

DISSENTING OPINION OF ACOBA, J.

I respectfully dissent.

In Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), this court set forth the requirements of the colloquy in advising a defendant of his or her constitutional rights regarding testifying. This court said that, in a criminal trial, the trial courts must inform the defendant that: 1) the defendant has a right to testify; 2) if the defendant wants to testify, no one can prevent him from doing so; 3) if the defendant testifies, the prosecution may cross examine him; 4) the defendant has the right not to testify; and 5) if a defendant does not testify, the jury can be instructed about that right. See id. at 236 n.7, 900 P.2d at 1302 n.7.

In State v. Staley, 91 Hawai'i 275, 982 P.2d 904 (1999), this court held that consistent with Tachibana, in every criminal case in which the defendant chooses not to testify, trial courts "*must obtain an on-the-record waiver of that right*" from the defendant. Id. at 287, 982 P.2d at 916 (quoting Tachibana, 79 Hawai'i at 235, 900 P.2d at 1303) (emphasis in original). Staley's constitutional right not to testify was violated because the court omitted a key requirement of the Tachibana colloquy when it asked only Staley's attorney if his client "was going [to] testify." Id. at 278, 982 P.2d at 909. By not eliciting or ascertaining an on-the-record waiver of

Staley's right from the defendant himself, this court said that the trial court committed plain error.

In State v. Lewis, 94 Hawai'i 292, 12 P.3d 1233 (2000), this court mandated that, prior to the start of trial, trial courts inform the defendant of his or her personal right to testify or not to testify in accordance with the Tachibana colloquy. See id. at 297, 12 P.3d at 1238 (citing Tachibana, 79 Hawai'i at 236 n.7, 900 P.2d at 1302 n.7).

While I believe the district court acted conscientiously, it failed to follow this court's Lewis mandate and failed to advise Defendant-Appellant Dewitt Lamar Long (Defendant) as required in Tachibana. In short, the court told Defendant that (1) he was under no obligation to testify, (2) he did not have to take the stand, and (3) if he wanted to take the stand, that point in the trial was his opportunity to do so. Furthermore, the court told Defendant, "So, I'm sure it's something I'm sure you've discussed with your counsel. Then you can let the court know what your decision is." At that point, prompted by his counsel, Defendant responded that he was not going to testify.

Thus, the court failed to inform Defendant of points 1, 2, and 3 of the Tachibana colloquy. As did the trial court in Staley, the district court committed plain error. Under these circumstances, the error was not harmless.

Some seven years ago, in Tachibana, this court required the trial courts to so advise defendants. The importance of

giving the Tachibana colloquy in its entirety was emphasized four years later in Staley. This instruction was reiterated in Lewis as recently as two years ago. Tachibana, Staley, and Lewis were intended to avoid the very kind of issue now raised in this appeal and similarly pending in other cases.

The foregoing is dispositive of the points on appeal. Therefore, I would vacate the conviction and remand for a new trial.