NO. 27986

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
JASON MCELROY, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-0585)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Jason McElroy (McElroy) appeals from the Judgment of Conviction and Sentence entered on May 17, 2006 by the Circuit Court of the First Circuit (circuit court).[1/] A jury found McElroy guilty of one count of Negligent Homicide in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-702.5 (1993). On appeal, McElroy advances the following points of error:

(1) The circuit court "reversibly erred in permitting Officer Oshiro's improper opinion, be it characterized as either 'expert' or 'lay' opinion testimony," and Officer Oshiro's testimony violated Hawaii Rules of Evidence (HRE) Rules 401, 402, 403, 701, 702, and 802.

(2) The circuit court "erred in failing to strike Dr. Goodhue's testimony after it became apparent that Dr. Goodhue failed to include essential information in forming his expert opinion," and, by failing to consider the reports of Officers Ochoco and Martinez, Dr. Goodhue's opinion was rendered unreliable and irrelevant pursuant to HRE Rules 702 and 703.

(3) "Even assuming arguendo that the [circuit] court did not err in permitting Dr. Goodhue's opinion, the [circuit]

1/ The Honorable Michael D. Wilson presided.

court nonetheless erred in failing to adequately instruct the jury as to how to treat Dr. Goodhue's opinion given the fact that it was based on an incomplete examination of the evidence.

(4) The circuit court "erred in allowing Dr. Goodhue to testify that he concluded 'beyond all reasonable doubt' that [McElroy] drove the vehicle. McElroy states that "Dr. Goodhue's legal conclusion was improper because it strayed beyond the confines of HRE 702 and was of no assistance to the trier of fact but 'merely [told] the jury what result to reach.'"

(5) The circuit court "erred in denying [McElroy] his constitutional right to self-representation." McElroy contends that after he expressed a desire to make his own closing argument, the circuit court "never engaged [him] in a colloquy to determine whether he waived his constitutional right to self-representation."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve McElroy's points of error as follows:

(1) Officer Oshiro's testimony was admissible pursuant to HRE Rule 702, which provides:

> **Rule 702 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

As to an expert's qualifications, the Hawai'i Supreme Court has stated:

> It is not necessary that the expert witness have the highest possible qualifications to testify about a particular matter, but the expert witness must have such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would

> probably aid the trier of fact in arriving at the truth. Once the basic requisite qualifications are established, the extent of an expert's knowledge of the subject matter goes to the weight rather than the admissibility of the testimony.

State v. Fukagawa, 100 Hawai'i 498, 504, 60 P.3d 899, 905 (2002) (ellipses omitted) (quoting State v. Toyomura, 80 Hawai'i 8, 26 n.19, 904 P.2d 893, 911 n.19 (1995)).

Officer Oshiro testified as to his 22 years of experience as a police officer and his specialized training, both in the classroom and on the job, as a traffic investigator. He had attended classes on collisions involving pedestrians and motor vehicles and received training in analyzing the forensic evidence available from evidence (such as shoes). Officer Oshiro testified that he had first-hand knowledge of the investigation and the evidence in question. He participated in the investigation and photographed McElroy and McElroy's shoes, as well as the interior of the vehicle and its foot pedals. He also qualified his statements, indicating that he could not state conclusively how the scuff mark got onto McElroy's shoe or what the condition of the car was prior to the collision. The State laid a sufficient foundation for Officer Oshiro's testimony. Having done so, McElroy's objection to Officer Oshiro's testimony goes to the weight rather than the admissibility of the testimony. Fukagawa, 100 Hawai'i at 504, 60 P.3d at 905.

Officer Oshiro's testimony violates no hearsay rule. Officer Oshiro was not, as McElroy contends, simply reciting the conclusions of his trainers; rather, Officer Oshiro described his training, and the State explained clearly that the purpose of that explanation was to lay a foundation for later testimony as to why Officer Oshiro took pictures of McElroy's shoes.

(2) The circuit court did not err by failing to strike Dr. Goodhue's testimony on the grounds that Dr. Goodhue failed to consider several police reports in reaching his opinion. Expert

testimony must be both relevant and reliable. State v. Fukusaku, 85 Hawai'i 462, 473, 946 P.2d 32, 43 (1997). Dr. Goodhue's failure to consider certain police reports does not rise to the level of rendering his conclusions unreliable. Although Dr. Goodhue may not have considered the subsidiary police reports made by Officers Ochoco and Martinez, he did consider Officer Brown's report, which included a summary of the subsidiary reports, as well as various other materials assembled during the course of the police investigation. McElroy offers no suggestion of how Dr. Goodhue's testimony would have been different had he considered the two reports in question instead of Officer Brown's summary report. While it is true that expert testimony must rest upon a "sound factual foundation" and a "reliable system of analysis," State v. Pauline, 100 Hawai'i 356, 370, 60 P.3d 306, 320 (2002), the decision to consult one report instead of another, without any showing of how the reports differed or would have affected the expert's testimony, cannot sustain a challenge to the expert testimony's foundational reliability. This line of reasoning would have been better explored at trial via cross-examination, as it speaks to the weight of the evidence and not its admissibility.

(3) The circuit court did not err by failing to instruct the jurors that "they could completely disregard the opinion based on [Dr. Goodhue's] defective analysis." Having concluded that the circuit court committed no error in failing to reject Dr. Goodhue's testimony as incomplete, it follows that the circuit court likewise did not plainly err in failing to give a compatible jury instruction. McElroy cites a Washington case, Jarstad v. Tacoma Outdoor Recreation, Inc., 10 Wash. App. 551, 519 P.2d 278 (1974), in support of his argument. Jarstad is wholly distinguishable; it is a civil case concerning a breach of contract action. 10 Wash. App. at 552-53, 519 P.2d at 279-80.

Jarstad was tried to the bench without a jury, and therefore no jury instructions were given. Id. at 553, 519 P.2d at 280. The trial court in Jarstad determined that the information supplied to the testifying expert was not credible. Id. at 556, 519 P.2d at 282. No such finding was made by the circuit court in this case, and McElroy does not argue that the information supplied to Dr. Goodhue was not credible.

(4) The circuit court did not reversibly err in allowing Dr. Goodhue to testify that McElroy was the driver of the car "beyond all reasonable doubt." McElroy's counsel repeatedly asked Dr. Goodhue for the "legal conclusion" testimony, in which he now urges us to find plain error. McElroy cannot therefore contend, as he does, that any error was not invited. In fact, the State objected to McElroy's question for the very reason that it sought a legal conclusion. Furthermore, the circuit court actually did instruct the jury to disregard Dr. Goodhue's testimony that Kaeha was the driver "beyond all reasonable doubt":

> [THE COURT:] At this time, I'm going to give you an instruction.
>
> The testimony of a previous witness that he concluded beyond a reasonable doubt that the identity of the driver of the vehicle should be disregarded by you. As the judges of the facts, it is solely for you to determine whether the identity of the driver has been proven beyond a reasonable doubt.

Juries are presumed to follow the circuit court's instructions. State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996). Based on the curative instruction given, McElroy's purposeful eliciting of the conclusion testimony, and Dr. Goodhue's repeated clarification that his testimony was to a reasonable medical certainty, we see no plain error.

(5) The circuit court did not err by denying McElroy "his constitutional right to self-representation." On the last

day of trial, in response to the circuit court's question as to whether anything else needed to be addressed before instructing the jury, defense counsel stated:

> [Defense Counsel]: One final matter, Your Honor.
>
> In all candor, Mr. McElroy, in speaking to him this morning, expressed a desire to give his own closing argument. But we've talked about it, and I told him that, you know, I believed it would be one of his rights if he wanted to give a closing argument here rather than have me give the closing argument, but I think at his point, then, Mr. McElroy is going to let me present the closing argument. I'm not sure, Your Honor.

McElroy never unequivocally asked to represent himself and waive his right to counsel. McElroy cites State v. Dickson, 4 Haw. App. 614, 619, 673 P.2d 1036, 1041 (1983), in support of his argument that the circuit court was required to engage him in a colloquy, based on the equivocal and half-hearted assertion made by his defense counsel. Dickson mandates no such colloquy; rather, it establishes a set of guidelines to be used by a trial court in determining whether a defendant's waiver of his right to counsel was voluntary, knowing, and intelligent. 4 Haw. App. at 619-20, 673 P.2d at 1041-42.

Therefore,

The Judgment of Conviction and Sentence entered on May 17, 2006 by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 9, 2007.

On the briefs:

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Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura
Associate Judge