CAAP-16-0000460

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAI`I

STATE OF HAWAI`I,	)	CASE NO. 3DTA-15-00745
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE JUDGMENT AND
	)	NOTICE OF ENTRY OF JUDGMENT
	)	ENTERED ON May 20, 2016
vs.	)	
	)	DISTRICT COURT OF THE THIRD
CYRINA HEWITT,	)	CIRCUIT
	)	
Defendant-Appellant.	)	HON. MARGARET K. MASUNAGA
	)	JUDGE

ANSWERING BRIEF OF THE STATE OF HAWAI`I, PLAINTIFF-APPELLEE

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ANSWERING BRIEF OF THE STATE OF HAWAI`I, PLAINTIFF-APPELLEE

The State of Hawai`i (hereinafter "the State"), by and through the Office of the Prosecuting Attorney for the County of Hawai`i, submits the following Answering Brief in response to the Opening Brief of Defendant-Appellant Cyrina Hewitt (hereinafter "Appellant").

I
STATEMENT OF THE CASE

The State does not contest the facts as set forth by Appellant in the Opening Brief, but would include the following, as well. The State argued the Appellant's Motion to Suppress was untimely, under Hawaii Rules of Penal Procedure ("HRPP") Rule 12(c). Transcript of Proceedings of October 28, 2015 filed under JEFS Dkt. 20 ("*Tr. 10/28/15*") at 10. The State also argued during the Appellant's Motion to Suppress Evidence from a blood draw that exigent circumstances existed based on the vehicle collision, the time lapse that had already occurred from the collision to the point Officer's had probable cause the Appellant was operating a vehicle under the influence of an intoxicant, and the fact the Appellant was at the hospital. *Tr. 10/28/15* at 12. When Officer Nacino asked her about being assaulted the Appellant responded

"she's a big girl, she can handle her stuff." *Id.* at 27. Robin Kiode is a certified medical technician by the American Society for Clinical Pathology. *Id.* at 100. Kiode follows the calibration check every time he conducts a blood test. *Id.* at 108. Kiode set up the Appellant's blood sample for testing the same as he did with the calibrations and control samples on July 8th. *Id.* at 113. Kiode testified the instrument was working properly on July 8th. *Id.* at 114. Kiode also testified that Dr. Clifford Wong "looks at my triplicate result and make sure that I'm correct." *Id.* at 120. Dr. Wong follows the same procedures every time to confirm blood tests. *Id.* at 136. Dr. Wong also testified extensively on the elimination of alcohol in the blood via the liver at an equivalent rate of .15 BAC per hour. *Id.* at 146-147.

II
STANDARDS OF REVIEW

A. SUFFICIENCY OF EVIDENCE

On review, evidence must be taken in the light most favorable to the State. *State v. Pensentheiner*, 95 Hawai'i 290, 293 (2001). "On appeal, the test for sufficiency of the evidence is 'not whether guilt is established beyond a reasonable doubt, but whether there is "sufficient evidence" to support the conclusion of the trier of fact.' *State v. Matavale*, 115 Hawaii 149, 157-158, (2007) (quoting *State v. Batson*, 73 Haw. 236, 248-249, (1992)). 'Substantial evidence' is 'credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.' *Id.* at 158, (quoting *Batson*, 73 Haw. at 248-249).

B. MOTION TO SUPPRESS

"An appellate court reviews a ruling on a motion to suppress de novo to determine whether the ruling was right or wrong." *State v. Prendergast*, 103 Hawai'i 451, 453 (2004).

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

When acting as trier of fact, the trial court may draw all reasonable and legitimate inferences and deductions from the evidence adduced, and findings of the trial court will not be disturbed unless clearly erroneous. *State v. Batson*, 73 Hawai'i 236, 245-46 (1992). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard." *State v. Eleneki*, 92 Hawai'i 562, 564 (2000). "A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." *Dan v. State*, 76 Hawai'i 423, 428 (1994).

D. SUFFICIENCY OF FOUNDATION

"When a question arises regarding the necessary foundation for the introduction of evidence, '[t]he determination of whether proper foundation has been established lies within the discretion of the trial court[,] and its determination will not be overturned absent a showing of clear abuse.'" *State v. Loa*, 83 Hawai'i 335, 348, (1996) (quoting *State v. Joseph*, 77 Hawai'i 235, 239, (1994)). "An abuse of discretion occurs when the decision maker 'exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.' " *In re Water Use Permit Applications*, 94 Hawai'i 97, 183, (2000) (quoting *Bank of Hawai'i v. Kunimoto*, 91 Hawai'i 372, 387, (1999)).

E. ADMISSIBILITY OF EVIDENCE

"When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard." *Kealoha v. County of Hawaii*,

74 Hawai'i 308, 319-320 (1993). The abuse of discretion standard applies when rules of evidence require a judgment call. *Id.*

F. STATUTORY INTERPRETATION

"The interpretation of a statute...is a question of law reviewable de novo." *State v. Arceo,* 84 Hawai'i 1, 10 (1996).

G. VOLUNTARY STATEMENT

Objections to the admissibility of a defendant's statement must establish that the statement was the result of (1) "interrogation" that occurred while the defendant was (2) "in custody." *State v. Loo*, 94 Hawai'i 207, 210 (2000). The State's burden of establishing that requisite Miranda warnings were given is not triggered unless the totality of the circumstances reflect that the statement being introduced into evidence was the result of "custodial interrogation." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). "If neither probable cause to arrest nor sustained and coercive interrogation are present, then questions posed by the police do not rise to the level of 'custodial interrogation'." *Loo,* 94 Hawai'i 207, 210.

H. HARMLESS ERROR

"[E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to the conviction." *State v. Kaiama,* 81 Hawai'i 15, 22-23 (1996) (quoting *State v. Holbron,* 80 Hawai'i 27, 32-33 (1995)). Further, "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence." *State v. Antone*, 62 Haw. 346, 353 (1980). "Under the harmless error standard, the appellate court "must determine

whether there is a reasonable possibility that the error complained of might have contributed to the conviction." *State v. Paulino*, 122 Hawai`i 58 (2010) (See Appendix "C").

III
ARGUMENT

A. THE COURT DID NOT ERR IN DENYING HEWITT'S MOTION TO SUPPRESS

The Appellant, both presently and at trial, has also failed to establish that *Miranda* and its progeny apply in this case. The burden rests on the Appellant to establish that there was custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, at 444 (1966). The testimony at trial was that Officer Nacino spoke with the Appellant as part of an investigation into a potential assault against the Appellant. *Tr. 10/28/15* at 26. When Officer Nacino asked her about being assaulted the Appellant responded "she's a big girl, she can handle her stuff." *Id.* at 27. While Officer Nacino characterized her response as incoherent, the statement by the Appellant was related to the issue of her being assaulted and was therefore intelligent and knowing given the context. Officer Nacino soon became aware the Appellant might have been in a traffic collision based on reporting from Hawai'i Fire Department personnel and Sergeant Mekia Rose. *Id.* at 28. At this point, Officer Nacino began investigating a traffic incident and asked the Appellant if she had been involved in a traffic accident. *Id.* at 30. The Appellant, again responding to the question accurately, stated she had been driving the vehicle at issue and parked it. *Id.* at 30. The Appellant specifically told Officer Nacino she was turning onto Lako Street to visit a friend, and the vehicle in question was found a quarter of a mile from Lako Street. *Id.* at 56 and 58. Further, Officer Nacino under voir dire, noted that the Appellant had been able to give her name in response to Officer's asking what her name was, another intelligent response. *Id.* at 32. Further, in contrast to the Appellant's testimony, the testimony of Officer Nacino was that the Appellant

was awake during the interview by Officer Nacino. *Id.* at 33. While Officer Nacino did serve the Appellant with a legal document, they did not place her under arrest. *Id.* at 34. Finally, at the point in which Officer Nacino had information that the Appellant was driving and in a vehicle accident, they stopped asking questions. *Id.* at 39.

Custodial interrogation can be shown by establishing that an investigation has focused on a defendant, and when, where, and in what surroundings the making a statement takes place, and whether the defendant's freedom of action has been deprived in any significant way, though no one factor alone is determinative. *State v. Patterson,* 59 Hawai'i 357, 363 (1979) and *State v. Ketchum*, 97 Hawai'i 107, 116 (2001). Under these standards, there is nothing to show the Appellant's statements to Officer Nacino were the product of custodial interrogation. While the Appellant was in the hospital with two police officers, she was not chained to the bed, she was not under arrest, and the police never told her she could not leave. The Appellant gave answers to questions that, while odd, were relevant to the questions asked. Further, the police were conducting first an assault and then a traffic investigation. When an officer lawfully "seizes" a person in order to conduct an investigative stop, the officer is not required to inform that person of his or her Miranda rights before posing questions that are reasonably designed to confirm or dispel as briefly as possible and without any coercive connotation by either word or conduct, the officer's reasonable suspicion that criminal activity is afoot. *State v. Loo*, 94 Hawaii 207 (2000). Further:

> "Where, however, the seizure of the defendant is reasonable to investigate a traffic violation and the investigating police officer engages in legitimate, straightforward, and noncoercive questioning necessary to obtain information to issue a traffic citation, there is no custodial interrogation; no Miranda warnings are required before the police officer begins asking questions".

State v. Kuba, 68 Hawai'i 184, 188 (1985), quoting *State v. Wyatt,* 67 Hawai'i 293, 298-300 (1984).

It is clear from the testimony that Officer Nacino limited his investigatory questioning of the Appellant to straightforward, non-coercive questions necessary to confirm or dispel whether she had been the victim of an assault and whether she had been in a traffic collision. Once Officer Nacino had the information she had been driving and in a traffic collision, he ceased his questioning. The freedom of the Appellant to leave the scene, which is unclear here, is also not decisive as a factor, as the court in *Berkmer* noted, especially when questioning occurs with exposure to public view. *Berkmer v. McCarthy*, 468 U.S. 427 (1984). In the present situation, the Appellant was alone with Officers in a public hospital room, but there was nothing preventing the nurse or doctor from entering while the police were present. Finally, two points must be made regarding the Appellant's brief on this matter. First, Appellant claims in her testimony she was repeatedly awaken by the officers in the hospital. The testimony of Officer Nacino indicates that the Appellant was awake during the time the officers were with the Appellant. Further, while the Appellant claimed in her own testimony to have been "sedated," this testimony was in direct relation to her contention that she kept falling asleep while being questioned. Given that evidence in a case under review must be viewed in the light most favorable to the state, this Court must assume that the officers did not repeatedly awaken the Appellant and that the Appellant was also not sedated. *State v. Pensentheiner*, 95 Hawai'i 290, 293 (2001). Second, on page twenty-five of the Appellant's opening brief it is stated in footnote 10 that Officer Nacino did not testify at the hearing on the Motion to Suppress, however, that is in fact not true. In the Appellant's own statement of the case on page two, Officer Nacino is extensively quoted from his testimony at the Motion to Suppress hearing.

The Appellant's contention that the District Court erred in permitting testimony regarding her statement to Officer Nacino on the night of July 3, 2014 is without merit. The Appellant was not in custody and not subject to interrogation. Officer Nacino and Officer Sugata questioned the Appellant briefly and straightforwardly regarding a potential assault and a traffic collision. Once incriminating evidence arose against the Appellant, they ceased their questions. The Appellant's statements, while odd, were intelligently and knowingly made, as they had relevance to the questions at hand. There is no valid evidence of coercion on the part of the officers. There was no confession in the present case either, rather the officer's conducted an investigatory stop. Finally, "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence" and the judge in the present case did not view the statements by the Appellant to Officer Nacino as incompetent evidence. *State v. Antone*, 62 Haw. 346, 353 (1980). Even if HRS §621-26 applies, the District Court determined following the Appellant's voir dire of Officer Nacino, and following a Motion to Suppress and Motion In Limine hearing, that the Appellant's statements were voluntarily made and admissible. The Appellant's first point of error should be denied by this Court.

B. THE COURT DID NOT ERR IN DENYING HEWITT'S MOTION TO SUPPRESS EVIDENCE

The Appellant next contends the District Court erred in allowing evidence of a blood draw to be admitted at trial following a motion to suppress. As noted in the Appellant's brief, the definition of exigency is "when the demands of the occasion reasonably call for an immediate police response." *State v. Clark,* 65 Hawai'i 488, 494 (1982). This includes the immediate threatened removal or destruction of evidence. *Id.* (citing *State v. Dorson*, 62 Hawai'i 377, 385 (1980)). In *Entrekin,* The Court formulated that the mandatory blood draw provisions in state law

were intended to "ensure evidence is safely obtained" and further, that such an extraction was permissible so long as "the police have probable cause to believe the person is DUI, exigent circumstances are present, and the sample is obtained in a reasonable manner." *State v. Entrekin*, 98 Hawai'i 221, 228, 232 (2002). In *Schmerber*, the defendant suffered injuries in an automobile accident and was taken to the hospital where he was arrested for DUI and a blood test was ordered. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966). The Court concluded that under the "special facts" of the case, namely the need for the officer to investigate the scene of the accident and bring the accused to the hospital, there was no time to secure a warrant and the dissipation of alcohol in the defendant's blood was an "emergency." *Id.* The present case is very similar. Here, the Defendant was already at the hospital, however the officers had to investigate first why she was at the hospital, then they had to wait for a fellow officer to report from the scene of the accident. Only then, around 3:30 am, had they reached the level of probable cause to believe the Defendant had been operating a vehicle under the influence of an intoxicant that was involved in a traffic collision, and thus did they arrest her and order the blood draw. *Tr. 10/28/15* at 51. At that point, several hours of time had already passed since the accident, estimated by Officer to have occurred around 11pm, and every minute of delay longer would result in more dissipation of alcohol or drugs in her system. *Id.* at 28.

The specific facts of the case present precisely the kind of exigent circumstances the Court has envisioned. As noted by Dr. Wong in his testimony, blood alcohol content ("BAC) dissipates from the blood at a rate of .15 per hour. *Id.* at 147. Given that nearly four and one-half hours had passed since the time of the accident and Officer Nacino's determination that the Appellant was driving and likely under the influence, the continued dissipation of the evidence of the Appellant's BAC was an emergency. While the Court in *McNeely* noted that "the natural

dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to conducting a blood test without a warrant," that holding does not mean the Court envisions that dissipation of alcohol cannot ever be considered an exigency. *Missouri v. McNeely,* 133 S. Ct. 1552, 1568 (2013) (emphasis added). While two officers were investigating this case, neither determined there was a criminal act on behalf of the Appellant until four and one-half hours after the vehicle collision. The very real danger of further delays for the purposes of getting a warrant would have resulted in the loss of even more evidence than had already been lost. For that reason, this Court should deny the Appellant's contention that the District Court erred in denying her Motion to Suppress Evidence.

C. THE STATE LAID THE APPROPRIATE FOUNDATION TO ADMIT THE BLOOD DRAW RESULTS

The Appellant last contends that the State failed to lay an adequate foundation for the admission of the blood draw results. First, the State would argue that under *State v. Long* an objection on the basis of "insufficient foundation" without anything more is not specific enough to raise a foundational issue on appeal. *State v. Long,* 98 Hawai'i 348, 351 (2002). The basis for this is that is does not advise the trial court and the opposing party the basis for the objection, nor allow for correction of the error or the ability of a court to fully understand and rule appropriately on the objection. *Id.* at 352. Here, the Appellant used the foundation objection at the point in Kiode's testimony dealing with the blood test results after Kiode had testified extensively as to his training, licensing, certifications, and the procedures he follows in calibrating the machine, running the samples, retrieving the samples, chain of custody, and so forth. *Tr. 10/28/15* at 98-116. The Appellant simply uttered "Foundation. Relevancy" as the basis

for his objection, giving no indication as to what part of the foundation was lacking in determining the result. *Id.* at 117. The Appellant did not object during testimony as to the calibration procedures, bringing up the issue of manufacturers requirements and training only on appeal. The Appellant did not object to the use of the gas chromatograph mass spectrometer ("GCMS") during the testimony on that machine based on a lack of foundation that it had been installed and serviced as required by the manufacturer. Instead, the Appellant relies on a single, catch-all objection at the end of Kiode's testimony regarding his test results. The State would further note that the Appellant relies on case precedent regarding speed lasers and radar regarding the foundation requirements for testing and training of personnel with respect to the GCMS. (See *State v. Assaye,* 121 Hawai'i 204 (2009) and *State v. Appollonio,* 130 Hawai'i 353, 362 (2013)). It is unclear how useful such parallels are given the differences in the equipment and the procedures of operation of such equipment, nor is it clear that the Court intended its decision in both cases to be so far reaching.

Regardless, the State would argue that Kiode's daily maintence and calibration of the GCMS met the manufacturer's requirements, as did his training on the machine. The proper foundation for the introduction of scientific test results would include expert testimony regarding the qualifications of the expert, whether the expert employed valid techniques to obtain a test result, and whether an instrument is in proper working order. *State v. Long*, 98 Hawai'i 348, 355 (2002). In the present matter, Kiode testified as to his qualifications, as to his training by a manufacturer's representative on use of the GCMS, and that his daily calibrations, using a manufacturer-checked software program, showed it was in working order. Further, he testified that the GCMS received annual maintence from a manufacturer's representative. Addressing whether Kiode's training met the manufacturer's requirements first, Kiode was trained by a

representative from the manufacturer of the GCMS through lecture and on-instrument training how to run and maintain the GCMS. *Tr. 10/28/15* at 101 and 104. He is also licensed by the State of Hawaii on running GCMS tests. *Id.* It can be reasonably inferred that a representative from the manufacturer of an instrument, conducting training on such an instrument, would train a person in accordance with the manufacturer's recommendations. Any other conclusion would be logically absurd, as would any requirement for more specific evidence of meeting a manufacturer's requirements. The present matter is clearly distinguishable from *Apollonio* in which the Officer using the laser device only received what he thought was a manufacturer's manual and training from other police officers. *State v. Apollonio,* 130 Hawai'i 353, 361-362 (2013).

Further, it can be reasonably inferred that a person conducting daily maintence on a machine in which they were trained to operate by a manufacturer's representative would conduct such maintence in accordance with the manufacturer's guidelines. How else would they have learned to conduct such maintence? Again, any other conclusion would be logically absurd absent evidence to the contrary. Kiode also testified that a computer controls the instrument and that the software comes with the computer and the instrument and is checked by the manufacturer's representative during the yearly maintence. *Id.* at 106, 121-122. Since the computer, with software checked annually by the manufacturer's representative, conducts the calibration checks, it can be reasonably inferred to meet the manufacturer's recommendations. Like Mohammed in *Manewa* with regards to the GCMS, Kiode testified that he conducted daily checks on the GCMS before he uses it and if anything is off he repeats the calibration. *Tr. 10/28/15* at 108. Further, Dr. Wong testified that if certain values are not met by the machine in its weekly, monthly, and annual maintence, then the machine is taken off line. *Id.* at 131-132. In

Manewa, the Court found that sufficient foundation for admitting the results of the GCMS. *State v. Manewa,* 115 Hawai'i 343, 347 (2007). Kiode further testified that he would know if the software doing the test and calibration was off based on a lack of 1.0 or .999 coefficient on results. *Tr. 10/28/15* at 122. Unlike Mohammed in *Manewa* with regards to the balance, however, Kiode knew how to calibrate the GCMS and how to maintain it, according to Dr. Wong. *Id.* at 104 and 131. *Manewa,* at 347. The Appellant's contention that the State failed to establish the GCMS was tested according to the manufacturer's procedures is without merit.

The Appellant's third contention that the State failed to show the GCMS had been installed, serviced, and inspected as required by the manufacturer is also without merit. Kiode testified that a representative from Agilent, the manufacturer of the GCMS, comes out to do the annual maintence and overhaul the machine. *Tr. 10/28/15* at 105. While there is no direct testimony that Agilent installed the machine, it is clear they as the manufacturer conduct annual maintence and checks on the machine and software based on both Kiode and Dr. Wong's testimony. Justice Acoba's analysis in *Assaye*, relating back to *Manewa*, regarding inspection and maintence according to the manufacturer's requirement, is satisfied in the present case. *State v. Assaye,* 121 Hawai'i 204, 217 (2009). Unlike the laser in *Assaye,* the GCMS machine in question is serviced by the manufacturer annually. Again, it is logically absurd to assume the manufacturer would service their own machine in any manner other than by their own guidelines. Further, unlike in *Assaye*, where the police officer's testimony directly exposed the fact he had held onto the laser gun for fifteen months, implying no annual maintence, there is no such testimony in the present case. *Id.* at 218. While there is no specific mention of the last time the GCMS machine was serviced by the manufacturer, there is no evidence it has been anything beyond the annual, meaning every year, as mentioned by both Dr. Wong and Kiode.

The Appellant's contention that the State failed to lay the proper foundation for admission of the blood results is erroneous, given that firstly, the objection as to foundation was too broad to raise the issue on appeal, and further because the testimony of Kiode and Dr. Wong shows clearly that their training, maintence, and procedures meet the manufacturer's requirements.

IV
CONCLUSION

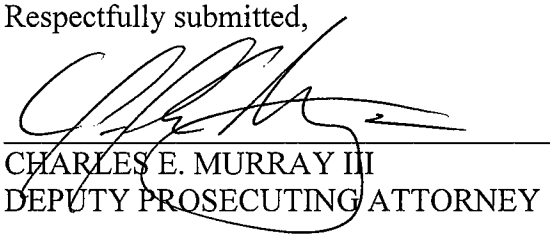
Based on the foregoing points and authorities, the State respectfully requests that this Honorable Court uphold the Appellant's conviction for Operating a Vehicle Under the Influence and Driving Without a Valid License.

STATEMENT OF RELATED CASES

The State is not aware of any related cases currently pending in the Hawai`i courts or agencies.

DATED: Kealakekua, Hawai`i, January 21, 2017.

Respectfully submitted,

By: 

CHARLES E. MURRAY III
DEPUTY PROSECUTING ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that an unfiled copy of the foregoing document was served upon the party identified below via the Judiciary Electronic Filing System on the date set forth below.

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On January 24, 2017.

OFFICE OF THE PROSECUTING ATTORNEY