IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

RICARDO APOLLONIO, Petitioner/Defendant-Appellant.

SCWC-11-0000695

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000695; CASE NO. 1DTC-10-010161)

October 10, 2013

ACOBA, MCKENNA, AND POLLACK, JJ., WITH RECKTENWALD, C.J., CONCURRING AND DISSENTING, WITH WHOM NAKAYAMA, J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that because the charge of Excessive Speeding, Hawaiʻi Revised Statutes (HRS) § 291C-105(a)(1) (Supp. 2010), against Petitioner/Defendant-Appellant Ricardo Apollonio (Petitioner) did not allege that Petitioner acted intentionally, knowingly, or recklessly it failed to allege the requisite state of mind. State v. Nesmith, 127 Hawaiʻi 48, 56, 276 P.3d 617, 625 (2012). Therefore, for the reasons stated herein, we vacate the August 22, 2012 judgment of the ICA, which affirmed the August

23, 2011 Notice of Entry of Judgment and/or Order and Plea/Judgment of the district court of the first circuit[1] (the court) and the court's aforesaid judgment, and remand the case to the court for dismissal without prejudice. Because of the likelihood of retrial, we also conclude that Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) failed to lay an adequate foundation to admit the laser instrument (laser gun or laser) reading of Petitioner's vehicle's speed into evidence.

I.

A.

On August 23, 2011, Petitioner was orally arraigned and charged in the court with excessive speeding, as aforesaid. The charge alleged as follows:

> On or about July 1st, 2010, in the City and County of Honolulu, State of Hawaiʻi, you did drive a motor vehicle at a speed exceeding the applicable state or county speed limit by 30 miles per hour or more by driving 76 miles per hour in a 35-mile-per-hour zone, thereby violating Section 291C-105, subsection (a)(1)(C)([2]) of the [HRS], as you have had one prior conviction within a five-year period.

Petitioner did not object to the oral charge.[2]

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[1] The Honorable Lono Lee presided.

[2] Prior to trial, Petitioner filed a Motion to Compel Discovery, asking Respondent to disclose, inter alia, "[t]he Operator's Manual for the specific laser gun used in this case," and "[t]he [Honolulu Police Department (HPD)] training manual for speeding citations." [(Petitioner's) Motion to Compel (Traffic Court docket number 23) at 3] In response, Respondent pointed out that the HPD had "loaned to the Department of the Prosecuting Attorney one copy each of: 1) the operator manual for the Marksman; 2) the HPD training manual, and 3) the operator manual for the [Laser Technologies, Inc. (LTI)] 20/20 UltraLyte, all provided by [LTI]." Further, "[o]n October 28, 2009, the DPA made those three manuals available for review by defense counsel." Respondent contended that Petitioner could not make copies of the manuals due to copyright laws. However, the court issued a protective order allowing Petitioner to review and make one copy of each manual that Petitioner

The HPD officer involved (the officer) testified that on July 1, 2010, he cited Petitioner for excessive speeding. On that date, a LTI 20-20 laser gun was used to measure the speed of Petitioner's vehicle.

The officer was trained in October 2006 by Sergeant Ryan Nishibun. His training consisted of "class work, going over the operator's manual, and hands-on time with the laser itself." He maintained that the operator's manual was "provided by [LTI]." Defense counsel objected to this testimony due to "lack of personal knowledge and hearsay." The court overruled the objection, stating that "those issues have been resolved in some other case."[3]

According to the officer, the manual stated that four tests[4] were necessary to establish that the laser gun was working properly. All four tests were performed on the date in question and indicated the laser was working properly. The officer stationed himself on the shoulder of Kamehameha Highway south of Punalau Place. The speed limit in the area was thirty-five miles per hour (mph). His laser gun indicated that Petitioner's vehicle was traveling at a speed of 76 mph. Based on the speed reading, Petitioner's vehicle was stopped and Petitioner cited.

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requested Respondent to disclose. The manuals are not a part of the record.

[3] The court did not specify what case it relied upon.

[4] The four tests are the self-test, the display test, the scope alignment test, and the delta distance test.

On cross-examination, the officer explained that the people who trained him were "all HPD officers," and that "there was nobody from LTI present." He related that the front cover of the manual "may have" had the HPD emblem stamped on it. The manual was provided by an HPD officer. He "[did not] know the person who wrote the manual," and "[did not] know" if the manual was "written or compiled by the [HPD]."

Based on this testimony, Petitioner renewed his motion to strike the speed reading based on a lack of foundation. Petitioner argued that the officer "[did] not recall what the manual looks like," "[did] not know who prepared the manual," and was "not able to say where or what the manual was prepared in accordance with." The court rejected the motion, stating that "[t]he court has also heard that that was [sic] the manuals provided by HPD in conjunction with LTI as part of [the officer's] training at the [police] academy. So the court will give it its due weight."

Petitioner continued cross-examination "with a few questions based on the court's ruling." The officer indicated he "assume[d] that somebody [from LTI] had to have provided [the manual]," but that he "[did not] know personally whether anybody from LTU provided these manuals to [HPD]." (Emphases added). Further, "[w]hen [he] testified on direct examination [that he was] . . . trained in accordance with the manual that LTI provided, that was just based on [his] assumption that somebody

from LTI must have provided [the manual]." (Emphasis added.) Petitioner then asked the witness about the maintenance of the laser gun. The officer testified that he had "no idea" if there were "any software upgrades that would have been provided" for the laser gun.

On redirect examination, the officer testified that he "pass[ed] the [training] course" provided by HPD, and was "qualified to use the [laser gun]." Defense counsel objected that the officer did not have personal knowledge regarding whether or not he was qualified. The court overruled the objection. Petitioner conducted recross-examination and then renewed his motion to strike, arguing that the officer "has no personal knowledge [of] who provided the manual." The court again denied the motion.

B.

Petitioner testified that on July 1, 2010, he was traveling northbound on Kamehameha Highway. He explained that before being pulled over he was "looking at his [speedometer] the whole time" and that he was never traveling faster than 60 mph. He also recounted that he was speeding because "he had to [use] the bathroom really bad." On cross-examination, Petitioner admitted that he did not know whether his speedometer was working properly.

C.

In closing argument, Petitioner stated "that [the

officer] testified on direct that he was trained in accordance with the manufacturer's specification[s]," but that on cross-examination, [the officer] admitted that "he had no personal knowledge as to whether or not he actually was." Petitioner also contended that the excessive speeding statute required Respondent to demonstrate that Petitioner recklessly traveled 30 mph faster than the speed limit, and because Petitioner testified that his speedometer indicated he was traveling at 60 mph, Respondent had not established that Petitioner was reckless as the statute required.

D.

The court found Petitioner guilty as charged, holding that it "heard credible testimony from [the officer] regarding his training and qualifications," and that the officer "followed the manufacturer's instructions" to ensure that the laser gun was working properly. Addressing mens rea, the court found that the relevant state of mind was "intentional, knowing, or reckless," and that "the court can infer from the circumstances that traveling at that speed, at the minimum, is reckless."

II.

A.

Petitioner appealed to the ICA. According to Petitioner, the only evidence introduced regarding the manufacturer's recommendations for testing the laser gun or training officers was provided by the manual, and the officer did

not have personal knowledge that the manual was provided by LTI. On this basis, Petitioner argued that Respondent failed to lay an adequate foundation for introducing the speed reading from the laser gun.

Petitioner also maintained that an adequate foundation was not laid because State v. Manewa, 115 Hawaiʻi 343, 167 P.3d 336 (2007), required Respondent to introduce evidence that "the instrument has been inspected and serviced as required by the manufacturer." (Citing State v. Assaye, 121 Hawaiʻi 204, 217, 216 P.3d 1227, 1240 (2009) (Acoba, J. concurring).)

B.

The ICA held that adequate foundation had been established to admit the speed reading. The ICA noted that the officer received eight hours of training from the HPD, "confirmed that during training he was provided with a training manual, which he acknowledged was provided by [LTI]" and testified that during training he was "taught [four] tests recommended by the manufacturer to determine whether the laser was working properly." State v. Apollonio, No. CAAP-11-0000695, 2012 WL 2894715, at *2 (App. July 16, 2012). According to the ICA, "[e]vidence from [the officer's] testimony" "confirmed that he performed these four tests on the laser gun on July 1, 2010, and that the results of the tests indicated that the laser was operating correctly." Id.

Further, the officer explained that the manual he received as a part of his training "'said Operator's Manual, LTI 20-20 Operator's Manual,'" although "[the officer] later agreed that the manual cover may also have stated 'Honolulu Police Department' [or contained an HPD logo]." Id. He "could not definitely say that the manual was not written or compiled by HPD." Id. The ICA concluded that, "[i]n light of the foregoing, the officer's testimony was sufficient to establish that 'the nature and extent of [his] training . . . meets the requirements indicated by the manufacturer.'" Id. (Quoting Assaye, 121 Hawaiʻi at 215, 216 P.3d at 1238.)

Addressing Manewa, the ICA held that once the laser is tested in accordance with procedures recommended by the manufacturer, "the Assaye majority did not require any further showing of inspection and service as required by the manufacturer." Id. Therefore, the ICA rejected Petitioner's argument that Respondent was required to demonstrate that the manufacturer had properly serviced the laser gun. Id.

III.

Petitioner presents the following questions in his Application:

> 1. Whether the ICA's order affirming [Petitioner's] conviction constitutes an obvious inconsistency with [this court's] April 12, 2012 decision in [Nesmith, 127 Hawaiʻi 48, 276 P.3d 617].
>
> 2. Whether the ICA gravely erred in holding that [Respondent] laid sufficient foundation for the admission of the laser gun reading.

On November 7, 2012, Respondent filed a Response to Petitioner's

Application (Response). On November 13, 2012, Petitioner filed a Reply.

IV.

A.

In connection with his first question, Petitioner argues that "[t]he oral charge [] failed to allege the intentional, knowing, and reckless states of mind required to alert the defendant[] of precisely what [he] needs to defend against to avoid a conviction."[5] (Citing Nesmith, 127 Hawaiʻi at 56, 276 P.3d at 625.) Additionally, Petitioner argues that "the oral charge was fatally defective under Hawaiʻi Rules of Penal Procedure (HRPP) Rule 7(d),"[6] because "state of mind was an 'essential fact,' which was required to be alleged." Finally, according to Petitioner, due to the lack of mens rea in the charge, "the [] court lacked jurisdiction over the case." (Citing State v. Cummings, 101 Hawaiʻi 139, 142, 63 P.3d 1109, 1112 (2003).)

B.

In its Response, Respondent argues that "[t]he Nesmith majority's holding that mens rea must be alleged in a charge was

[5] The concurring and dissenting opinion (dissenting opinion) contends that "[i]t was not until the case reached this court that, for the first time, [Petitioner] contended that the charge was inadequate." Dissenting opinion at 2. Nesmith was filed on April 12, 2012, well after February 24, 2012, the date Petitioner declined to file a Reply Brief before the ICA. Thus, Petitioner could not have raised the Nesmith argument before the ICA.

[6] HRPP Rule 7(d) states in relevant part that "[t]he charge shall be a plain, concise and definite statement of the essential facts constituting the offense charged."

based on its reasoning that 'a charge omitting the mens rea requirements would not alert a defendant that negligently operating a vehicle under the influence of an intoxicant . . . for instance is not an offense recognized [by statute].'" (Quoting Nesmith, 127 Hawaiʻi at 56, 276 P.3d at 625.) "In other words," Respondent contends, Nesmith held that the "state of mind must be included in the charge to 'alert the defendants [] [of] precisely what they needed to defend against to avoid a conviction.'" (Quoting Nesmith, 127 Hawaiʻi at 56, 276 P.3d at 625.)

Respondent observes that Petitioner's "defense was that he was never aware that he was driving his vehicle more than sixty [mph]." According to Respondent, Petitioner's counsel stated the correct state of mind requirements during closing argument and noted that "this is not a negligence case." Respondent argues that, therefore, Petitioner "was clearly aware of precisely what he needed to defend against [to avoid] a conviction." Thus "his constitutional rights were not adversely affected."[7]

[7] Further, Respondent contended for the first time that HRS § 291C-105(a) involves an absolute liability offense, and hence the State was not required to allege a state of mind in the charge. Respondent's argument that HRS § 291C-105(a) is an absolute liability offense was not raised before the court, and is therefore waived. See State v. Kikuta, 125 Hawaiʻi 78, 89, 253 P.3d 639, 650 (2011) ("[T]he failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."). In any event, Respondent's arguments are virtually identical to those raised by the State in State v. Gonzalez, 128 Hawaiʻi 314, 288 P.3d 788 (2012). In Gonzalez, the argument that excessive speeding is a strict liability crime was rejected. Id. at 324, 288 P.3d at 798. Accordingly, we do not discuss this contention further.

C.

In Nesmith, this court cited with approval Elliot, in which the petitioner had challenged the sufficiency of the oral charge for the first time on appeal, arguing that the oral charge did not include a mens rea element. Nesmith, 127 Hawaiʻi at 56, 276 P.3d at 625 ("[Elliot] provides an illustration of how omission of facts in a charge can render a charge deficient.") Nesmith stated that, as a result, Elliot "liberally reviewed the oral charge in favor of its validity." Id. However, "[e]ven under a liberal review, [this court] held [in Elliot] that the charge could not be reasonably construed to state the offense of resisting arrest," because "the requisite state of mind was omitted." Id.

In this case, as in Elliot, Petitioner challenged the sufficiency of the oral charge for the first time on appeal, and therefore the charge must be construed liberally in favor of its validity. Id. As in Elliot, the instant charge omitted the requisite state of mind. Analogous to Elliot, then, the excessive speeding charge cannot be "reasonably construed to state an offense." Id. Nesmith therefore mandates dismissal without prejudice. Id.

Respondent argues that Nesmith supports a contrary result, because Nesmith holds that a charge is only deficient if defendants lack the notice necessary to avoid a conviction. In Elliot, however, this court noted that the defendant "has not

indicated how she was surprised or prejudiced by the omissions, and the record does not show that she was hampered in her defense." 77 Hawaiʻi at 311, 884 P.2d at 374 (brackets omitted). Nevertheless, Elliot held that "with respect to the resisting arrest count, the requisite state of mind was omitted from the charge," and therefore "the oral charge at issue [was] fatally defective." Id. at 313, 884 P.2d at 376. Similarly, in this case, the charge omitted the requisite state of mind, and therefore it cannot be "reasonably construed to state [an] offense." Id.

Less than ten months ago this court, in a unanimous opinion,[8] held that the failure to allege a requisite state of mind results in dismissal without prejudice:

> In Nesmith, this court reasoned that 'state of mind requirements, though not an element of an offense' were required to be included in the charges against the defendants in order 'to alert the defendants of precisely what they needed to defend against to avoid a conviction.' 127 Hawaiʻi at 56, 276 P.3d at 625 (internal quotation marks and citations omitted). Nesmith held that [if a] state of mind [is not] included in a charge[] the case [is] dismissed without prejudice. Id. at 54, 276 P.3d at 623. Because the charge here did not contain the requisite state of mind, as the State concedes, Nesmith mandates dismissal without prejudice.

Gonzalez, 128 Hawaiʻi at 324, 288 P.3d at 798.[9] Accordingly, we

[8] Respectfully, in light of this court's recent unanimous adherence to this proposition, the dissenting justices' position with respect to plain error need not be discussed.

[9] The dissent contends that Gonzalez is distinguishable because in Gonzalez, the defendant objected to the oral charge before trial commenced. Dissenting opinion at 2-3 n.2. However, based on Nesmith, Gonzalez stands for the principle that a charge that fails to include the requisite state of mind would be dismissed without prejudice, Gonzalez, 128 Hawaiʻi at 324, 228 P.3d at 798 ("Nesmith held that [if] state of mind [is not] included in a charge [] the case [is] dismissed without prejudice."), even if an objection is not raised at trial and the defendant was not prejudiced by the omission of state of mind. Elliot, 77 Hawaiʻi at 313, 884 P.2d at 376; cf. Nesmith, 127 Hawaiʻi at 55; 276 P.3d at 624 ("Like Elliott, in this case, the . . . state of mind requirements . . . needed to be charged[.]").

adhere to this core principle: A charge that fails to charge a requisite state of mind cannot be construed reasonably to state an offense and thus the charge is dismissed without prejudice because it violates due process.[10] Elliot, 77 Hawaiʻi at 313, 884 P.2d at 376; see also Nesmith, 127 Hawaiʻi at 56; 276 P.3d at 625 ("In Elliott, the petitioner challenged the sufficiency of this oral charge for the first time on appeal . . . . Even under a liberal review, we held that the charge could not be reasonably construed to state the offense of resisting arrest.").

V.

Due to the likelihood of retrial, Petitioner's argument that Respondent failed to lay an adequate foundation for the introduction of the speed reading from the laser gun may be addressed in part to prevent future error. In order to lay an adequate foundation for the speed reading from a laser gun, the State must demonstrate (1) that the accuracy of the laser gun was tested according to procedures recommended by the manufacturer, Assaye, 121 Hawaiʻi at 213, 216 P.3d at 1236, and (2) that "the nature and extent of an officer's training in the operation of a

[10] The dissent contends that dismissing the charge has the effect of "treating timely and untimely objections to a charge the same." Dissenting opinion at 14 n.6. However, that a charge that does not include the requisite state of mind is dismissed without prejudice based on due process is now firmly established. See Nesmith, 127 Hawaiʻi at 56; 276 P.3d at 625; see also Gonzalez, 128 Hawaiʻi at 324, 288 P.3d at 798; State v. Bortel, No. SCAP-12-0000392, 2013 WL 691794, at *3 (Haw. Feb. 25, 2013) (mem.) ("According to Gonzalez, Nesmith held that the state of mind must be included in a charge or the case [is] dismissed without prejudice.") (internal quotation marks omitted); State v. Castro, No. SCWC-30703, 2012 WL 3089722, at *1 (July 30, 2012) (SDO). As this court concluded in Nesmith, "mens rea must be alleged in a[ ] charge." 127 Hawaiʻi at 56; 276 P.3d at 625.

laser gun [met] the requirements indicated by the manufacturer." Id. at 215, 216 P.3d at 1238. Petitioner argues that neither requirement was satisfied here. He also asserts that Respondent failed to introduce evidence that the laser gun was "inspect[ed]" or service[d] by the manufacturer," as required by Manewa, 115 Hawaiʻi at 354, 157 P.3d at 347.

A.

Petitioner advances three arguments suggesting that, under the first prong of the Assaye test, Respondent did not establish that the laser gun was tested in accordance with the manufacturer's recommendations. First, Petitioner argues that the officer's knowledge of the four tests was based upon "reading the manual that was never offered or admitted into evidence." Thus, according to Petitioner, "his testimony was based upon hearsay[11] -- the contents that he obtained from the manual were statements, other than statements made by him while testifying, offered to prove the truth of the matter asserted – that the manufacturer, LTI, recommended these four tests to ensure that the device was in proper working order."

Second, Petitioner argues that "[the officer] assumed the manual was published by LTI," but he was "trained by an HPD officer, he received the manual from the training officer, and

[11] Hawaiʻi Rules of Evidence (HRE) Rule 802 provides, in relevant part:

> **Rule 802. Hearsay**
> Hearsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaiʻi supreme court, or by statute.

the manual's cover was imprinted only with the words 'Operator's Manual' and possibly an HPD logo." Additionally, "[the officer] admitted that he did not know who provided the manual to HPD, whether the manual was written or compiled by HPD, and that he never met anyone from LTI." Petitioner declares that thus, "[the officer's] testimony that the tests were recommended by the manufacturer should not have been admissible for lack of personal knowledge."

Third, Petitioner contends that the best evidence rule required Respondent to introduce the manual itself into evidence. According to Petitioner, HRE Rule 1002[12] states that "'to prove the content of a writing . . . the original writing . . . is required'" and here "the content of the manual was the very evidence the State relied upon to establish that LTI had recommended the four tests."

Regarding training under the second prong of the Assaye test, Petitioner argues that Respondent "failed to adduce any evidence as to whether the [officer's] training . . . met the requirements indicated by the manufacturer. In fact, [Respondent] did not present any evidence as to what LTI even

[12] HRE Rule 1002 provides as follows:

> **Rule 1002. Requirements of Original**
> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

(Emphasis added.)

requires in the training in the operation [sic] of the laser gun." (Emphasis in original.)

Finally, with respect to Manewa, Petitioner asserts that this court held that an inadequate foundation was laid when a chemist "lacked the personal knowledge that an [analytical balance] had been properly calibrated," and "merely assumed that the manufacturer's service representative had done so." Petitioner then cites the concurring opinion in Assaye as holding that "Manewa 'requires not only that the State show that there is an accepted manufacturer's procedure . . . but also to show that the instrument has been inspected and serviced as required by the manufacturer.'" (Quoting Assaye, 121 Hawaiʻi at 217, 216 P.3d at 1240 (Acoba, J., concurring).)

B.

In its Response, Respondent argues that all of Petitioner's evidentiary arguments other than its personal knowledge objection are waived, because they were not raised before the ICA. As to personal knowledge, Respondent relies on the arguments made before the ICA, where it maintained that the officer's testimony that the manual was provided by LTI was a "reasonable inference," and that other evidence linked LTI to the manual, such as the fact that the laser gun was manufactured by LTI and the title of the manual was the "LTI 20-20 Operator's Manual."

Further, Respondent contends that "[Petitioner's] exact argument [regarding the best evidence rule] was recently rejected in another case." (Citing State v. Jervis, No. 30463, 2011 WL 1713501 (App. May 5, 2011) (SDO).) In Jervis, the ICA reasoned that the best evidence rule did not apply because "[the officer's] testimony about the manual was not adduced to prove the contents of the manual, but rather to establish foundation for his testimony." Jervis, 2011 WL 1713501 at *1 (citing Fireman's Fund Ins. Co. v. Stites, 258 F.3d 1016, 1023 (9th Cir. 2001); Smith v. Atlantic Richfield Co., 814 F.2d 1481, 1486 (10th Cir. 1987); United States v. Carlock, 806 F.2d 535, 551 (5th Cir. 1986); Lang v. Cullen, 725 F. Supp. 2d 925, 953–54 (C.D.Cal. 2010)).

With respect to Manewa, Respondent argued that there, this court held that the State had established that a "[Gas chromatograph mass spectrometer]" was working properly because an expert "testified that he personally conducted a 'routine check' 'each and every morning' 'to ensure that all the parameters are within the manufacturer's specifications.'" (Quoting Manewa, 115 Hawaiʻi at 354, 167 P.3d at 347.) Respondent contended that, therefore, establishing that a "routine check" was performed is enough to establish that a device is working. Lastly, Respondent maintained that in the instant case "it was never established at trial whether there was in fact a manufacturer's service representative who periodically calibrated the laser gun," and in

the absence of such evidence "the State is not required to show that the laser gun 'had been properly calibrated by the manufacturer's servicing representative.'" (Quoting Manewa, 115 Hawaiʻi at 354, 167 P.3d at 347.)

VI.

A.

Petitioner argues that "[a]bsent [the officer's] assumption that LTI might have provided the manual . . . there is nothing in evidence to support that [the tests used to verify the gun's accuracy] were recommended by LTI." We conclude that in this respect, admission of the officer's testimony as evidence was wrong. See Kealoha v. County of Hawaiʻi, 74 Haw. 308, 319-20, 844 P.2d 670, 676 (1993) ("When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.").[13]

[13] This court has not addressed whether the court's finding that a witness has personal knowledge pursuant to HRE Rule 602 is reviewed under the right/wrong standard or the abuse of discretion standard. The right/wrong standard applies to questions where "there could only be one correct answer" such as "whether the evidence had simply failed to fulfill the applicable requirements for admission." Kealoha, 74 Haw. at 319, 844 P.2d at 676; see also State v. Moore 82 Hawaiʻi 202, 217, 921 P.2d 122, 137 (1996) (holding that, regarding hearsay exceptions, "the appropriate standard for appellate review is the right/wrong standard," because "with respect to the exceptions, the only question for the trial court is whether the specific requirements of the rule were met"). However, the abuse of discretion standard applies to questions that require the court to make a "judgment call" such as those that require balancing on the part of the trial court. Kealoha, 74 Haw. at 315, 844 P.2d at 674 (holding that HRE Rule 403 questions are subject to the abuse of discretion standard because they require a "delicate balance between probative value and prejudicial effect").

As with the hearsay exceptions, the only question for the court under Rule 602 is whether or not a witness has personal knowledge of the matter he or she testifies to, i.e., "whether or not the specific requirements of the rule were met." Moore, 82 Hawaiʻi at 217, 921 P.2d at 137. Hence, where the court's ruling regarding the witness' personal knowledge is concerned, "the appropriate standard for appellate review is the right/wrong standard." Id.

HRE Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The Commentary to HRE Rule 602 explains that, "'Personal knowledge,' for purposes of this rule, means that the witness perceived the event about which he testifies." In other words, witnesses may not testify based on "guesswork" or "speculation," such as when the witness concludes that a fact "must have" been true. See Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 602-1[5] (2012) (hereinafter Bowman, HRE Manual).

Here, the officer's testimony that the manual was provided by LTI was based on "guesswork" and "speculation." As he acknowledged, the officer did not "know personally whether anybody from LTI provided [the] manual[]," but "assumed that somebody from LTI must have provided it." The only individuals present during the officer's training were HPD officers. The manual was provided by "the traffic division instructors that were training [the officer]." Thus, "nobody from LTI gave [him] the manual." The officer recounted that he had "[n]ever met a representative from [LTI]." Finally, the officer confirmed that he "[didn't] know personally whether anybody from LTI provided these manuals to [HPD]." In other words, the officer had no personal knowledge that the manual was provided by LTI, or was an LTI manual.

Additionally, the officer's testimony regarding the manual's appearance did not connect the manual to LTI. "[T]he only thing that [he could] recall about the manual" was that it said "Operator's Manual" on its cover and that it "may have a[n] HPD logo." Although the officer did state that the manual's cover read "LTI 20-20 Operator's Manual," this indicated only that the manual concerned the laser gun designated "LTI 20-20," and not that LTI produced the manual. In sum, the officer provided no testimony as to the manual itself that would suggest that it was from LTI.

Finally, the officer conceded that he did not have personal knowledge regarding who wrote or compiled the manual. The officer did not know "if the manual . . . that may or may not be stamped with the [HPD] logo was [sic] written or compiled by the [HPD]." He did not "know the person who wrote the manual." The officer had no verifiable basis for concluding that the manual was provided by LTI.[14]

Thus, nothing in evidence was "sufficient to support a finding" that the officer had personal knowledge of the fact as testified to on direct, see HRE Rule 602, that the manual was "provided by [LTI], the manufacturer of [the] LTI 20-20." Respondent itself noted that the officer's statement on direct examination was based on the inference that the manual "must

[14] As noted before, none of the manuals produced in discovery were admitted into evidence or linked to the officer's testimony. Although Respondent allowed Petitioner to review three separate manuals in discovery, as noted, the record is silent as to the contents of the manuals.

have" been provided by LTI. Rule 602 prohibits precisely such an inference. That inference, without any basis in fact, must be categorized as guesswork. See Bowman, HRE Manual at § 602-1[5] (noting that the personal knowledge rule is violated when a witness concludes that a fact "musta," i.e, "must have," been true). Because the officer lacked personal knowledge that the manual was "provided by" LTI, there was no evidence establishing that the four tests performed by the officer were recommended by the manufacturer. Therefore, the court erred in concluding that the four tests were recommended by the manufacturer.

B.

Respondent apparently maintains that even without the officer's testimony, the evidence supported the conclusion that the manual was provided by LTI, essentially because the laser gun was manufactured by LTI and the cover of the manual read "LTI 20-20 Operator's Manual." Contrary to the court's finding, there was no evidence connecting LTI to the manual itself. As discussed supra, the fact that "LTI" was in the manual's title indicated only that the manual concerned the laser designated "LTI 20-20," and not that LTI produced the manual. Evidence regarding the manual -- the officer's testimony that the HPD logo was on the cover and that the manual was provided to him by an HPD officer -- implied that the manual was compiled, not by LTI, but by the HPD. Hence, the court erred by concluding that the manual was provided by LTI.

C.

Respondent's failure to link the manual to the laser gun's manufacturer resolves Petitioner's contention that Respondent failed to satisfy the first prong of Assaye. Petitioner's arguments regarding the hearsay rule and best evidence rule were not raised in Petitioner's Opening Brief before the ICA, and are therefore waived. Hawaiʻi Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued may be deemed waived.").

VII.

A.

Petitioner also asserts that Respondent failed to satisfy the second prong of Assaye, which requires the State to prove that an officer's training in the operation of a laser conformed to the manufacturer's requirements. 121 Hawaiʻi at 215, 216 P.3d at 1238. To recount, Respondent argues as it did before the ICA that Assaye does not require the State to set forth the manufacturer's requirements for officer training, but instead "implicitly teaches that it is difficult to discern how anyone can use the laser gun properly without any training or instruction." (Emphasis in original.) The officer's testimony that he received eight hours of training, according to Respondent, met that requirement. To the contrary, Assaye held that the State must establish that an officer's training

satisfied the laser manufacturer's requirements. 121 Hawaiʻi at 215, 216 P.3d at 1238.

Logically, this requires a showing as to both (1) the training requirements set forth by the manufacturer, and (2) the training actually received by the operator of the laser gun. We have said before that this showing cannot be met simply by describing the officer's training. See id. at 215-16, 216 P.3d at 1238-39 (holding that although an officer testified that he was "certified" after taking a "four hour class," the State "ha[d] not shown whether the training that [the officer] received [met] the requirements of the manufacturer of the laser gun") (internal quotations omitted). Consequently, Respondent could not demonstrate that the officer's training met the manufacturer's requirements because the only evidence of those requirements was the manual, and there was no evidence linking the manual to LTI.

B.

Respondent also asserts that because in closing argument Petitioner "conceded that [the officer] testified on direct [examination] that he was trained in accordance with the manufacturer's specification," and that "the specification was derived from the manual itself," Petitioner cannot now argue that [the officer's] training was insufficient.[15] But read in its

[15] In closing argument, Petitioner argued that

> [d]efense will concede that the officer testified on direct that he was trained in accordance with the manufacturer's

entirety, Petitioner's closing argument demonstrates that Respondent's contention is incorrect. Petitioner argued that on cross-examination, the officer admitted that although he "testified on direct examination that he was trained in accordance with the manual that LTI provided," that "was just based on [his] assumption that somebody from LTI must have provided it." Thus, Petitioner's "concession" did not preclude the argument that the officer had only speculated as to who provided the manual upon which his training was based.[16]

VIII.

According to Petitioner, the concurring opinion in Assaye correctly interprets Manewa, and under the concurrence,

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> specification. Defense did ask to voir dire at that point, however, also acknowledge[d] that it could be done on cross-examination subject to re-objection. And I believe on cross-examination, defense was able to successfully elicit that while the officer stated the words he was trained on the manufacturer's specification in accordance [sic], he had no personal knowledge as to whether or not he actually was.

(Emphases added.)

[16] The record here does not reveal any prosecution in which the State has established that the four tests referred to and the training requirements are set forth in a manual that has been verified by the manufacturer and provided to the State by the manufacturer. See, e.g., State v. Eid, 126 Hawaiʻi 430, 444-45, 227 P.3d 1197, 1211-12 (2012) (noting that in a "test case" there was "extensive evidence, including lengthy testimony from master certified automobile technicians . . . that the procedures and equipment used to conduct the [speed checks]" gave "adequate assurances that the . . . speed checks were reliable"); see also Assaye, 121 Hawaiʻi at 213-15, 216 P.3d at 1236-38 (requiring that accuracy of a laser gun must be "adduced through evidence that the procedures are recommended by the manufacturer," that "an officer's training in the operation of a laser gun meets the requirements indicated by the manufacturer."); In re Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection Sys., 314 N.J. Super. 233, 714 A.2d 381, 391-92 (1998)) ("the admissibility of speed readings produced by the LTI Marksman 20-20 Laser Speed Detection System shall be subject to certain rules, which includes the requirement that pre-operational checking procedures recommended by the manufacturer of the laser speed detector shall be shown to have been made in each case") (brackets and internal quotation marks omitted)).

Respondent must also demonstrate that the laser gun was serviced by a representative of the manufacturer to lay an adequate foundation for the speed reading taken from the laser gun. In this case, there is no clear evidence in the record with respect to the periodic servicing of the laser guns. Petitioner asked the officer whether the laser gun was under warranty and required periodic software updates, but he replied that he was "unaware" of any such requirement. Thus, Petitioner's question regarding Manewa need not be resolved here.

IX.

Based on the foregoing, the August 22, 2012 judgment of the ICA, which affirmed the court's August 23, 2011 Notice of Entry of Judgment and/or Order and Plea/Judgment and the court's aforesaid judgment are vacated and the case remanded to the court with instructions to dismiss the case without prejudice.

Craig W. Jerome,
(James A. Tabe on
the application),
for petitioner

Brandon H. Ito,
for respondent

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack