

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

Because I disagree with both the analysis and the effect of the majority opinion, I respectfully dissent.

Unabridged, the testimony of the prosecution's expert prior to the defense's initial objection reads:

Q. [By the prosecutor] And in general, is this fourier transform infrared spectrometer generally accepted in the scientific community as an accurate scientific device for determining the presence of cocaine?

A. Yes.

Q. And having -- now, how much of the distance [sic] do you have to put into this machine in order to -- for there to be an accurate reading by the machine of whether or not the substance contains cocaine"

A. Well, you can use a fraction of a milligram or one or two milligrams.

Q. Do you recall how much you used in this case?

A. Most likely a couple of milligrams.

Q. How many of these tests do you do a day, for example?

A. It can be from none to I can do over 50 or depending on what --

Q. In the space of a year, how many would you do?

A. It could be several hundreds.

Q. And so you probably don't remember specifically each test; right?

A. Correct.

Q. And in preparation for your testimony today, did you -- did you look over any report that you had made in connection with this?

A. Yes.

Q. Okay. Now, having done that test, what -- did you also weigh the whole substance that was in the plastic bag that had been given to you?

A. Yes.

Q. And first of all, how much did it weigh?

A. It weighed 0.095 grams.

Q. Okay. So to put it another way, 0.095 grams is 95 milligrams; is that correct?

A. Yes.

Q. Which is -- well, we don't need to know, but can you transform that into ounces, you know, on the fly, or would you have to sit down and use a machine to do that?

A. Well, I can say 3.54 grams is one-eighth of an ounce.

Q. So this is a lot less than one-eighth of an ounce?

A. Yes.

Q. And what did that substance contain?

A. I found it to contain cocaine.

[By defense counsel:] Your Honor, objection foundation. We'd object to insufficient foundation, request that the response be stricken.

The trial court overruled the objection. On cross-examination, the expert testified:

Q. [By defense counsel] The FTIR, machine, I'll refer to it as that, is there a single machine in the laboratory -- lab, or are there several?

A. There are several.

Q. Now, the process of the machines are electronic, are they not, as opposed to mechanical? You plug it in and the measurements and all these things take place internally to the machine?

A. Yes.

Q. Approximately how many specialists such as you, work in the lab are actually hired, work at any time during the given week?

A. That use the instrument?

Q. Mm-hm

A. About four.

Q. And are the instruments assigned specifically to each of you specialists, or might you use one machine and then another machine during the course of a week depending on which one is available?

A. We use what's available.

Thereafter, on re-direct examination, the prosecution asked, "Are the machines -- all the machines, all four of them tested from time to time and calibrated to ensure their accuracy?" The expert responded, "All the instruments are checked."

I agree with the general proposition that, as the basis for an objection, merely stating "insufficient foundation" is inadequate to preserve a specific issue for appeal. I also acknowledge that we have held that incompetent evidence admitted without a proper objection or motion to strike is treated as competent evidence on appeal. See State v. Wallace, 80 Hawai'i 382, 409-10, 910 P.2d 695, 722-23. However, the majority opinion holds that the specific basis for the objection in this case

should have been obvious to the court because the absence of testimony that the FTIR machine was in proper working order when the expert tested the recovered substance was the only foundational element lacking. Majority Opinion (Maj. Op.) at 14-15. I disagree.

According to the majority opinion, a proper foundation for the introduction of a scientific test result requires:

- (1) the qualifications of the expert;
- (2) whether the expert employed valid techniques to obtain the test result; and
- (3) whether the instrument in question was in proper working order.

The majority opinion concludes that defense counsel's objection clearly related to the last element because it was the only foundational question remaining. Maj. Op. at 15. However, in the present case, the prosecution's expert testified that "a fraction of a milligram or one or two milligrams" was required for the FTIR machine to yield an accurate reading. But when asked to identify how much of the recovered substance she actually tested in the FTIR machine, the expert responded, "Most likely a couple of milligrams." The expert also testified that she did not specifically remember each test she performed. Thus, the expert's testimony as to the "couple of milligrams" she actually tested in the FTIR machine was pure speculation.

Clearly, the prosecution must establish that the amount of substance tested was sufficient to enable the FTIR machine to

yield an accurate reading in order to satisfy the foundational requirement that valid techniques were used to obtain the test result. Here, the expert's testimony fails to establish that valid techniques were used. Therefore, the record indicates that there were at least two different foundational requirements that were arguably lacking. Given that an objection based upon a specific ground constitutes a waiver of all other objections, State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) (citation omitted), the trial judge should not assume the role of an advocate by selecting which of the available grounds for objection to pursue. Accordingly, I do not believe defense counsel was relieved of his burden of making a specific objection.

Finally, I disagree with the majority's view that the trial judge in this case was required to divine a specific basis from the defense's general objection. This case demonstrates that, even on appeal, with the benefits of time and a complete transcript, reasonable minds can differ as to what constitutes an obvious ground for an objection. Nevertheless, the majority opinion requires a trial court faced with an inadequate objection to ferret out a specific basis upon which to sustain it, presumably like the basis the majority deems "obvious" in the

instant case.¹ Additionally, the majority opinion encourages counsel -- without a specific basis in mind -- to, nevertheless, gamble by making a general objection and hope that the trial court will sustain the objection or that an issue will be preserved for appeal. Such wagering tactics are further encouraged by the majority opinion's emphasis that a party is not required to advise an adversary how his or her foundation is lacking. I do not believe this court should encourage counsel to treat evidentiary issues like games of chance. Moreover, I believe that encouraging general objections will result in advocates laying the entire foundation for critical evidence anew, wasting court time and resources.

For the foregoing reasons I would dismiss the application for writ of certiorari as improvidently granted.

¹ I note that in the majority's recitation of the testimony it deems relevant, the majority omits nearly four full pages of testimony, presenting a somewhat skewed depiction of the context in which the objection was raised.