counts had been particularized for the jury or a unanimity instruction had been given. I believe that a bill of particulars, a more specific indictment, or a unanimity instruction would have been advisable in this case because such measures would have ensured that each juror voted to convict Defendant on the basis of the same instances of sexual misconduct.

CORINNE K. A. WATANABE
Associate Judge

1. The record indicates that during closing argument, the deputy prosecutor initially identified Count 1 as sexual assault in the first degree and identified the underlying act as Defendant's inserting his penis into the complainant's vagina, using strong compulsion, and without consent. The deputy prosecutor identified the underlying conduct for Count 2, which charged sexual assault in the third degree, as grabbing the complainant's breast with strong compulsion and without consent. The deputy prosecutor identified Count 3 as sexual assault in the first degree, but did not discuss the act underlying the count. At this point, the deputy prosecutor either

became confused or misspoke. He recapped Count 1 as sex in the shed after Defendant had dragged the complainant from the car. He then described Count 1 as the sexual penetration that occurred when the complainant tried to run away and Defendant tackled her and inserted his penis while the complainant was on the ground. Next, the deputy prosecutor misidentified Count 2 as sexual assault in the first degree, describing penetration that occurred after Defendant had dragged the complainant back to the shed. The deputy prosecutor then described Count 3 simply as "Hand on breast. Sexual Assault in the third degree." He then erroneously described Count 4 as Defendant grabbing the complainant's breast the first time they were having sex in the shed, which would constitute sexual assault in the third degree, when, in fact, Count 4 charged Defendant with sexual assault in the first degree. Finally, the deputy prosecutor described Count 5 as Defendant's grabbing the complainant's breast after Defendant had dragged the complainant back again.

On rebuttal, the deputy prosecutor incorrectly identified Counts 1, 3, and 5 (rather than Counts 1, 3, and 4) as charging Defendant with sexual penetration with strong compulsion and without consent. The deputy prosecutor also referred to Counts 2 and 4 (rather than Counts 2 and 5) as charging Defendant with sexual contact, hand on breast, without consent and with strong compulsion.