IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

HENRY POMROY, Petitioner/Defendant-Appellant.

SCWC-29688

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29688; Report No. C06030300 (3P2-07-00738))

JANUARY 31, 2014

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

Defendant Henry Pomroy asserts that (1) the district court erred in failing to provide him with a prior-to-trial advisement regarding his right to testify, as required by State v. Lewis, 94 Hawaiʻi 292, 12 P.3d 1233 (2000); (2) the colloquy that the court conducted during trial was defective under Tachibana v. State, 79 Hawaiʻi 226, 900 P.2d 1293 (1995); and (3) there was insufficient evidence to support his conviction. For

the reasons set forth below, I would affirm Pomroy's conviction. Accordingly, I respectfully dissent.

Although the district court erred in failing to advise Pomroy before trial of his right to testify, see Lewis, 94 Hawaiʻi at 297, 12 P.3d at 1238, Pomroy has not demonstrated that the lack of such an advisement actually prejudiced him. Pomroy argues that the lack of that advisement denied him the opportunity to reflect, during the course of the trial, on whether he wanted to testify. However, this deficiency would be true for every defendant, and thus cannot constitute the kind of actual prejudice required by Lewis. 94 Hawaiʻi at 297, 12 P.3d at 1238.

With regard to the colloquy conducted by the court at the close of Pomroy's case, that colloquy was sufficient to establish that Pomroy knowingly, intelligently and voluntarily waived his right to testify. It is true, as the majority observes, that the colloquy was not perfect in every respect. The district court did not expressly advise Pomroy that he had the right not to testify. However, that principle was implicit in the court's discussion of the consequences that would follow "if you choose not to testify" (emphasis added), and any deficiency in this regard would seem immaterial given that Pomroy did not in fact take the stand.

The court also did not explicitly advise Pomroy that no one could prevent him from testifying. However, that principle was implicit in the court's statement that the decision to testify "is yours and yours alone," and there is nothing in the record to suggest that the court's failure to be more explicit had any effect on Pomroy's decision.

The district court also did not ask Pomroy, each time that it described to him an aspect of the right to testify, whether he understood what he was being told. Instead, the court waited until the end of its description and then asked Pomroy, "You understood that?" The majority characterizes this as a failure to engage in a "true exchange" with Pomroy. While it might be better practice to question a defendant regarding his or her understanding of each aspect of the right individually, there is nothing to suggest that Pomroy was somehow confused by the approach taken by the court. To the contrary, the record shows that Pomroy was actively engaged in the discussion and not reluctant to engage in a "true exchange" with the court, as evidenced by his volunteering his rationale for not testifying, i.e., that "I have already said what has happened."

At that point, the district court recognized Pomroy's error in assuming that his statement to the police was in evidence, pointed the error out to him without advising him what he should do, and then allowed him to consult with counsel. In

my view, those actions were appropriate and sensible. However, the majority implicitly criticizes them, and suggests that "[i]t may have been preferable for the district court not to comment on the state of the evidence," but rather to simply stick to the script suggested by Tachibana. Majority Opinion at 19 n.6. Respectfully, I cannot see how the interests of justice are furthered by suggesting that the court should ignore an obvious misunderstanding by the defendant, while criticizing the court for failing to engage in a "true exchange" with the defendant by not asking for a yes or no answer with regard to each aspect of the right to testify identified in Tachibana. Of course, there are risks whenever a court departs from a set script; trial judges should be aware of those risks and avoid pressuring the defendant to testify or not. But, in my view, there is a greater risk in suggesting that the court not respond to an obvious misunderstanding by the defendant.

After Pomroy spoke with his attorney, the following exchange occurred:

> THE COURT: Alright.
>
> THE DEFENDANT: I don't need any testimony I guess.
>
> THE COURT: Your choice not to testify?
>
> THE DEFENDANT: Yes, ma'am.

Pomroy seizes on the phrase "I guess" to suggest that he still did not understand his rights even after consulting with counsel, a position which the majority accepts. Majority Opinion

at 18-19. Respectfully, I cannot agree that this comment demonstrates continued confusion by Pomroy. The district court could observe Pomroy's demeanor and assess the inflection in his voice, which we cannot do from a cold record, and there is no reason to assume that the court would have ignored uncertainty on Pomroy's part if that is how he presented to the court. Indeed, the district court's engagement with Pomroy regarding the state of the evidence suggests the opposite. Moreover, Pomroy had consulted with his attorney, and then answered affirmatively to the follow up question, "Your choice not to testify?"

Given all these circumstances, the record sufficiently establishes that Pomroy's waiver of his right to testify was knowing, intelligent and voluntary. That determination, after all, is what this entire process is about--or at least as the process was initially envisioned when adopted by this court in Tachibana. 79 Hawaiʻi at 237, 900 P.2d at 1304 ("In the instant case, the trial court did not at any time conduct a colloquy with Tachibana to ensure that he was aware of his right to testify and that he knowingly and voluntarily waived that right."). Although we acknowledged that fundamental position in our subsequent decision in Lewis, 94 Hawaiʻi at 296, 12 P.3d at 1237 ("there is nothing to indicate here that Petitioner's decision to testify was anything other than voluntarily, knowingly, and intelligently made"), we also identified a second "objective" of the Tachibana

colloquy, "the minimization of post-conviction disputes over the actual waiver of the right to testify," id. at 295, 12 P.3d at 1236. Respectfully, with today's decision, that second "objective" has become the tail that wags the dog, and the lines between what is required by the constitution and what is required in an effort to reduce post-conviction disputes are further blurred.[1]

Lastly, with regard to Pomroy's third argument, there was sufficient evidence to support the conviction, when viewed in the light most favorable to the prosecution. State v. Bailey, 126 Hawaiʻi 383, 398-99, 271 P.3d 1142, 1157-58 (2012) ("Evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction[.]" (brackets omitted) (quoting State v. Kalaola, 124 Hawaiʻi 43, 49, 237 P.3d 1109, 1115 (2010)).

Accordingly, I would affirm the judgment of the Intermediate Court of Appeals.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[1] Indeed, by suggesting that a trial court's assessment of a defendant's understanding of his right to testify is not relevant, the majority opinion elevates the goal of creating a record for appellate review over the original purpose of the colloquy, that is, ensuring that the defendant's waiver was knowingly, voluntarily and intelligently given. See majority opinion at 19-20 n.7.