IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

VICENTE L. DOMUT, also known as VICENTE DUMOT,
Petitioner/Defendant-Appellant

SCWC-16-0000402

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000402; CASE NOS. 2DTA-15-01298 and 2DTC-14-004621)

JANUARY 31, 2020

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART
AND DISSENTING IN PART, WITH WHOM NAKAYAMA, J., JOINS

The Majority vacates Vicente Domut's convictions based on plain error for a purportedly insufficient jury trial waiver colloquy. I respectfully disagree with the Majority's conclusion

that the district court's colloquy was insufficient.[1] I would thus affirm Domut's convictions.

The Majority asserts that because the district court did not specify which of the two charges carried a right to a jury trial, it "did not inform [Domut] that he was entitled to a jury trial on the [driving without a license (DWOL)] charge." Majority at 5. This logic equates a failure to say the name of the charge that is subject to a jury trial with a failure to inform the defendant of the right to a jury trial at all - a contention for which the Majority cites no authority.

The Majority also finds it problematic that the district court's statement incorrectly implied that Domut would have a jury trial on only one of the charges. Majority at 25. In all likelihood, the Majority says, had Domut not waived his right to a jury trial on the DWOL charge, he would have received a jury trial for both charges, DWOL and NMVI. This is because Hawai'i Revised Statutes (HRS) § 701-109(2) states that, generally, a defendant shall not have separate trials for charges arising out of the same incident. The Majority concludes that the trial court's statement was therefore "insufficient, confusing, and incorrect." Majority at 26.

[1] I agree that Domut failed to raise the good-faith borrower defense to the no motor vehicle insurance (NMVI) charge, and therefore join the Majority as to that part.

The Majority's argument is based on an incorrect premise: that there can only be one finder of fact in a trial. Domut could have had a single trial with two different factfinders if he had declined to waive his jury trial right. Many state courts have approved of the practice of having a simultaneous bench and jury trial in a case like Domut's. E.g., State v. Knight, 835 A.2d 47, 52-53 (Conn. 2003) (affirming guilty verdict of the court and not-guilty verdict of the jury on separate counts after joint bench and jury trial); Copening v. United States, 353 A.2d 305, 310 (D.C. Ct. App. 1976) (same);[2] Commonwealth v. States, 938 A.2d 1016, 1024-25 (Pa. 2007) (approving of the practice of simultaneous bench and jury trials, noting, "[w]hile we have not had occasion to consider this unusual trial procedure, it may not be as unusual as we think"); cf. People v. Almeter, 912 N.E.2d 41, 43 (N.Y. 2009) (finding that trial court should have timely informed defendant that he would have a simultaneous jury and bench trial on separate charges). Indeed, the Hawai'i Rules of Penal Procedure and our

[2] After Copening, the D.C. Code was amended to provide that "[i]f a defendant in a criminal case is charged with 2 or more offenses and the offenses include at least one jury demandable offense and one non-jury demandable offense, the trial for all offenses charged against that defendant shall be by jury unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto." Davis v. United States, 984 A.2d 1255, 1259 n.5 (D.C. Ct. App. 2009) (quoting D.C. Code § 16-705(b-1) (2009 Supp.)). Copening has thus been superseded by statute, but its reasoning nonetheless remains valid.

caselaw do not appear to foreclose the possibility of having a simultaneous bench and jury trial in a case like Domut's. Thus, Domut could have had a single trial with the verdict on the DWOL charge rendered by the jury and the NMVI charge by the judge. In this scenario, what the Majority calls the district court's implication - that Domut would have a jury trial on only one of the charges - would be correct.

Moreover, HRS § 701-109(3) states that, upon "application of the prosecuting attorney or the defendant," the court may order separate trials if justice so requires. Thus, if Domut did not waive a jury trial and the court declined to utilize the joint bench and jury trial procedure outlined in the preceding paragraphs, it is also possible that the court would have ordered separate trials. Under this alternative scenario, the implication that Domut would have had a jury trial on only one of the charges would also have been correct.

Thus, the trial court's statement that Domut had the right to a trial by jury on "one of the charges" was absolutely correct. Domut could not have invoked a right to a trial by jury for the NMVI charge. Regardless of whether he had one trial or two, Domut's jury trial right inured to only one of the two offenses with which he was charged.

The Majority contends that this case is similar to

State v. Carlton, -- P.3d ----, 2019 WL 6271671 (Nov. 25, 2019). Majority at 26 n.17. In Carlton, we held that the sentencing court erred when it did not inform the defendant which charge it was sentencing him on before it did so. 2019 WL 6271671, at *8. The surface-level comparison to Domut's case fails upon further investigation. In Carlton, it mattered which charge the defendant was being sentenced on because his right of allocution entitled him to make a statement to the court about relevant facts he felt should affect the sentence imposed. Id. at *8 ("Since Carlton did not know the offense he was to be sentenced on, he did not know which of his actions he needed to address and possibly provide explanation, mitigation, or take responsibility for."). Conversely, in Domut's case, the specific charge that entitled him to a jury trial was not plausibly relevant to his decision-making process about whether to waive his jury trial right. Carlton is therefore inapplicable.

Ultimately, the Majority's plain-error reversal of Domut's conviction is inconsistent with the underlying purpose of our jury trial waiver colloquy jurisprudence. Trial courts in our state have a "'serious and weighty responsibility'" to ensure that, where a defendant waives the right to a jury trial, "the waiver was knowingly, intelligently, and voluntarily given." State v. Baker, 132 Hawai'i 1, 6, 319 P.3d 1009, 1014 (2014)

(quoting United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)). Numerous cases from this court have instructed trial courts to perform colloquies with defendants to ensure that, when a defendant waives the right to a jury trial, the waiver is knowing, intelligent, and voluntary. See, e.g., id. (citing State v. Gomez-Lobato, 130 Hawai'i 465, 469, 312 P.3d 897, 901 (2013); State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993); State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000); State v. Sprattling, 99 Hawai'i 312, 321, 55 P.3d 276, 285 (2002)). We have stated:

> The colloquy in open court informing a defendant of his right to a jury trial at arraignment serves several purposes: (1) it more effectively [e]nsures voluntary, knowing and intelligent waivers; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal; and (3) it emphasizes to the defendant the seriousness of the decision.

Friedman, 93 Hawai'i at 68, 996 P.2d at 273 (internal quotation marks, alterations, and citations omitted).

Consistent with the requirement that a defendant's waiver be knowing, intelligent, and voluntary, a sufficient colloquy thus allows the judge to "ascertain[] the defendant's understanding of the proceedings" and attendant rights. See Baker, 132 Hawai'i at 8, 319 P.3d at 1016 (Acoba, J., concurring) (emphasis, citation, and internal quotation marks omitted). This court has declined to adopt a bright-line rule as to the required

elements of a jury trial waiver colloquy. Friedman, 93 Hawai'i at 69, 996 P.2d at 274. But we have found that a defendant must understand what a jury trial is in order to waive the right to it. Id. at 70 (finding a valid waiver where the defendant "articulated to the trial court that '[a] jury trial is where the outcome of . . . whether it's guilty or not is to be determined by 12 adults instead of a judge.'" (alterations in original)).

In this case, the fact that Domut was not told the name of the one charge that carried with it a right to trial by jury does not implicate the purposes of the jury trial colloquy. In other words, the most important fact that Domut must understand in order to adequately waive his right was that he had a right to a jury trial. As part of this, it was essential that Domut understood what a jury trial is - and the district court adequately explained this. Knowing the name of the charge that carried the jury trial right could not plausibly have affected the decision to waive it.

Moreover, Domut has never argued that his jury trial waiver colloquy was insufficient. "This court has held that it 'will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v.

Miller, 122 Hawai'i 92, 100, 223 P.3d 157, 165 (2010) (quoting State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998)) (emphasis in original). Yet "the 'power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.'" State v. Fields, 115 Hawai'i 503, 529, 168 P.3d 955, 981 (2007) (quoting State v. Rodrigues, 113 Hawai'i 41, 47, 147 P.3d 825, 831 (2006) (other citation history omitted)). In this case, because the jury trial waiver colloquy was sufficient, I believe that the Majority's invocation of the plain error doctrine is incorrect.

For the foregoing reasons, I would affirm Domut's convictions. I therefore concur in part and dissent in part from the majority opinion.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama