NO. 23881

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES VENTIMIGLIA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
EWA DIVISION
(TRAFFIC NO. 00-0047460)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Charles Ventimiglia (Ventimiglia) was arrested for reckless driving, in violation of Hawaii Revised Statutes (HRS) § 291-2 (Supp. 2001).[1] Following a bench trial before per diem District Court Judge Michael Marr of the District Court of the First Circuit, Ewa Division (the district court), on October 3, 2000, Ventimiglia was convicted as charged, fined $275.00, assessed a $7.00 Driver's Education fee, and ordered to attend a defensive driving class. Sentence was stayed pending appeal.

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[1]HRS § 291-2 provides in relevant part as follows:

> **§291-2 Reckless driving of vehicle or riding of animals; penalty.** Whoever operates any vehicle . . . recklessly in disregard of the safety of persons or property is guilty of reckless driving of vehicle . . . , and shall be fined not more than $1,000 or imprisoned not more than thirty days, or both.

On appeal, Ventimiglia contends that prosecutorial misconduct prejudiced his right to a fair trial, the district court committed plain error by improperly admitting evidence of prior speeding tickets, and he was denied effective assistance of counsel. We disagree with Ventimiglia's contentions and affirm the October 3, 2000, Judgment of the district court.

## I. BACKGROUND

Honolulu Police Officer Shane Williams (Officer Williams) testified that on February 6, 2000, he responded to a dispatch call regarding a motor vehicle accident on Moanalua Freeway, westbound, right by the merge with H-1 West. Officer Williams observed two motor vehicles "smashed up" with one vehicle flipped over on its roof, other cars on the shoulder of the freeway, and lots of people at the scene. Officer Williams identified Ventimiglia as the person he spoke with at the scene who stated he was driving the vehicle that flipped over onto its roof. Officer Williams identified the vehicle driven by Ventimiglia as a blue 1995 Honda (the Honda) and the other vehicle involved in the accident as a 1998 Acura (the Acura). Approximately fifteen minutes after arriving at the scene of the accident, Officer Williams arrested Ventimiglia for reckless driving.

Kawika Keala (Keala) testified that at approximately 2:00 a.m. on February 6, 2000, he was driving home on the

Moanalua Freeway heading toward Pearl City. As Keala passed Red Hill, approximately ten yards past the stadium off ramp, he looked in his rear view mirror and "saw a bunch of racing cars coming up on me real quick." Keala identified the cars as "racing" because "they were going very fast, very fast." Keala was traveling at approximately 65 miles per hour, and the cars passed him "very fast." Keala approximated that eight to ten cars raced by him in a group. While Keala traveled in the center lane, a Honda and an Acura came up suddenly behind Keala, and the Honda came within two to four inches from his rear bumper. Expecting the Honda would hit him, Keala warned his passenger to hold on while Keala clutched the steering wheel as hard as he could in expectation of a collision. The Honda quickly changed lanes, and the cars "very rapidly" moved ahead out of Keala's sight. Rounding a curve moments later, Keala saw the Honda flipped on its roof and the Acura crashed up against a tree. Under cross-examination, Keala stated that he did not include in his written statement to the police that the Honda came within inches of his rear bumper or which vehicle passed him first.

Following the State's case, Ventimiglia made a motion for a judgment of acquittal. The district court denied the motion, ruling:

> THE COURT: Okay, the motion for judgment of acquittal is denied. The Court believes that in the light most favorable to the State that the

State has proven that the crime of reckless driving was committed.

Ventimiglia testified on his own behalf, stating that on February 6, 2000, at approximately 2:00 a.m., he was traveling home on the Moanalua Freeway, westbound, in the Honda. As he traveled over Red Hill among three or four vehicles in very light traffic, Ventimiglia was unaware of any vehicles racing prior to the accident. Traveling in the far left lane, Ventimiglia accelerated and overtook a car in the center lane in order to merge onto the H-1 Freeway. He did not approach the car in the center lane by a close margin.

Ventimiglia testified that after overtaking the car in the center lane, he noticed the Acura (Ventimiglia identified the Acura as "Graham's vehicle") "come flying up" at a high rate of speed behind him, staying in Ventimiglia's lane of travel. No other vehicles were in the proximity of the Honda or Acura at that point. The Acura came within two or three car lengths of Ventimiglia before the Acura "shot over to the right lane" and pulled alongside the Honda. Ventimiglia assumed the driver of the Acura wanted to race him. Ventimiglia responded by pulling his foot off the accelerator in order to let the Acura pass. The driver of the Acura then cut in front of Ventimiglia, accelerated suddenly, and lost control of the Acura. The Acura started to slide to the right. The driver of the Acura slammed on his brakes, and smoke from his tires "started to camouflage [the

Acura] and engulf [Ventimiglia]." Turning away to avoid the Acura caused Ventimiglia to lose control of the Honda, hit a guardrail, and eventually overturn the Honda. Ventimiglia got out of his vehicle and walked over to "where Graham was at." There was a group of people gathered by Graham, talking to him, and there were several stopped cars with no one inside the cars. Ventimiglia thought these were Graham's friends and that the stopped cars were driven by these friends because "all those people didn't come out of Graham's car, so they must have came [sic] somewhere and they must have been friends that were following him."

Ventimiglia admitted he was driving in excess of the posted speed limit when he accelerated to overtake another vehicle, but denied that he was racing with anyone.

The following exchange occurred at trial between Ventimiglia and his attorney:

> [Defense Counsel] Q You heard that gentleman testified, [Keala]?
>
> [Ventimiglia] A Yes.
>
> Q That gentleman testified that he thought it was your vehicle that had nearly, had come within four to two inches of his vehicle?
>
> A That, he's highly mistaken, and I would never do anything that dangerous. I believe that he's probably thinking that it was another one of those vehicles that was involved in that pack, but there's no way, there was no other vehicles that were really even close to me when I was traveling down that stretch of the freeway. So, all of this action was all of these other vehicles obviously was definitely farther behind me than the witness was stating.

Later, under cross-examination, the following exchange occurred:

> [Prosecutor]: Q Now, you said on your direct with your attorney that our witness must have been mistaken, you said that right?
>
> [Ventimiglia]: A I believe I said that, yes.
>
> [Prosecutor]: Q And you also -- because you would never do anything as dangerous of what he was describing to you?
>
> [Ventimiglia]: A Because no, I didn't pass within four inches or even within one car length of any vehicle.
>
> [Prosecutor]: Q But you did say on your direct that because you would never do anything dangerous like that?
>
> [Ventimiglia]: A Yes.
>
> [Prosecutor]: Q You did say that?
>
> [Ventimiglia]: A Yes.
>
> . . . .
>
> [Prosecutor] Q Okay, now would you agree with me that going in access [sic] of maybe ten miles over the speed limit is pushing maybe being dangerous?
>
> [Defense Counsel]: I'm going to object, your Honor. That calls for speculation, beyond the scope of this witness' ---
>
> THE COURT: Objection's overruled.
>
> [Defense Counsel]: Plus, we don't know what particular incident, improper foundation.
>
> THE COURT: Well, maybe we'll find out after she asks a few more questions.
>
> [Ventimiglia]: A Due to the conditions, the traffic being very light, three vehicles undivided, I would say that it would not be dangerous to travel ten miles an hour over the speed limit.
>
> [Prosecutor]: Q What about 20?
>
> [Ventimiglia]: A I'd say, yeah.
>
> [Defense Counsel]: Same objection, your Honor, same objection. Series of -- continuing running objection, your Honor.
>
> THE COURT: Objection's overruled.

[Prosecutor]: Q What about 20?

[Ventimiglia]: A Yes, it would be dangerous, yeah.

[Prosecutor]: Q So, anything above 20 you would say is being dangerous?

[Ventimiglia]: A I would say that eight-ten miles under certain conditions could be dangerous, yeah. I'm not saying that ten miles and [sic] hour could not be dangerous, it would just depend, but I'd say under the conditions that were happening, ten miles an hour would not be dangerous.

[Prosecutor]: Q I just mean in general circumstances if somebody going over 20 miles an hour, would you consider that most likely dangerous?

[Defense Counsel]: I'm going to object. Vague, open-ended, ambiguous, we don't know the circumstances, and that's why I have a continuing objection. I mean, that's just a real general ---

THE COURT: The Court will sustain this objection.

[Prosecutor]: Q Would you consider going 89 in a 55 dangerous?

[Defense Counsel] Same objection, your Honor. We have to ---

[Prosecutor]: This is to the exact circumstances.

THE COURT: As a general rule or what -- the Court is gonna take a brief recess.

. . . .

THE COURT: Okay, we're back on the record. Sir, you're still under oath and the prosecutor is gonna continue asking you questions.

. . . .

[Prosecutor]: Q The last question I asked you is would you feel going 89 in a 55 could be dangerous?

[Ventimiglia]: A It could be.

[Prosecutor]: Q And is it also true that you were actually ---

THE COURT: What was the speed again you said?

[Prosecutor]: 89 in a 55.

THE COURT: 89 in a 55.

[Prosecutor]: Q And it's also true that you actually got that exact speeding ticket September 27th, 1999?

[Ventimiglia]: A I believe that the conditions, it was a downhill run, and also done by laser gun, so I accepted it. I find it hard to believe that my old (indiscernible) pickup could travel that quickly. The situation called for immediate overtake of a army personnel transport.

[Prosecutor]: Just stop, but at that point ---

[Defense Counsel]: I'm gonna object, your Honor, he was trying to finish.

THE COURT: Please let him finish his response.

[Prosecutor]: Q Okay. Go ahead and finish your ---

[Ventimiglia]: A So, in that situation, because there was, it was completely unobstructed, and in order to safely get around this vehicle, I accelerated quickly around in a short period and apparently by the reading of the laser it was 89, but the condition was not a dangerous one, no.

[Prosecutor]: Q Now, you also have gotten a ticket for going 82 in a 55 on May 19th, 1999, and you've also gotten a speeding ticket December 16th, 1999, for going 41 in a 25?

[Ventimiglia]: A I don't believe I (indiscernible) of 82 in a 55.

[Prosecutor]: Q That's correct, I apologize.

[Defense Counsel]: Your Honor, I move to strike, your Honor.

THE COURT: Well, okay, you mentioned two there, May, '99 and December '99. Which one is stricken, which one are you referring to that was not a conviction?

[Defense Counsel]: The May one I believe.

[Prosecutor]: The May, '99.

THE COURT: Okay, that is stricken from the record.

[Defense Counsel]: And I don't know about the third one that was mentioned. I don't think that was ever clarified.

THE COURT: There was a third one the prosecutor mentioned, December, '99, 41 in a 25.

[Ventimiglia]: 41 in 25, that was Palisades, yes, that one, yes. That also was a very steep downhill which is difficult not to travel over the speed limit. There was no vehicles on the road, but yes, I did travel 41 in a 25.

[Prosecutor]: Q So, just within a half a year before this incident happened, you actually had been ticketed twice for speeding, that would be a correct statement?

[Ventimiglia]: A Once in December and once ---

[Prosecutor] Q In August?

[Ventimiglia]: A Yes.

THE COURT: August?

[Prosecutor]: I'm sorry, he was fined in September. The ticket was actually issued August 17th, 1999.

The district court made the following specific findings:

THE COURT: Defendant will have to stand. The Court's ready to rule. [Defense counsel] has done an excellent job for his client, but at the same time, the Court is going to find the defendant guilty beyond a reasonable doubt.

The reason is this: the Court believes that the defendant did, in fact, merge, got involved in this group of cars and decided that, I don't know if he knew that there were that many cars racing, eight, approximately eight, but he decided that the Acura was going at a high rate of speed and he decided to race with the Acura. I don't know who edged who on first, if it was the Acura that edged on the defendant or the defendant edged on the driver of the Acura, I believe his name was Graham.

In any event, subsequent to that, they came upon Kawika Keala's car, and this witness has, there's no reason for Mr. Keala to lie, or, excuse me, not to lie, but I -- well, there's no reason for him to not tell the truth, and the Court believes his testimony. That's something that's gonna stick out in an individual's mind.

If you see a group of cars coming up behind you, mostly likely you're going to remember the vehicle that almost struck your car by, according to the witness, Mr. Keala, of two to four inches. It may not have been two to four inches, it may have been 12 inches. Still, Mr. Keala indicated that he was traveling at about 65 miles per hour and the vehicles just swept by him. That would indicate to me that they were probably going, if he's going 65 miles per hour and other vehicles are gonna go by him like he's not moving, or hardly moving, then those vehicles must be going at a tremendous speed, and that constitutes reckless driving, the speed as well as almost hitting the vehicle, Kawika Keala, by according to him two to four inches. The Court will now entertain sentencing.

## II. STANDARDS OF REVIEW

### A. Prosecutorial Misconduct

> Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction. Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.

State v. Rogan, 91 Hawai‘i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks and citations omitted) (quoting State v. Sawyer, 88 Hawai‘i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawai‘i 148, 158, 871 P.2d 782, 792 (1994). "In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

### B. Admissibility of Evidence

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of

> evidence that require a "judgment call" on the part of the trial court.

Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993). "Under the right/wrong standard, [the appellate court] examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Timoteo, 87 Hawai'i 108, 113, 952 P.2d 865, 870 (1997) (internal quotation marks omitted; brackets added).

**C. Effective Assistance of Counsel**

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and brackets omitted).

> [T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.
>
> [State v. Ritchie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998)] (quoting State v. Silva, 75 Haw. 419, [440], 864 P.2d 583, 593 (1993)). Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of actual prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai‘i 20, 27, 979 P.2d 1046, 1053 (1999) (ellipsis in original, internal quotation marks omitted) (quoting State v. Fukusaku, 85 Hawai‘i 462, 480, 946 P.2d 32, 50 (1997)).

"In reviewing a claim of ineffective assistance of counsel, the standard for determining adequacy of representation is whether the assistance provided, viewed as a whole, is within the range of competence demanded of attorneys in a criminal case." State v. Hirano, 8 Haw. App. 330, 338, 802 P.2d 482, 486 (1990).

**D. Plain Error**

The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai‘i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks omitted).

## III. DISCUSSION

### A. Evidence of Prior Speeding Tickets Does Not Constitute Prosecutorial Misconduct or Plain Error.

Ventimiglia contends the State's introduction of evidence of prior instances of speeding tickets constituted prosecutorial misconduct and created plain error that denied him his right to a fair trial. Ventimiglia contends that the

introduction of evidence of past speeding tickets was precluded under Hawai‘i Rules of Evidence Rule 404 and that their admission constituted plain error.

Hawai‘i Rules of Evidence (HRE) Rule 404(a)(3) provides that HRE Rule 404 does not bar evidence of the character of a witness as provided in HRE Rule 608, which states:

> **Rule 608 Evidence of character and conduct of witness.** (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
>
> (1) The evidence may refer only to character for truthfulness or untruthfulness, and
>
> (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' [sic] credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' [sic] conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' [sic] privilege against self-incrimination when examined with respect to matters which relate only to credibility.

When asked during direct examination about Keala's testimony that Ventimiglia traveled in a "pack of cars racing" and that Ventimiglia came within two to four inches of Keala's vehicle, Ventimiglia testified that "[Keala's] highly mistaken, and I would never do anything that dangerous." Under cross-

examination, the State questioned Ventimiglia regarding specific instances of speeding. The instances of prior speeding tickets were relevant to a determination of Ventimiglia's credibility and revealed his lack of truthfulness regarding operation of his vehicle in a reckless manner; the instances were therefore admissible pursuant to HRE Rule 608. We conclude that no prosecutorial misconduct occurred in questioning Ventimiglia about prior speeding tickets and the district court did not plainly err in determining that instances of prior speeding were admissible to assist the court in determining the credibility of Ventimiglia's testimony.

### B. Ventimiglia Was Not Denied the Right to Effective Assistance of Counsel.

Ventimiglia contends that he was denied the right to effective assistance of counsel in violation of article I, section 14 of the Hawai‘i Constitution and the sixth amendment of the United States Constitution. Ventimiglia complains that defense counsel "failed to object to the introduction of highly prejudicial and otherwise inadmissible prior bad acts (speeding tickets)" and, during closing arguments, misstated the evidence.

Ventimiglia contends that his counsel's failure to object to the prior speeding tickets evidence was a specific error that amounted to ineffective assistance of counsel. As previously discussed, the cross-examination of Ventimiglia regarding whether he testified truthfully that he "would never do

anything that dangerous" was proper under HRE Rule 608. Therefore, defense counsel's failure to properly object to the speeding ticket evidence did not result in "substantial impairment of a potentially meritorious defense." Barnett, 91 Hawai‘i at 27, 979 P.2d at 1053.

Ventimiglia contends that his counsel's misstatement during closing arguments constituted ineffective assistance.

Ventimiglia points to defense counsel's statement during closing argument:

> You know, I think we concede that there was speeding. I think my client was speeding, although there is no direct testimony as to how fast my client might have been going. I think the closest thing that we can gather would be 90 miles per hour as testified to by the lay witness.

Speeding alone is not an element of reckless driving of a vehicle under HRS § 291-2.[2] Territory v. McGregor, 22 Haw. 786, 793 (1915) (stating that speed alone does not determine whether a vehicle is being driven heedlessly or not). There is substantial evidence in the record that Ventimiglia traveled on the Moanalua Freeway at a high rate of speed, came within inches of Keala's vehicle before passing him, and drove in a manner that resulted in his flipping his vehicle on its roof. Ventimiglia

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[2]To be convicted under § 291-2, one must operate a vehicle "recklessly." HRS § 702-206(3)(a) (1993) defines recklessly as follows:

> **§702-206 Definitions of states of mind.**
> . . . .
> (3) "Recklessly."
> (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

himself admitted at trial that he drove in excess of the posted speed limit. Therefore, defense counsel's attempt to reconcile Keala's credible testimony with Ventimiglia's admission at trial by conceding that Ventimiglia traveled at a high rate of speed did not amount to a "substantial impairment of a potentially meritorious defense." Barnett, 91 Hawai‘i at 27, 979 P.2d at 1053.

## IV. CONCLUSION

Accordingly, the October 3, 2000, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai‘i, March 28, 2002.

On the briefs:
Jack Schweigert
for defendant-appellant.

Chief Judge

Alexa D.M. Fujise,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge