

NO. 26746

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee-Respondent,

vs.

LOUIS DALE CAMBRA, Defendant-Appellant-Petitioner.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 02-1-0623)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant-Petitioner, Louis Dale Cambra ("Cambra"), petitioned this court to review the Intermediate Court of Appeals' ("ICA's") October 25, 2006 memorandum opinion affirming the second circuit court's¹ July 9, 2004 judgment convicting him of committing the offenses of (1) Attempted Promoting a Dangerous Drug in the First Degree, in violation of Hawai'i Revised Statutes ("HRS") §§ 712-1241(1)(b)²

¹ The Honorable Joel E. August presided.

² HRS § 712-1241(1)(b) (Supp. 2002) provides as follows:

§712-1241 Promoting a dangerous drug in the first degree.

(1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

. . . .

(b) Distributes:

- (i) Twenty-five or more capsules, tablets, ampules, dosage units, or syrettes containing one or more dangerous drugs; or
- (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
 - (A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
 - (B) Three-eighths ounce or more, containing any other dangerous drug[.]

and 705-500,³ and (2) Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5(a).⁴

In his application for writ of certiorari, Cambra raises multiple points of error challenging the circuit court's admission of the testimony of Criminologist Julie Wood ("Wood"). It is difficult to parse his precise legal arguments, but, having carefully reviewed his pro se application, we believe them to be as follows: (1) the ICA gravely erred by affirming his conviction insofar as the prosecution failed to prove the precise amount of pure methamphetamine in the substance recovered from

³ HRS § 705-500 (1993) provides the following:

§705-500 Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:

- (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
- (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of a crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

⁴ HRS § 329-43.5(a) (1993) provides as follows:

[\$329-43.5] Prohibited acts related to drug paraphernalia.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

his fanny pack; (2) the ICA gravely erred by failing to recognize that the foundation for Wood's testimony was inadequate inasmuch as it was improperly based upon inadmissible hearsay; (3) the use of inadmissible evidence to obtain a conviction violated his rights under the Hawai'i and United States constitutions;⁵ and (4) the record lacks substantial admissible evidence to support his conviction.

For the following reasons, we concluded that Cambra's challenge to the foundation laid for Wood's testimony as to the weight of the substance recovered from his possession had merit, and, therefore, accepted his application for writ of certiorari. We now (1) vacate the ICA's November 21, 2006 judgment on appeal to the extent that it is inconsistent with this opinion, (2) vacate Cambra's conviction of the offense of Attempted Promoting a Dangerous Drug in the First Degree, and (3) remand the matter for entry of judgment of conviction on the lesser included offense of Attempted Promoting a Dangerous Drug in the Second Degree and for resentencing in accordance therewith.

I. BACKGROUND

A. Factual Background

On October 1, 2002, Cambra was served with two search warrants. During a search of Cambra's person, Officer Randy Esperanza ("Officer Esperanza") discovered a container with what appeared to be eight Ziplock bags of crystal methamphetamine. Officer Esperanza also observed a glass pipe, used to smoke

⁵ Cambra's constitutional argument, to the extent discernible, is predicated solely upon the error asserted by his other non-constitutional arguments. Accordingly, this court need not commence a separate constitutional inquiry insofar as the following resolution of Cambra's non-constitutional arguments simultaneously addresses Cambra's constitutional concerns.

crystal methamphetamine, encased in a blue handkerchief. Based upon his observations, he recovered the fanny pack and placed Cambra under arrest "for narcotics."

B. Procedural Background

On November 18, 2002, the prosecution filed an indictment alleging as follows:

COUNT ONE: 99-69887

That on or about the 28th day of September, 1999, in the County of Maui, State of Hawaii, LOUIS DALE CAMBRA did intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Promoting a Dangerous Drug in the First Degree, by knowingly attempting to distribute one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing methamphetamine or any of its salts, isomers, and salts of isomers, thereby committing the offense of Attempted Promoting a Dangerous Drug in the First Degree in violation of Sections 705-500 and 712(1)(b)(ii)(A) of the Hawaii Revised Statutes.

COUNT TWO: 02-80845

That on or about the 1st day of October, 2002, in the County of Maui, State of Hawaii, LOUIS DALE CAMBRA did intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Promoting a Dangerous Drug in the First Degree, by knowingly attempting to distribute one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing methamphetamine or any of its salts, isomers, and salts of isomers, thereby committing the offense of Attempted Promoting a Dangerous Drug in the First Degree in violation of Sections 705-500 and 712-1241(1)(b)(ii)(A) of the Hawaii Revised Statutes.

COUNT THREE: 02-80846

That on or about the 1st day of October, 2002, in the County of Maui, State of Hawaii, LOUIS DALE CAMBRA did intentionally use, or possess with intent to use, drug paraphernalia, to wit, plastic packets, a cut straw, and/or a glass pipe, to prepare, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled substance, to wit, methamphetamine, thereby committing the offense of Prohibited Acts Related to Drug Paraphernalia in violation of Section 329-43.5(a) of the Hawaii Revised Statutes.

Count I was severed from Counts II and III, and trial commenced as to Counts II and III on April 5, 2004.

At trial, the prosecution presented, inter alia, the

testimony of Criminologist Julie Wood, who was qualified as an expert in the field of drug identification.⁶ Insofar as Wood's testimony is the focal point of Cambra's appeal, it has been laid out, at length, as follows.

1. The Fourier Transform Infrared Spectrometer Test

Wood testified that a Fourier Transform Infrared Spectrometer ("FTIRS") instrument identifies substances by projecting an infrared beam of light onto an unknown substance. The infrared light that passes through the substance hits a detector, which then produces a graph. The graphical signature of the unknown substance is then compared to the graphical signature of known substances.

In order to ensure that the FTIRS instrument is working properly, Wood first conducts a background check by comparing the air in the laboratory to a blank sample, which shouldn't produce any "strange aberrations" insofar as the FTIRS instrument is essentially "comparing the air in the lab to the air in the lab[.]" Wood subsequently tests a known polystyrene standard sample⁷ and compares the graph produced by the FTIRS instrument to a graph produced by an earlier test of the same known standard. Wood noted that "if those two graphs match, then the instrument is working correctly."

Wood thereafter testified that she followed the

⁶ Cambra expressly conceded Wood's expertise.

⁷These known standards are provided by an independent chemical company. Each known standard delivered comes with a "certificate of analysis" to ensure that the known standard is what it purports to be. Wood does not, however, rely solely on the certificate of analysis. For example, she testified that she personally tests every methamphetamine polystyrene standard received by conducting her own FTIRS test on the sample and comparing its graphical signature to a graphical signature in published reference materials generally accepted by the scientific community to represent methamphetamine.

foregoing quality assurance procedures when testing the residue extracted from the glass pipe that was recovered from Cambra's possession and that the FTIRS instrument appeared to be working properly at that time:

A. Yes. I did do a quality assurance check. And what I did was I ran a background spectrum, which basically shows a graph of what the air in the lab looks like.

And then I ran a blank spectrum, which compares the background air to the air that's still there, so that comes out basically as a flat line.

Then I ran a polystyrene standard, which is the standard provided by the manufacturer of the instrument. I compared the graph that I got from the standard that I ran that day to the standard that was run originally when the instrument was last serviced, and those graphs matched.

And then at the end of the day I also ran --

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A. And then at the end of the day I ran a standard blank, which is for the potassium bromide, which is what I use as a carrier to hold the sample in place to make sure that there was no contamination of that substance.

Q. And did your instrument appear to be in good working order and provide the results -- test results that you expected in the testing to see if it was working properly?

A. It passed all the quality assurance tests, yes.

Wood opined that the FTIRS test indicated that the residue contained methamphetamine.

Finally, Wood described the specific procedure that she followed when using the FTIRS instrument to identify the substance stored in the eight Ziplock bags as containing methamphetamine. Wood stated that she tested each of the eight packets individually, and thus produced eight separate graphs. She compared each of the eight graphs to a graph of the polystyrene sample known to be methamphetamine. Wood testified that each of the eight packets tested positive for the presence of methamphetamine.

2. The Microcrystalline Test

The microcrystalline test is a preliminary

identification procedure whereby gold chloride is combined with phosphoric acid to create a reagent solution. A drop of the reagent solution is applied to a sample of the unknown substance, and the type of chemical reaction indicates the identity of the unknown substance.

Wood initially described the general quality assurance procedures with respect to the microcrystalline test as follows. Wood testified that she tests the quality of the reagent solution by applying a drop to a sample from a polystyrene standard known to be methamphetamine. She testified that, if clothes-pin-shaped crystals form, she knows that the reagent solution is working. Wood further testified that if the reagent solution was contaminated with methamphetamine, it would turn cloudy in the bottle.

Wood subsequently testified that the microcrystalline tests conducted on the residue extracted from the glass pipe and the substances contained in the eight Ziplock bags tested positive for methamphetamine.

3. The Certified Analytical Balance

The record indicates that there was some initial dispute as to the term "certified analytical balance":

Q. And do you also weigh the evidence?

A. Yes, I do.

Q. And what kind of instrument do you use for that?

A. The weight is taken using a certified analytical balance.

Q. And the system -- the methods you use, are they generally recognized in the relevant scientific community?

A. Yes, they are.

[DEFENSE COUNSEL]: Your Honor, I am going to object to the terminology certified, certified balance, at this point in time, unless the court will qualify it as to lack of foundation on the actual balance at this point.

THE COURT: Well, you can ask her what she means by that term, Counsel. She used the term certified analytical balance. You can ask her what she means by that term.

BY [THE PROSECUTION]:

Q. Miss Wood, what do you mean by that term?

A. Well, when I say certified analytical balance, I mean that it's tested by an independent testing laboratory or service technician annually. And I receive a certificate for that service, and that the balance is operating correctly.

[DEFENSE COUNSEL]: So at this point in time I would object. That's hearsay, and there has to be a foundation laid for that.

THE COURT: I will overrule the objection.

Wood thereafter testified as to the general procedure followed when operating the certified analytical balance:

Q. For the certified analytical balance, how does it operate? How do you operate that?

A. Okay. Basically when I'm going to weigh a substance, I take -- well, let me start at the beginning on how I know that it's working right in the first place. Okay?

Every year we do -- we have an independent person come in and test the balance for its accuracy. They clean it and service it and recalibrate it if it needs recalibrating.

And then each month, at the beginning of the month, or before I start weighing any items for that month, I'll do my own performance check to make sure that the balance is still reading accurately. And how I do that is I have a box of weights that I keep in the laboratory, and -- for example, one of the weights I use is a weight that has a mass of 50 grams.

So I'll put that weight on the balance, and it's a digital balance. If it reads 50 grams plus or minus .0005 grams, then the balance is working correctly or accurately. I will do that for a series of weights, and I do that each month.

Now, that weight set, it needs to be certified for accuracy every year too. So I also send that weight set to an independent laboratory on the mainland, and they check that weight set for accuracy so I know that those weights indeed weigh what they are purport [sic] to weigh. So when I use those to check my balance, if the numbers are accurate, then we know the balance is working correctly. Okay? So that's how I do the check each month.

Then when I go to weigh a substance, I take a piece of weighing paper so as not to contaminate the pan of the balance. I put that on the balance. It's going to weigh something, but I subtract that weight out.

So now you have a balance, the paper is sitting on top, the weight is zero.

THE COURT: Excuse me. Typically what would the paper weigh?

THE WITNESS: The weighing paper that I use weighs a little less than half a gram, about .435 grams or something like that. Each paper weighs a little bit different.

THE COURT: So you first weigh the paper?

THE WITNESS: Yes. I take -- I put the paper on the balance. There is a weight that shows on the balance, and then I -- it's called taring the balance.

I basically hit the subtract button to subtract that weight out. So now you have the paper on the balance, but it weighs nothing at this point. Then I'm going to put the substance on top of the paper and read that weight, and that's going to be

the weight of the substance, not counting the paper or anything else. Okay?

Then I remove that and go on to the next sample.

Q. Before -- for your monthly checks, and referring to your weights that you use -- so in order to make sure your scale - your balance is accurate, you have to know what those -- make sure those weights are accurate; is that correct?

A. That's right.

The prosecution submitted the original inspection certificates of the certified analytical balance into evidence, which were received by the court as State's Exhibits S-14a and S-14b. The prosecution also offered two documents demonstrating that the test weights utilized by Wood were accurate, which the court admitted as State's Exhibits S-14e and S-14f, over Cambra's objection.

Despite having admitted State's Exhibits S-14a, S-14b, S-14e, and S-14f, the court changed its mind and struck them at a later point in the proceedings based on its reading of Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 944 P.2d 1279 (1997). The court concluded that the foregoing exhibits did not qualify under the business records exception to the exclusionary hearsay rule, but that admission of the exhibits themselves were not necessary to establish an adequate foundation for Wood's testimony under Hawai'i Rules of Evidence ("HRE") Rule 703.

The prosecution subsequently attempted to introduce documents demonstrating that an independent company, Quality Control Services, checked the certified analytical balance annually using its own independent weight set. The court refused to admit the documents, but permitted Wood to refer to them as a foundational basis for her testimony.

Subsequently, Wood testified that she followed "general standard operating procedure for quality assurance in a

laboratory" and that, in her opinion, the certified analytical balance was operating correctly on the day she weighed the substances recovered from Cambra's possession.

Finally, Wood testified that she used the certified analytical balance to determine that (1) residue obtained from the glass pipe recovered from Cambra weighed 0.116 grams, and (2) the aggregate weight of the substances contained in the eight Ziplock bags was 11.326 grams.

4. Verdict

Following the close of the evidentiary portion of trial, the jury returned a verdict finding Cambra guilty of the offenses of Attempted Promoting a Dangerous Drug in the First Degree and Prohibited Acts Related to Drug Paraphernalia, as charged in Counts II and III respectively.

On July 9, 2004, the circuit court filed a judgment of conviction sentencing Cambra to serve (1) twenty years of incarceration in connection with Count II, with a mandatory minimum term of six years and eight months, and (2) five years of incarceration in connection with Count III, with a mandatory minimum term of six years and eight months, both sentences to be served concurrently.⁸

5. Appeal Before the ICA

Cambra filed a timely notice of appeal on August 11, 2004.

The appeal was assigned to the ICA on July 21, 2005. In his amended opening brief, Cambra argued, in pertinent part,

⁸ Cambra subsequently entered a no contest plea to two other drug offenses -- Promoting a Detrimental Drug in the Third Degree and Prohibited Acts Related to Drug Paraphernalia -- for which judgment was entered on November 17, 2004.

that: (1) the circuit court erred by allowing Wood to testify as to the net weight of the substances recovered from Cambra, insofar as the foundation laid failed to establish that the analytical balance was in proper working order at the time of the procedure, thus violating the principles established in State v. Wallace, 80 Hawai'i 382, 407, 910 P.2d 695, 720 (1996); (2) the circuit court erred by allowing Wood to testify as to the FTIRS test results insofar as there was no documentation in the record verifying the accuracy and/or proper calibration of the FTIRS instrument; and (3) the circuit court erred by allowing Wood to testify as to the results of the microcrystalline test, insofar as there was no documentation in the record verifying that the chemicals used to make the reagent solution was genuine. The prosecution, on the other hand, asserted that a proper foundation was laid for Wood's expert testimony as to the weight and identification of the substances in question.⁹

On October 25, 2006, the ICA filed a memorandum opinion rejecting Cambra's arguments and affirming the circuit court's judgment of conviction. A judgment on appeal was filed on November 21, 2006.

On February 5, Cambra filed a timely application for writ of certiorari.

II. STANDARDS OF REVIEW

A. Certiorari

Our review of a decision of the ICA is governed by HRS § 602-59 (Supp. 2006), which provides as follows:

§602-59 Review of decision of the intermediate appellate court, certiorari. (a) After issuance of the intermediate

⁹ Cambra filed a reply brief on July 7, 2005.

appellate court's judgment or dismissal order, a party may seek review of the intermediate appellate court's decision and judgment or dismissal order only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court.

(b) The application for writ of certiorari shall tersely state its grounds, which shall include:

- (1) Grave errors of law or of fact; or
- (2) Obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of those errors or inconsistencies dictating the need for further appeal.

(c) An application for writ of certiorari may be filed with the supreme court no later than ninety days after the filing of the judgment or dismissal order of the intermediate appellate court. Opposition to an application for writ of certiorari may be filed no later than fifteen days after the application is filed. The supreme court shall determine to accept the application within thirty days after an objection is or could have been filed. The failure of the supreme court to accept within thirty days shall constitute a rejection of the application.

(d) Upon the acceptance of the application, the clerk shall forward the complete file of the case to the supreme court. Supplemental briefs shall be accepted from the parties only upon the request of the supreme court.

B. The Admissibility of Expert Testimony

It is well settled that this court reviews a trial court's decision to admit expert testimony for an abuse of discretion. See State v. Samonte, 83 Hawai'i 507, 532, 928 P.2d 1, 26 (1996) ("Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion.") (Citing State v. Maelega, 80 Hawai'i 172, 180, 907 P.2d 758, 766 (1995) (quoting State v. Montalbo, 73 Hawai'i 130, 140-41, 828 P.2d 1274, 1281 (1992)).).

III. DISCUSSION

As previously mentioned, it is difficult to ascertain the precise legal arguments presented by Cambra in his application for writ of certiorari. However, we believe that the following discussion adequately addresses the discernible points

raised.

A. HRS § 712-1241(1)(b)(ii)(A)

Cambra first appears to contend that there was no testimony as to the exact composition of the substance in question, and the failure to establish the precise amount of pure methamphetamine is fatal to the prosecution's case:

The crux of Petitioner's issues deal with the court's failure to recognize that the allegations in the indictment were in fact allowed to be (at least in part) proven by more allegations; as no proper factual foundation was laid by the State concerning the actual ingredients, weight, percentage of actual illegal substance vs. non-illegal substances found in the seized substance from Petitioner. The State charged Petitioner with a Class A Felony because of the amount, weight and quality of an illegal and controlled substance, and paraphernalia appertaining to the same that it claimed he possessed at the time of his arrest. However, at trial (through direct testimony in the State's Case-in-Chief), the ONLY evidence presented was that the 11.326 grams were "of a substance containing (emphasis added), methamphetamine," quality and assurance of it's potency and weight of the actual illegal substance cs any other legal substances were never presented nor testified to. The ultimate fact that Crimilist Woods AT NO TIME testifies that the substance actually possessed or WAS IN FACT methamphetamine, BUT RATHER MERELY CONTAINED, OR SHOWED POSITIVE FOR THE PRESENCE OF the same is an issue that this court must address and recognize as a fact leading to the reversal of this conviction for the reasons already noted. Because of Wood's testimony and the lack of foundation thereof, one can conclude that the "unknown substance" seized from Petitioner contained other ingredients also - yet these were never identified, nor their percentages testified to (nor the percentage of illegal substance either), as one would reasonably expect in order to sustain such a serious (Class A) felony conviction leading to twenty (20) years in prison. By extention one could further argue that SPAM contains Sodium nitrite, but certiantly NO ONE thinks of SPAM as sodium nitrite. Thus, the percentages were [and remain] an important factor in this case, for this serious charge.

(Exact quote.) First, Cambra did not raise that point at trial or before the ICA, and therefore it may be deemed waived. See Hill v. Inouye, 90 Hawai'i 76, 82, 976 P.2d 390, 396 (1998) ("The general rule provides that '[i]ssues not properly raised on appeal will be deemed to be waived.'" (Brackets in original.) (Citing Pele Def. Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268 (1992), cert. denied, 507 U.S. 918 (1993)).). Second, this

court, in State v. Reed, 77 Hawai'i 72, 881 P.2d 1218 (1994), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000), has already considered and rejected a similar argument:

Reed also argues that his trial counsel's failure to obtain an analysis of the composition of the white powder . . . prevented him from negating the prosecution's evidence that he "knowingly and voluntarily engaged in a Class A drug transaction." Although the exact nature of Reed's argument is unclear, we assume that the premise is that HRS § 712-1241(1)(b)(ii)(A) does not proscribe the knowing distribution of substances containing relatively small concentrations of pure cocaine. That premise is incorrect. . . . The statute plainly does not make commission of the offense contingent on the relative concentration of "pure" cocaine in the "preparations, compounds, mixtures, or substances" distributed. Thus, even assuming as true Reed's unsubstantiated assertion that the white powder contained a proportionately small amount of cocaine, that fact would not have been a meritorious defense to the charge of promoting a dangerous drug in the first degree, in violation of HRS § 712-1241(1)(b)(ii)(A).

Id. at 86, 881 P.2d at 1232. Applying Reed's commentary on HRS § 712-1241(1)(b)(ii)(A) to the facts of the present case, there is no requirement that the prosecution prove the precise percentage or amount of methamphetamine contained within the preparation, compound, mixture, or substance in question. The statute merely requires that the prosecution prove that the aforesaid preparation, compound, mixture, or substance -- containing some unknown amount of methamphetamine -- have "an aggregate weight of . . . [o]ne-eighth ounce or more[.]" HRS § 712-1241(1)(b)(ii)(A) (emphasis added).

B. The FTIRS Test

Cambra also specifically challenges the foundation laid for Wood's expert opinion regarding her use of the FTIRS test to conclude that the substance in question contained methamphetamine.

1. Wood's testimony adequately establishes that the FTIRS instrument was in proper working order at the relevant time.

Cambra first contends that "because the State failed to verify through documentation, or the testimony of a valid technician who actually calibrated, tested or prepared the instruments or chemicals, that [Wood's] testimony of her test results were in and of themselves hearsay." For the following reasons, we disagree.

This court has previously stated that "a proper foundation for the introduction of a scientific test result would necessarily include expert testimony regarding: (1) the qualifications of the expert; (2) whether the expert employed 'valid techniques' to obtain the test result; and (3) whether 'the measuring instrument is in proper working order.'" State v. Long, 98 Hawai'i 348, 355, 48 P.3d 595, 602 (2002) (citing Wallace, 80 Hawai'i at 407, 910 P.2d at 720). Here, Cambra has already conceded that the first two prongs were "satisfactorily established." Thus, the only remaining issue is whether the FTIRS instrument was in proper working order.

In Wallace, this court held that an expert's testimony as to the weight of cocaine lacked sufficient foundation insofar as the expert did not have personal knowledge that the balance had been correctly calibrated:

As the trial court noted, Chinn apparently had personal knowledge that the electronic balance was calibrated annually; his testimony to that effect was therefore admissible. HRS 602 (1993). However, by his own admission, Chinn lacked personal knowledge that the balance had been correctly calibrated and merely assumed that the manufacturer's service representative had done so. The service representative did not testify at trial regarding his calibration of the balance, nor did the prosecution, through a custodian of records, offer any business record of the manufacturer reflecting proper calibration of the balance. . . . There being no reliable evidence showing that the balance was

"in proper working order," . . . the prosecution failed to lay "a sound factual foundation" that the net weight of the cocaine measured by the balance was accurate.

Wallace, 80 Hawai'i at 412, 910 P.2d at 725 (internal citations omitted).

In the present case, however, Wood did not lack personal knowledge that the FTIRS was in proper working order. Wood testified that she personally tested the FTIRS instrument daily by executing the following procedure generally accepted throughout the scientific community. First, Wood conducted a background check, comparing the air in the laboratory to a blank sample. She subsequently compared a graph of a standard polystyrene sample produced that day to a graph of a polystyrene sample produced the day the instrument was last serviced. Insofar as the two samples are known to be the same compound,¹⁰ the two graphs should match.

Wood further testified that she followed the foregoing procedure on January 30, 2003, the day she tested the substances recovered from Cambra's possession and that, in her opinion, the FTIRS was operating correctly:

Q. On January 30th, before -- January 30th, 2003, before you did the drug tests in this criminal number -- I'm sorry -- police report number as well as report number 02-80845, did you assure the accuracy of your equipment? And if you -- of your instrument? And if you did, how did you do that?

A. Yes. I did do a quality assurance check. And what I did was I ran a background spectrum, which basically shows a graph of what the air in the lab looks like.

And then I ran a blank spectrum, which compares the background air to the air that's still there, so that comes out basically as a flat line.

Then I ran a polystyrene standard, which is the

¹⁰ Wood knew that they were the same compound because she personally verified that the polystyrene standard samples received from the manufacturer were, in fact, methamphetamine by comparing their graphical signatures -- produced by FTIRS tests of the standard samples conducted by her -- to a graph located in published reference materials generally accepted by the scientific community as depicting the graphical signature of methamphetamine.

standard provided by the manufacturer of the instrument. I compared the graph that I got from the standard that I ran that day to the standard that was run originally when the instrument was last serviced, and those graphs matched.

And then at the end of the day I also ran --

[DEFENSE COUNSEL]: Objection, your Honor. This calls for hearsay, and --

THE COURT: Counsel, please don't interrupt.

[DEFENSE COUNSEL]: This is a compound answer, and I have separate objections to every portion of this.

THE COURT: Your objection is overruled.

I'm sorry, you may proceed.

A. And then at the end of the day I ran a standard blank, which is for the potassium bromide, which is what I use as a carrier to hold the sample in place to make sure that there was no contamination of that substance.

Q. And did your instrument appear to be in good working order and provide the results -- test results that you expected in the testing to see if it was working properly?

A. It passed all the quality assurance tests, yes.

Her testimony thus adequately establishes that the FTIRS instrument was in proper working order on the day she analyzed the substances recovered from Cambra's possession. Cf. Long, 98 Hawai'i at 355, 48 P.3d at 602 ("[T]here is no evidence that the machine was in proper working order at the time it was used. The prosecution's question on redirect would not elicit necessary foundational evidence fo the working status of the spectrometer at the relevant time of the test, because it was couched in terms of calibration 'from time to time.'") (Emphasis in original.).

Additional documentation was not required insofar as Wood's testimony, based on personal knowledge, sufficiently established that the FTIRS was in proper working order at the time she conducted the relevant tests.

Therefore, Cambra's initial argument is without merit.

2. Cambra waived the argument that Wood's testimony lacked proper foundation because the prosecution failed to establish that Wood tested a sufficient quantity of the substance in question to produce an accurate test result.

Cambra further challenges the foundation laid for Wood's testimony as to the FTIRS test results as follows:

Furthermore, Ms. Woods' testimony that she prepared samples of the unknown substance allegedly seized from Petitioner to run through the FTIRS instrument, further supports our belief that her testimony was without proper foundation as she (or the State) FAILED (emphasis added), to establish that the amount of substance prepared was sufficient to enable the FTIRS instrument to yield a truly accurate reading of the chemical compounds it was testing for. This in fact, is adduced according to Hawaii Case precedent See: (State v Long).^[11] According to our reading of this case, Ms. Wood's testimony is rendered invalid and becomes illegal because the foundational requirements that valid techniques were used (with at least some proof of the same) **were never presented to the jury.** Without this proof, Ms. Woods test results are **unconfirmed and thus unreliable as a substantive fact in a court of law.** See also: State v Wallace.

(Exact quote.)

To the extent that Cambra asserts that Wood's testimony lacked foundation because the prosecution failed to establish that Wood tested a sufficient quantity of the substance in question to produce an accurate test result, that argument was not raised at trial or before the ICA. Thus, this court may deem the argument waived. See Hill, 90 Hawai'i at 82, 976 P.2d at 396 ("The general rule provides that '[i]ssues not properly raised on appeal will be deemed to be waived.'") (Brackets in original.) (Citing Pele Def. Fund, 73 Haw. at 613, 837 P.2d at 1268.).

The record indicates that, at trial, Cambra lodged objections to Wood's testimony regarding the FTIRS test based on

¹¹ Cambra appears to be referring to a statement made by the dissent in Long, that "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." Long, 98 Hawai'i at 357, 48 P.3d at 604 (Moon, C.J., and Nakayama, J., dissenting).

lack of foundation. But the only foundational defect specified by Cambra to support his objections was that the foundational evidence was inadmissible hearsay. Thus, we may not construe his general objections as to foundation as encompassing the present argument advanced insofar as it substantially differs from the foundational objection specified at trial. Indeed, this court has stated that an objection as to lack of foundation must identify the particular foundational defect alleged. See Long, 98 Hawai'i at 353, 48 P.3d at 600 ("We affirm that a 'lack of foundation' objection generally is insufficient to preserve foundational issues for appeal because such an objection does not advise the trial court of the problems with the foundation."). Although we have recognized the exception that "a specific objection is not required where the defect is obvious from the context[,] "id. at 354, 48 P.3d at 601, such is not the case here.

C. The Microcrystalline Test

Cambra does not expressly contest the ICA's affirmation of the circuit court's admission of Wood's testimony as to the results of the microcrystalline test. Indeed, Cambra appears to avoid that issue in his section entitled, "Questions Presented For Decision[,] " as follows:

1. Why did the Intermediate Court of Appeals (hereinafter "ICA") fail to recognize that as per State v. Wallace 80 Haw.387; 910 P.2d 695 1996, that Crimilist Julie Wood's testimony regarding the test results (emphasis added), **and** the accuracy of the equipment (FTIRS and Certified Analytical Balance) used in order to obtain and determine those results, were admissible at trial over Petitioner's numerous objections concerning the hearsay Rules and the States failure to lay a proper foundation for such evidence?

(Exact quote.) Thus framed, Cambra's application appears to challenge the ICA's conclusions as to the FTIRS test and the

"certified analytical balance," but implicitly disavows any challenge to the microcrystalline test.

It is possible, however, to construe the following excerpt from Cambra's argument section as encompassing an argument that the microcrystalline test lacked a proper foundation:

Moreover, because Petitioner contends that NO proper foundation was laid by the State in order for Ms. Woods to testify as to the actual weight and composition of the substance seized (she was NOT an expert in weights, instrumentation etc.), she was only admitted as an expert in the limited area of drug identification (and this she did poorly, failing in the above noted complaint), and because the State failed to verify through documentation, or the testimony of a valid technician who actually calibrated, tested or prepared the instruments or chemicals, that her testimony of her test results were in and of them-selves hearsay.

(Exact quote.) By referencing the term "chemicals," it is possible that Cambra intended to incorporate his argument, made before the ICA, that Wood's testimony regarding the microcrystalline test lacked an adequate foundation insofar as the prosecution failed to produce documentation verifying that the chemicals used to perform the test were, in fact, gold chloride and phosphoric acid. However, even if this court were to favorably construe the foregoing language, the argument is unavailing.

Although the ICA considered and rejected Cambra's argument, the record indicates that Cambra failed to make an appropriate objection at trial. Cambra objected to the foundation laid for Wood's testimony that the substances recovered from Cambra's possession tested positive for methamphetamine during the microcrystalline test. However, Cambra did not specify the basis for his objection asserting lack of foundation. The circuit court presumed that Cambra's point of

contention was that Wood had not testified as to the purity of the reagent solution -- i.e., that it was not contaminated with methamphetamine. Thus, the prosecution elicited testimony from Wood describing how she knew that the reagent solution was not contaminated with methamphetamine. Cambra did not assert that the foundation was inadequate because the record lacked documentation that the chemicals used to create the reagent solution were, in fact, gold chloride and phosphoric acid. Accordingly, that argument has been waived. See Hill, 90 Hawai'i at 82, 976 P.2d at 396 ("The general rule provides that '[i]ssues not properly raised on appeal will be deemed to be waived.'") (Brackets in original.) (Citing Pele Def. Fund, 73 Haw. at 613, 837 P.2d at 1268.).

D. The Analytical Balance

Cambra also challenges the foundation laid for Wood's testimony as to the weight of the substance recovered. Specifically, Cambra appears to reference his argument made before the ICA that the record lacks documentation verifying that the analytical balance was correctly calibrated and thus accurate. The ICA rejected Cambra's argument and concluded that the foundation laid was sufficient based upon Wood's testimony alone. See ICA's memorandum opinion, slip op. at 7-8. The ICA reasoned that, pursuant to HRE Rule 703 (1993), Wood was entitled to rely on the information contained in the documents certifying that the balance had been properly calibrated and that the weights she used were accurate even if those documents were not admitted in evidence. Id. The ICA further pointed out that Wood testified without contradiction that the procedures she used to assure that the balance was in proper working order were accepted

by those in her field of expertise. Id.

That conclusion, however, does not comport with this court's holding in Wallace. In Wallace, the prosecution sought to prove the net weight of cocaine seized from the defendant's vehicle through the testimony of Donald Chinn ("Chinn"), a forensic chemist employed by the Naval Investigative Services Laboratory. 80 Hawai'i at 388, 910 P.2d at 701. Chinn used a "top load electronic balance" to obtain "a net weight of 40.94 grams--the equivalent of 1.444 ounces." Id. At trial, Chinn testified that he had personal knowledge that the electronic balance was calibrated annually, but admitted that he lacked personal knowledge that the balance had been correctly calibrated. Id. at 412, 910 P.2d at 725. Chinn testified that he "merely assumed that the manufacturer's service representative had done so." Id. This court found it persuasive that the prosecution failed to offer either the testimony of the service representative or a business record of the service company indicating that the balance was properly calibrated. Id. Accordingly, insofar as "the prosecution failed to lay 'a sound factual foundation' that the net weight of the cocaine measured by the balance was accurate[,]" id. (citing State v. Montalbo, 73 Haw. 130, 138, 828 P.2d 1274, 1280 (1992)), we held that "the circuit court clearly abused its discretion in admitting Chinn's testimony regarding the net weight of the cocaine." Id.

The present case calls for a slightly nuanced application Wallace. Here, Wood testified that she had personal knowledge that the analytical balance was calibrated annually. She further testified that every month she personally verified that the balance was properly calibrated by using her own set of

known test weights. However, it logically follows that in order for Wood's personal verification to constitute "reliable evidence showing that the balance was 'in proper working order,'" id., the record must contain some reliable evidence that the test weights were accurate. Indeed, Wood testified that she obtains certification for her test weight set annually from an independent laboratory on the mainland to insure that the "weights indeed weigh what they [] purport to weigh." She further testified that, inasmuch as the laboratory certified the accuracy of her weight set both before and after the day that she weighed the substances recovered from Cambra's possession, her weight set must have been accurate on that day. Thus, to the extent that Wood relied on the independent laboratory's representations, she lacked personal knowledge that her weight set was accurate. It logically follows that she also lacked personal knowledge that her analytical balance was accurately calibrated, to the extent that she used her test weight set for verification. Insofar as the record lacks other reliable evidence (i.e., the testimony of a service representative or a document complying with the evidentiary hearsay rules),¹² the prosecution has failed to lay a sound factual foundation that the net weight of the substance recovered from Cambra was accurately measured by the analytical balance. Thus, per Wallace, we hold that the circuit court abused its discretion by admitting Wood's testimony as to the net weight of the substances recovered from

¹² As previously mentioned, the prosecution offered and the court admitted four documents verifying the accuracy of the analytical balance and Wood's weight set. However, the court later struck those documents from evidence based upon their failure to comply with the business records exception to the exclusionary hearsay rule. The prosecution did not object to the court's ruling, and did not further contest that ruling on appeal.

Cambra and that the ICA gravely erred by affirming the circuit court's decision.

E. Sufficiency of the Evidence

Finally, in light of the foregoing conclusions, we conclude that there is insufficient admissible evidence to sustain Cambra's conviction of the offense of Attempted Promoting a Dangerous Drug in the First Degree, in violation of HRS § 712-1241(1)(b)(ii)(A), there being no admissible evidence of the net weight of the substance recovered from Cambra.

There is, however, sufficient evidence to convict Cambra of the lesser included offense of Attempted Promoting a Dangerous Drug in the Second Degree, in violation of HRS §§ 712-1242(1)(c)¹³ and 705-500,¹⁴ insofar as the admissible evidence establishes that Cambra was driving on a public road with eight Ziplock bags filled with an unknown amount of substance containing methamphetamine. Accordingly, we vacate Cambra's conviction of the offense of Attempted Promoting a Dangerous Drug in the First Degree and remand the matter for entry of judgment of conviction of the lesser included offense of Attempted Promoting a Dangerous Drug in the Second Degree and for resentencing in accordance therewith. See State v. Malufau, 80 Hawai'i 126, 136, 906 P.2d 612, 622 (1995) ("[I]f an appellate court determines that the evidence presented at trial was insufficient to support a conviction of a greater offense but sufficient to support a conviction of a lesser included offense,

¹³ HRS § 712-1242(1)(c) (1993) provides that "[a] person commits the offense of promoting a dangerous drug in the second degree if the person knowingly . . . [d]istributes any dangerous drug in any amount." (Emphasis added.)

¹⁴ See supra note 3.

the court may remand for entry of judgment of conviction on the lesser included offense[.]”), reconsideration granted in part and denied in part, 80 Haw. at 134, 906 P.2d at 620; cf. State v. Elliott, 77 Hawai‘i 309, 313, 884 P.2d 372, 376 (1994) (remanding for entry of judgment of conviction of a lesser included offense and resentencing in accordance therewith where the indictment failed to sufficiently allege all of the essential elements of the greater offense for which defendant was convicted at trial).

IV. CONCLUSION

Based upon the foregoing analysis, we (1) vacate the ICA’s November 21, 2006 judgment to the extent that it is inconsistent with this opinion, (2) vacate Cambra’s conviction of the offense of Attempted Promoting a Dangerous Drug in the First Degree, and (3) remand the matter for entry of judgment of conviction on the lesser included offense of Attempted Promoting a Dangerous Drug in the Second Degree and for resentencing in accordance therewith.

DATED: Honolulu, Hawai‘i, April 18, 2007.

Louis Dale Cambra,
defendant-appellant-petitioner
pro se, on the application