

DISSENTING OPINION BY ACOBA, J., IN WHICH MOON, C.J., JOINS

I believe the Complaint herein was defective because the language of the Complaint failed to state the nature and cause of the accusation, in a manner that could be understood by a person of common understanding. Assuming, arguendo, that the Complaint was not defective, I agree with the determination of the Intermediate Court of Appeals (ICA) that the Family Court of the First Circuit (family court) abused its discretion in denying the "alternative request for a bill of particulars [of Respondent/Defendant-Appellant Lawrence L. Corder (Corder)] because the [f]amily [c]ourt failed to consider whether, under the circumstances, the bill of particulars was necessary to Corder's preparation for trial and to prevent him from being prejudicially surprised as to what acts he allegedly committed in violation of the [Extended Order for Protection (EOP)]." State v. Corder, No. 28877, 2009 WL 886843 at *2 (App. Mar. 31, 2009). Therefore I respectfully dissent.

I.

Article 1, Section 14 of the Hawai'i State Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" Thus, a charge must be in a "legally sufficient form which correctly advises the defendant about the allegations against him or her." State v. Israel, 78 Hawai'i 66, 69, 890 P.2d 303, 306 (1995) (quoting State v. Cadus, 70 Haw. 314, 318, 769 P.2d 1105, 1109 (1989)). Additionally, according to statute, "[n]o 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." Hawaii Revised Statutes (HRS) § 806-31 (1993) (emphasis added).

The Complaint herein simply asserted that there were violations of the EOP on three different dates. Three counts of violating the EOP were listed in the Complaint, with each of the counts identically worded, except for the specific dates on which the violations occurred. For example, Count I referred to a violation occurring on January 12, 2007. Count I stated in its entirety:

COUNT 1: On or about January 12, 2007, in the City and County of Honolulu, State of Hawaii, LAWRENCE CORDER did intentionally or knowingly violate the Order for Protection issued in FC-DA No. 05-1-1551 on August 2, 2006 by the Honorable Nancy Ryan, Judge of the Family Court of the First Circuit, State of Hawaii, pursuant to Chapter 586 of the [HRS], thereby committing the offense of Violation of an Order for Protection in violation of Section 586-5.5 and Section 586-11(a)(1)(A) of the [HRS].

Count II referred to a violation occurring on January 15, 2007.

Count III referred to a violation occurring on January 19, 2007.

The Complaint failed to indicate what conduct was allegedly culpable on each occasion and which of the EOP sections was allegedly violated on each date, despite the fact that the EOP contained several different provisions referring to various types of acts.¹ Because the Counts in the Complaint merely

¹ Arguably the relevant provisions of the EOP were as follows:

A. THREATS AND ABUSE

1. Defendant is prohibited from threatening or

alleged that Corder "did intentionally or knowingly violate the [EOP] issued in FC-DA No. 05-1-1551 on August 2, 2006[,] without designating which conduct and sections within the EOP were violated, "the nature and cause of the accusation [could not] be understood by a person of common understanding from a reading of the Complaint itself." Israel, 78 Hawai'i at 71, 890 P.2d at 308 (internal quotations marks omitted).

The Complaint did reference in its caption (as opposed to in the charges) Police Report No. 07-016631 with respect to

physically abusing the Plaintiff or anyone living with the Plaintiff and shall not maliciously damage any property of the Plaintiff or property of the Plaintiff's household. . . .

B. CONTACT BETWEEN PARTIES

2. Defendant is prohibited from contacting the Plaintiff.

3. Defendant is prohibited from telephoning, writing, or otherwise electronically communicating (by recorded message, pager, etc.), including through third parties, with the Plaintiff and any children residing with the Plaintiff, except as allowed by this order.

4. Defendant is prohibited from coming or passing within 100 yards of any place of employment or where the Plaintiff lives and within 100 feet of each other at neutral locations. In the event the parties happen upon each other at a neutral location, the subsequent arriving party shall leave immediately or stay at least 100 feet from the other. When the parties happen upon each other at the same time at a neutral location, the Defendant shall leave immediately or stay at least 100 feet from the Plaintiff. . . .

5. Notwithstanding the foregoing Order [x] Defendant may have LIMITED contact with the Plaintiff in person for the purpose of . . . attending in-court proceedings and limited contact for service of legal documents

6. Defendant is prohibited from contacting the following: Allison L. Corder, [minor son of Lawrence Corder (minor 1), until minor's 18th birthday [] February 01, 2008, [minor daughter of Lawrence Corder (minor 2)] until August 10, 2011. . . .

C. TEMPORARY CUSTODY AND VISITATION

9. . . . Defendant shall have visitation with the minor children as follows: . . . supervised visitation; [] For minor child. . . at PACT VISITATION CENTER. . . . Unsupervised visitation with [minor 1] shall be at the discretion [of minor 1].

Count I, Police Report No. 07-021001 with respect to Count II, and Police Report No. 07-026265 with respect to Count III.² However, without specificity as to the prohibited conduct in the Complaint itself, Petitioner/Plaintiff-Appellee State of Hawai'i (the State) was not bound at trial to prove all matters listed in the police reports or to adhere to the EOP sections as cited by the police officers in their reports. Hence, the information provided in these corresponding police reports could be subject to varying applications. Corder, in effect, was left without any certitude of what violative conduct he would be prosecuted for at trial. Thus the Complaint, even viewed in the context of the police reports, was not adequate to fairly permit Corder to prepare for trial. See generally State v. Robins, 66 Haw. 312, 316, 660 P.2d 39, 42 (1983) (recognizing the fact that a bill of particulars is discretionary with the judge pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 7(a) and the fact that other discovery rules given to the defendant are limited, might prevent a defendant from discovering the State's position); State v. Mitake, 1 Haw. App. 335, 340, 619 P.2d 1078, 1081 (1980) (recognizing that the HRPP does not "permit a broad and

² The caption of the Complaint included the following counts:

COUNT 1:
VIOLATION OF AN ORDER FOR PROTECTION (Police Report No. 07-016631)

COUNT 2:
VIOLATION OF AN ORDER FOR PROTECTION (Police Report No. 07=021001)

COUNT 3:
VIOLATION OF AN ORDER FOR PROTECTION (Police Report No. 07=026265)

freeranging discovery in criminal cases"). Therefore, the Complaint was defective.

II.

In cases of this sort, at the very least, a straightforward and efficient approach would be to require the State to specify in the complaint itself, the particular EOP requirement allegedly violated. Of course, "a bill of particulars is not a cure for a defective charge." Territory v. Kanda, 41 Haw. 591, 596 (1957). However, assuming, arguendo, that the Complaint is not defective, "[i]n the event the prosecution chooses not to specify the crimes intended, trial courts should freely grant bills of particulars for identification of such crimes." State v. Lagat, 97 Hawai'i 492, 502, 40 P.3d 894, 904 (2002) (Acoba, J., concurring). Pursuant to HRPP Rule 7(g) (2007), it is within the trial court's discretion to direct the prosecution to file a bill of particulars informing the defendant of the specifics of the charges he must defend against at trial. In this case, the family court's discretion should have been exercised in light of the purposes of a bill of particulars, which is designed to enable the defendant to "prepare for trial and to prevent surprise." State v. Balanza, 93 Hawai'i 279, 286, 1 P.3d 281, 288 (2000) (emphases added) (citing State v. Reed, 77 Hawai'i 72, 78, 881 P.2d 1218, 1224 (1994), overruled on other grounds by Balanza, 93 Hawai'i at 288, 881 P.3d at 290). This court has held that a bill of particulars is not required if the information called for has been provided "in some other

satisfactory form." Reed, 77 Hawai'i at 78, 881 P.2d at 1224 (citation omitted), overruled on other grounds by Balanza, 93 Hawai'i at 288, 881 P.3d at 290 (holding that the trial court did not abuse its discretion in denying Reed's motion for bill of particulars when Reed did not deny that the transcripts of the preliminary hearing and police reports provided him with the information that he claimed was lacking in the complaint).

However, without being apprised in the Complaint of which specific provisions of the EOP were violated or which particular acts were charged, for the reasons stated in Part I, supra, Corder could not adequately prepare for his trial. A bill of particulars would clarify the conduct covered by the charges and would avoid prejudice. In terms of the administration of justice, it is fairer to require a bill of particulars to be filed rather than to leave a defendant uncertain as to the particular conduct he or she is alleged to have committed until trial, and it is more efficient to grant a bill of particulars to avoid appeals regarding questions of the kind raised in this case. Thus, a failure to grant such a motion when there is obvious uncertainty on the face of the Complaint as to the nature of the violations alleged would amount, in my view, to an abuse of discretion. See Lagat, 93 Hawai'i at 502, 40 P.3d at 281 (Acoba, J., concurring).