

CONCURRING OPINION BY NAKAMURA, J.

I concur in the result reached by the majority but write separately to note my disagreement with the majority's interpretation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006), which prohibits the unauthorized control of a propelled vehicle (UCPV). In my view, it is not enough for the prosecution to prove that the registered owner of the vehicle did not consent to the defendant's use. Rather, I believe the prosecution is required to prove that the defendant knew or was aware that the registered owner of the vehicle did not consent to the defendant's use. However, in this case, my difference with the majority over the interpretation of HRS § 708-836 was not material in that it did not prevent us from reaching the same conclusion regarding the proper resolution of this appeal.

It was Defendant-Appellant Erwin E. Fagaragan's theory of defense, supported by Fagaragan's own testimony, that he was not guilty of UCPV because he borrowed the car from individuals who he believed were renting the car from a rental company. Unfortunately for Fagaragan, his theory of defense was misguided. By virtue of Fagaragan's testimony and theory of defense, he essentially admitted to the required elements of proof for the UCPV offense, even under my interpretation of the statute. By asserting that he obtained permission from individuals he believed were renting the car, Fagaragan conceded that he knew he had not obtained the consent of the registered owner. The affirmative defense under HRS § 708-836(3)(a) was also unavailable given the undisputed evidence that the individuals Fagaragan claimed had loaned him the car were not the actual agents of the registered owner. Under these circumstances, any errors committed by the trial court regarding the UCPV count alleged by Fagaragan in his points of error on appeal were harmless beyond a reasonable doubt.

*Craig W. Nakamura*