IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

MAXWELL F. JONES,
Petitioner/Defendant-Appellant.

SCWC-16-0000345

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000345; CASE NO. 1DTA-15-03477)

JUNE 30, 2020

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

The majority today upends more than twenty years of precedent by holding that police officers, whether testifying as lay witnesses or experts, cannot opine as to whether a defendant was intoxicated. This categorical ban sounds not in the Hawai'i Rules of Evidence (HRE), statute, or another legal principle, but in hypothetical concerns arising in hypothetical cases. I

respectfully dissent as to Part IV.D.[1]

In State v. Toyomura, 80 Hawai'i 8, 904 P.2d 893 (1995), this court considered when an officer could offer an opinion about a defendant's intoxication based on the standardized field sobriety tests (SFSTs). Adopting the analysis of the Intermediate Court of Appeals (ICA) in State v. Nishi, 9 Haw. App. 516, 852 P.2d 476 (1993), we concluded that "a police officer may not testify, without proper foundation, about his opinion about whether a . . . defendant is intoxicated based on [SFSTs.]" Toyomura, 80 Hawai'i at 26, 904 P.2d at 911 (quoting Nishi, 9 Haw. App. at 523, 852 P.2d at 480). We reasoned that the State must elicit testimony that the SFSTs

"were elements of the [police department's] official [SFST] protocol," that "there was any authoritatively established relationship between the manner of performance of these procedures and a person's degree of intoxication," and that the officer "had received any specific training in the administration of the procedures and the 'grading' of their results." Toyomura, 80 Hawai'i at 26, 904 P.2d at 911. Thus, Toyomura contemplated and permitted an officer testifying as an expert to opine on intoxication based on the SFSTs. The foundation requirements of Toyomura are consistent with general

[1] I otherwise concur.

principles of expert testimony under HRE 702.[2] State v. Metcalfe, 129 Hawai'i 206, 227, 297 P.3d 1062, 1083 (2013) ("In order to provide expert testimony under HRE Rule 702: (1) the witness must be qualified by knowledge, skill, experience, training or education; (2) the testimony must have the capacity to assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) the expert's analysis must meet a threshold level of reliability and trustworthiness."). I see no reason to depart from Toyomura and disagree with the majority's decision to overturn it.

Toyomura also recognized that a lay witness,[3] including an officer testifying as such, can form an opinion as to whether someone they observed is intoxicated based on information besides the SFSTs, and Hawai'i courts have long followed this

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[2] HRE Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

[3] HRE Rule 701 governs opinion testimony by lay witnesses and provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

rule. Toyomura, 80 Hawai'i at 25–27, 904 P.2d at 910–12 ("[A]ny lay person, including a police officer, can have an opinion regarding sobriety." (ellipsis, citation, and internal quotation marks omitted)); see also State v. Bebb, 99 Hawai'i 213, 217, 53 P.3d 1198, 1202 (App. 2001) (recognizing that "a police officer, based on his or her 'lay' observations, can have a 'lay' opinion that an arrestee is not sober" (citation omitted)).

We reaffirmed the same principle in State v. Vliet, 91 Hawai'i 288, 983 P.2d 189 (1999). In Vliet, this court concluded that the officer's testimony that the defendant "did poorly, he would be driving poorly too" and "would have been over the legal limit" constituted impermissible legal conclusions, akin to telling the finder of fact what result to reach. Id. at 298, 983 P.2d at 199. But although the defendant challenged the State's question about the defendant's "state of sobriety" on the same grounds, the court was explicit that the question was permissible because "any lay person, including a police officer, can have an opinion regarding sobriety." Id. (ellipsis omitted) (citing Toyomura, 80 Hawai'i at 26–27, 904 P.2d at 911–12). The majority glosses over this holding and incorrectly folds in "intoxication" with the "legal conclusion" testimony Vliet prohibited. Majority at 51–52. Thus, although the majority purports to be applying Vliet, it effectively overrules it.

While the majority contends that "[t]here is no real

qualitative distinction between the testimony found improper in Vliet and . . . testimony that a driver was 'intoxicated,'" majority at 51, Vliet already determined the permissible limits of this kind of testimony and, in my view, did so correctly. The line drawn by Vliet makes sense as it reflects what the State must prove to establish guilt of operating a vehicle under the influence of an intoxicant (OVUII). "Intoxication" is not a legal term of art for purposes of OVUII nor an element of any OVUII offense as defined by Hawai'i Revised Statutes (HRS) § 291E-61(a) (2007):

> A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
>
> (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
>
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

Compare the statute to the testimony barred in Vliet: whether the driver "would be driving poorly" and was "over the legal limit" reflect legal conclusions as to the defendant's culpability, as the statute prohibits driving while unable to "care for the person and guard against casualty" and, in the alternative, driving with a certain blood alcohol content. In

other words, to opine that the defendant "would be driving poorly" and was "over the legal limit" is to tell the finder of fact whether a driver was illegally operating a vehicle under the influence of an intoxicant. To opine that he was "intoxicated" may "embrace[] an ultimate issue," permitted under HRE 704,[4] but it does not tell the factfinder whether the defendant is guilty of OVUII and does not improperly encroach the province of the factfinder. In fact, opinions on "intoxication" specifically are a well-recognized example of an "ultimate issue" that will usually be "helpful" to the

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[4] HRE Rule 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Per the commentary to the rule:

> The abolition of the "ultimate issue" rule does not leave the court without safeguards. . . . [U]nder the limitations of Rules 701 and 702 supra, opinion testimony must be helpful to the trier of fact. . . . [U]nder Rules 403 and 703 supra, the court has discretion to exclude the testimony entirely if it is prejudicial, confusing, misleading, unnecessarily cumulative, or lacking in trustworthiness. As the Advisory Committee's Note to Fed. R. Evid. 704 puts it:
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> > These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have the capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

HRE Rule 704 cmt.

factfinder within the meaning of the rules.[5] 1 Kenneth S. Broun et al., McCormick on Evidence § 11 (8th ed. 2020) (noting that opinions on intoxication were traditionally admitted under the "helpfulness/convenience" standard, which the Rules of Evidence codify); 6 Michael H. Graham, Handbook of Fed. Evidence, § 704:1 (8th ed. 2019) ("[T]estimony as to such matters as intoxication . . . will normally be admitted [under Rule 704].").

Vliet and Toyomura reflect the prevailing view in both federal and state courts that testimony regarding a defendant's intoxication, even in an OVUII or equivalent case, falls well within the bounds of opinion testimony that HRE Rules 701, 702, and 704 permit. State v. Abrigo, 144 Hawai'i 491, 500 n.14, 445 P.3d 72, 81 n.14 (2019) ("Federal cases interpreting the Federal Rules of Evidence (FRE) serve as 'persuasive authority in interpreting similar provisions of the [HRE].'" (alteration in original) (citation omitted)). "There is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible if it meets the . . . criteria [of Rule 701]." United States v. Horn, 185 F. Supp. 2d 530, 560 (D.

[5] Indeed, the commentary to the Federal Rules of Evidence (FRE) Rule 704 explained that the common law rule forbade testimony on an ultimate issue, as now expressly permitted by FRE (and HRE) Rule 704. But even under the old rule – described as "unduly restrictive, difficult of application, and generally serv[ing] only to deprive the trier of fact of useful information" – the common law often permitted opinion testimony on "such matters as intoxication" as a "concession[] to need." FRE Rule 704 cmt.

Md. 2002) (collecting cases).[6] Numerous other federal and state courts agree that, with adequate foundation, an expert witness may opine on intoxication based on scientific or technical signs (here, the SFSTs) as well. See, e.g., United State v. Barbee, 968 F.2d 1026, 1032 (10th Cir. 1992) (permitting an expert in drug use to opine on whether the defendant appeared to be on drugs); State v. Pjura, 789 A.2d 1124, 1130 (Conn. App. Ct. 2002) (holding that an officer can offer an expert opinion about their "interpretation of field tests" including whether the defendant was intoxicated); State v. Rambo, 279 P.3d 361, 366 (Or. Ct. App. 2012) ("Based on such training and experience, police officers can — and frequently do — testify as to their [expert] opinions of whether an individual was under the influence of alcohol or a controlled substance."); City of Seattle v. Heatley, 854 P.2d 658, 661–62 (Wash. Ct. App. 1993) ("It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another

[6] For additional examples of this well-established principle, see, e.g., People v. Souva, 141 P.3d 845, 850 (Colo. App. 2005) ("Colorado law is well established that once the proper foundation has been laid, a lay witness may express an opinion as to whether a defendant was under the influence of alcohol."); Williams v. State, 43 N.E.3d 578, 581–82 (Ind. 2015) (reaffirming cases that established testimony about a defendant's intoxication does not invade the province of the jury); State v. Bealor, 902 A.2d 226, 233 (N.J. 2006) ("Since 1924, because sobriety and intoxication are matters of common observation and knowledge, New Jersey has permitted the use of lay opinion testimony to establish alcohol intoxication."); State v. Sarkisian-Kennedy, 227 A.3d 1007, 1016 (Vt. 2020) ("This Court has long recognized that, where alcohol is involved[,] a lay person, on the basis of his personal observations, is competent to give his opinion as to the sobriety of an individual, because it takes no special scientific knowledge or training to recognize intoxication." (brackets, ellipsis, and citation omitted)).

person where the witness has had an opportunity to observe the affected person. . . . [I]f a lay witness may express an opinion regarding the sobriety of another, there is no logic to limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons."). The majority's decision not only unsettles our own law, but markedly departs from that of other jurisdictions.

Besides HRE Rule 704 – which expressly permits this testimony – the majority also points to HRE Rules 403, 701, and 702 as potentially troublesome for opinion testimony regarding intoxication. HRE 403 poses "significant . . . concerns" to the majority because the "evolving" definition of the term "intoxicated" might cause confusion. Majority at 52 n.33. However, HRE Rule 403 is a poor vehicle for banning this testimony, as the rule is designed for case-by-case application in the trial courts. See State v. McDonnell, 141 Hawai'i 280, 293, 409 P.3d 684, 697 (2017) ("The determination of the admissibility of relevant evidence under HRE Rule 403 is eminently suited to the trial court's exercise of its discretion because it requires a 'cost-benefit calculus' and a 'delicate balance between probative value and prejudicial effect.'" (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996)); United States v. Gomez, 763 F.3d 845, 857

(7th Cir. 2014) ("Because each case is unique, Rule 403 balancing is a highly context-specific inquiry; there are few categorical rules."). This case falls far beyond the pale of what has justified a categorical Rule 403 bar;[7] the new rule also prohibits evidence with less of a potentially unfair prejudicial effect than classes of evidence we have determined warrant a case-by-case HRE Rule 403 evaluation.[8]

In any event, banning the use of the term because it may "mean different things to different people" is baffling. Majority at 52 n.33. Words are not used in a vacuum; if its meaning is unclear when used in a given case, the opposing party

[7] For instance, contrast the majority's rule to that established in Old Chief v. United States, 519 U.S. 172 (1997). In Old Chief, the United States Supreme Court held that a district court abused its discretion by admitting the record of a prior judgment, which was used to establish the prior conviction element of a felon in possession charge, when the defendant agreed to stipulate to the element. Id. at 191–92. In light of the stipulation, the probative value of the evidence was scant. Id. at 186. And the prejudicial effect of admitting the details of a past crime is substantial, as it may induce the jury to base its verdict on a defendant's propensity for crime - indeed, the FRE and HRE codify a prohibition on prior bad act evidence for this very reason. Id. at 180–81. Old Chief demonstrates that Rule 403 justifies a categorical ban only on rare occasions: when the prejudicial effect of the evidence is substantial and well-established, and its probative value is virtually nil. Even then, the Court established what it described as "the general rule," leaving room for discretion in exceptional cases. Id. at 191–92.

[8] In State v. Martin, 146 Hawai'i 365, --, -- n.20, 463 P.3d 1022, 1040, 1041 n.20 (2020), for example, we explained that the history of popular understandings of suicide presents the risk of unfair prejudice when evidence of a defendant's suicide attempt is introduced. We nonetheless held it was admissible for certain purposes provided the State laid the requisite foundation, and we reminded courts to "conduct an HRE Rule 403 balancing analysis" on a case-by-case basis. Id. Likewise, in State v. McDonnell, we noted the risks of prejudice inherent in generalized testimony about the dynamics of a sexual abuser-victim relationship but held that such testimony is admissible if it satisfied HRE Rule 403. 141 Hawai'i at 297, 297 n.14, 409 P.3d at 701, 701 n.14.

may object or cross-examine to probe for additional clarity. This argument could be true of any number of words spoken frequently on the stand in our courts: should we likewise prohibit testimony that a defendant was "emotional" because the term could refer to alternatively sadness, anger, or anguish? Do these "evolving" definitions render the term so prejudicial that it should be banned outright? Of course not. The Rules of Evidence and common sense compel a more grounded solution. And this reasoning also ignores the probative value of this testimony in favor of an inflated portrayal of its prejudicial effect; in a case concerning OVUII, lay or expert opinion testimony as to a defendant's intoxication will usually be highly probative of key issues. If it is "needless" and "cumulative," or otherwise unfairly confusing such that its probative value is "substantially outweighed," then it may be excluded in an individual case. Majority at 53 n.33. But the majority's analysis elides the fact that HRE Rule 403 does not require that any prejudicial evidence be excluded – all evidence is inherently prejudicial to the person against whom it is admitted. Only when evidence presents "danger of unfair prejudice" that "substantially outweigh[s]" its probative value does HRE Rule 403 warrant exclusion. (Emphases added.) While that will no doubt sometimes be the case when intoxication testimony is introduced, the majority has not and cannot

establish that will always be the case.

The majority also points to the risk of prejudice arising from an "expert in lay witness clothing," majority at 49 n.32, which captures the concern that the strictures of HRE Rule 702 can be evaded by presenting a lay witness. This issue is hardly unique to intoxication testimony; the case on which the majority relies to point out this challenge considered "opinion [testimony] on the time frame in which [the defendant's] gun had been fired," concluding that such testimony required "scientific, technical, or other specialized knowledge" such that it fell within HRE Rule 702. State v. Torres, 122 Hawai'i 2, 29, 222 P.3d 409, 436 (App. 2009). Our existing law already provides for this problem: we require expert foundation when an officer bases their opinion as to intoxication on the SFSTs precisely because that inference requires "scientific, technical, or other specialized knowledge" under HRE Rule 702. State v. Ito, 90 Hawai'i 225, 236, 978 P.2d 191, 202 (App. 1999).

But even in that case, the majority fears that when an officer testifies in both capacities, lay and expert, the lay testimony may be imbued with "unmerited credibility." Majority at 49 n.32 (quoting United States v. Sandoval, 680 F. App'x 713, 718–19 (10th Cir. 2017)). The majority's logic is faulty: at best, this argument could justify prohibiting either lay opinion testimony or expert testimony about intoxication, or requiring

to State to choose one in a given case, either of which would resolve the issue entirely. But the unpublished United States Court of Appeals for the Tenth Circuit opinion on which the majority relies also demonstrates that there is another obvious and appropriate solution for this quandary, one that falls short of a blanket prohibition of otherwise-admissible evidence: "some circuits have encouraged district courts to take precautionary measures, including warning the jury about the witness's dual roles or bifurcating the questioning to clearly demarcate lay and expert testimony offered by the same witness, to protect against these dangers." Majority at 49 n.32 (quoting Sandoval, 680 F. App'x at 718–19). By the majority's own account, the federal courts address the concerns that arise from dual lay-expert witnesses by taking "precautionary measures." They do not, however, outright ban classes of testimony that may be adduced by a witness testifying in both capacities.

I dissent from the majority's categorical holding because such testimony as a general matter violates no Rule of Evidence. It has long been settled that witnesses may opine on intoxication under HRE Rule 704. See Vliet, 91 Hawai'i at 298, 983 P.2d at 199. And hypothetical transgressions of other rules in hypothetical cases cannot support a categorical ban: the Rules of Evidence already delineate when such evidence is admissible or inadmissible, and imposing a blanket prohibition

because a rule may sometimes be violated is the very definition of overinclusive. By all means, we should caution trial courts of the potential prejudicial effect of this testimony and remind them to judiciously apply HRE 403. Likewise, we can and should flag for the courts in our state the dangers of "proffering an expert in lay witness clothing" or the challenges that arise when a witness testifies in both capacities; doing so empowers the trial courts to limit the testimony as the Rules of Evidence demand or take other "precautionary measures" in service of sound judicial administration. But what we should not do is abandon the Rules of Evidence altogether in favor of an overbroad and arbitrary ban on a particular class of evidence, because it perhaps, sometimes, may pose ill-defined "concerns." This approach evinces an unwarranted lack of faith in our trial courts to properly apply the law, which provides effective safeguards against the improper admission of this evidence, and in our appellate courts to correct them if they err. More than twenty years of precedent fall in the process. I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama