IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

PETER DAVID,
Petitioner/Defendant-Appellant.

SCWC-19-0000319

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000319; CASE NO. 1PC111000050)

SEPTEMBER 9, 2021

OPINION BY RECKTENWALD, C.J., DISSENTING

I. INTRODUCTION

In my view, the Circuit Court of the First Circuit (circuit court) did not abuse its discretion when it precluded the admission of the precise blood alcohol content (BAC) of decedent Santhony Albert, without expert testimony explaining the import of that scientific measurement. Nor do I conclude that the circuit court's ruling infringed on defendant Peter

David's right to present a complete defense, when ample other testimony established that Albert was intoxicated. I would affirm David's convictions, and I accordingly respectfully dissent.

II. DISCUSSION

A. The Circuit Court Did Not Abuse Its Discretion

The majority and I agree on much: we agree, for instance, that alcohol intoxication and its effects on behavior are generally within the ken of the layperson and are appropriate subjects of testimony.[1] See State v. Jones, 148 Hawai'i 152, 179, 468 P.3d 166, 193 (2020) (Recktenwald, C.J., concurring in part and dissenting in part) ("[T]estimony regarding a defendant's intoxication . . . falls well within the bounds of opinion testimony that [Hawai'i Rules of Evidence (HRE)] Rules 701 [regarding lay opinions], 702 [regarding expert opinions], and 704 [regarding opinions on ultimate issues] permit."). We agree that evidence of intoxication may be relevant to establish self-defense. State v. DeLeon, 131 Hawai'i 463, 486, 319 P.3d 382, 405 (2014) (vacating a defendant's

[1] I note, however, that the majority relies on media articles, research papers, and other sources outside the record for principles such as the correlation between alcohol and violence ("Increased alcohol consumption may not cause violent or aggressive behavior, but ordinary adults understand the link between the two," majority at 15). See majority at 14 nn. 14 & 15, 15 nn. 16 & 17. These were not before the circuit court when it determined that expert testimony would be useful for the jury to understand what Albert's BAC meant such that HRE Rule 403 precluded its admission.

convictions when evidence of the decedent's intoxication was not admitted and the defendant's self-defense argument "depended heavily" on the decedent's behavior).

However, the relatively narrow issue presented by this case is where the majority and I part ways: whether the circuit court acted within its discretion when it determined that the import of the specific BAC in this case – .252 – and what that precise figure meant for Albert's behavior is not necessarily within the understanding of the lay juror. In my view, the circuit court did not abuse its discretion by concluding that admitting Albert's specific BAC figure would be confusing or misleading absent expert testimony to explain its significance or by precluding its admission under HRE Rule 403 in light of the other competent evidence of intoxication that was admitted.

It must be emphasized that the HRE Rule 403 balancing analysis is a discretionary one. State v. Lavoie, 145 Hawai'i 409, 422, 453 P.3d 229, 242 (2019). The decision as to whether or not expert testimony should be admitted is likewise within a trial court's discretion. State v. Metcalfe, 129 Hawai'i 206, 222, 297 P.3d 1062, 1078 (2013); DeLeon, 131 Hawai'i at 482, 319 P.3d at 401; Jones, 148 Hawai'i at 165, 468 P.3d at 179. A trial court abuses its discretion if it "clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant." State v. Behrendt,

124 Hawai‘i 90, 102, 237 P.3d 1156, 1168 (2010).

The circuit court acted within its discretion when it concluded that admitting the fact that Albert's BAC was .252 at the time he died would be speculative or confusing absent expert testimony explaining the import of that figure. The majority contends that this conclusion was wrong because the "legal limit" of .08 BAC in the context of operating a vehicle under the influence of an intoxicant (OVUII) is common knowledge. Majority at 14. But that figure does not render the interpretation of BAC generally common knowledge, for "[b]lood alcohol tests are scientific in nature." State v. Werle, 121 Hawai‘i 274, 282, 218 P.3d 762, 770 (2009). Hawai‘i courts routinely require expert testimony to infer the extent of intoxication from scientific metrics. E.g., State v. Ferrer, 95 Hawai‘i 409, 425–26, 23 P.3d 744, 760–61 (App. 2001) (collecting cases for the principle that the horizontal gaze nystagmus test is scientific in nature requiring expert testimony to interpret performance); State v. Toyomura, 80 Hawai‘i 8, 26, 904 P.2d 893, 911 (1995) (requiring expertise to testify to intoxication based on an assessment of the results of the standardized field sobriety test). Indeed, we have cautioned that lay witnesses should not testify to matters that require "scientific, technical, or other specialized knowledge" for fear that the foundational requirements of expert testimony, which serve to

ensure that testimony about specialized matters is reliable and comes from a qualified source, will be evaded "through the simple expedient of proffering an expert in lay witness clothing." Jones, 148 Hawai‘i at 174 n.32, 468 P.3d at 188 n.32 (citations omitted).

Moreover, the circuit court reasonably concluded that the .08 anchoring point could confuse or mislead the jury as to Albert's intoxication. This is for several reasons: the "legal limit" speaks only to driving a vehicle, not any other effect of intoxication (like, as relevant here, aggression). Moreover, a person may also be guilty of OVUII even if their BAC is under .08 but they are nonetheless unable to drive safely, Hawai‘i Revised Statutes § 291E-61(a)(1), or if alcohol merely contributed to their intoxication, State v. Vliet, 91 Hawai‘i 288, 293, 983 P.2d 189, 194 (1999). Accordingly, the kind of behavior a juror may associate with being "too drunk to drive" may or may not resemble that of a person with a BAC of .08 – let alone enable jurors to envision the behavior of a person with a BAC of .252, like Albert. Finally, the jury might be under the possibly-incorrect impression that someone with a BAC roughly three times the legal limit (like Albert) exhibits behavior three times "worse" than a drunk driver. While I agree with the majority that it is uncontroversial to suggest that a higher BAC means greater impairment, majority at 14, it is not at all clear

to me whether BAC affects behavior linearly such that the behavioral effects of alcohol increase proportionately, in lockstep with BAC. We are hardly in a position – nor was the circuit court – to determine as a scientific and technical matter if that is the case.

Moreover, the circuit court made its decision in reliance on the ample other evidence of Albert's intoxication. That evidence included: testimony that Albert was drinking beer and hard liquor at the daytime party in Kalihi, testimony that Albert continued drinking at the apartment in Waipahu later that day, testimony that Albert was "drunk," and that he was drunker than David, testimony that Albert continued drinking after the police came to Waipahu earlier in the evening, testimony that Albert continued to drink when David and he began arguing, and testimony that Albert's blood contained alcohol. I therefore disagree that "[n]o other evidence" established that "Albert was excessively intoxicated." Majority at 26. Rather, the added value of admitting the BAC value itself was marginal in light of other evidence in the record that amply served to support the argument that Albert was "excessively intoxicated."

But more fundamentally, even if I agreed with the majority that "[t]he trial court overstated the evidence's potential to confuse jurors," majority at 23, or that the .252 BAC would have "fully frame[d] the volatile situation David

described finding himself in," majority at 27, it does not follow that the circuit court acted outside the bounds of reason when it came to a different conclusion than the majority would have. The majority sees the risk for juror confusion differently than the circuit court did; that does not mean the circuit court's assessment of the prejudicial effect was so erroneous that it "clearly exceed[ed] the bounds of reason[.]" Behrendt, 124 Hawai'i at 102, 237 P.3d at 1168. The evidence no doubt would have been useful to David's case; that does not mean it was so indispensable and of such great probative value to the defense that the circuit court was required to admit it notwithstanding the court's reasonable assessment of the risks.

The circuit court's exercise of discretion here comports with the reasoning of courts in other jurisdictions, which have recognized that admitting the BAC to suggest a fact about a person's behavior poses the risk of confusion, and a court does not abuse its discretion by excluding the BAC, particularly when other evidence was admitted to show intoxication. State v. Garcia, 110 P.3d 531 (N.M. Ct. App. 2005), is particularly instructive. In Garcia, the trial court "excluded a toxicology report showing Victim's blood alcohol content (BAC) to be .245 percent at the time of his death" on relevance grounds; the defense argued that the BAC was relevant to show that the victim was the first aggressor. Id. at 539-40.

Reviewing for an abuse of discretion, the New Mexico Court of Appeals affirmed this decision:

> Although Defendants contend that evidence of Victim's .245 percent BAC would have tended to show that Defendants were reasonable in their apprehension and that Victim was the first aggressor, Defendants have not supplied authority to support this proposition. There undoubtedly is in many instances a correlation between alcohol and violence. However, as the district court observed, although it is clear that BAC may demonstrate impaired ability to drive a motor vehicle, a correlation between BAC and aggressiveness seems speculative unless tied more specifically to an individual's history. As such, the probative value of the BAC evidence in this case is questionable at best. . . . Even if some relevance had been found, the district court could properly have determined that any slight probative value that the BAC evidence might have had was outweighed by its prejudicial effect.

Id. at 540 (citation omitted).

The Garcia court further reasoned that "although Defendants were not permitted to introduce Victim's BAC, evidence was presented to the jury indicating that Victim had been drinking prior to the [] incident. . . . As a result, we conclude that the exclusion of the BAC evidence did not prejudice Defendants." Id.

I find the reasoning of Garcia compelling.[2] As in

[2] Other cases demonstrate that evidence about the correlation between BAC and behavior is routinely admitted – in Hawai'i and elsewhere – through expert testimony. E.g., DeLeon, 131 Hawai'i at 475, 319 P.3d at 394 (admitting expert testimony that decedent had a BAC indicating "a high degree of alcohol intoxication"); Moorhead v. State, 638 A.2d 52, 56 (Del. 1994) ("The next issue raised by [the defendant] concerns the testimony of . . . an expert witness testifying on behalf of the State, regarding the effects of alcohol on an individual, and the relation between the amount of alcohol consumption and the risk of an automobile accident. . . . The expert testimony was clearly probative on the degree of risk that resulted from [the defendant] consuming enough alcohol to have a blood alcohol concentration of 0.22 percent."); State v. Sullivan, 167 A.3d 876, 885 (Vt. 2017) (holding that the trial court did not abuse its discretion by admitting the testimony

Garcia, Albert's BAC standing alone did not provide information about him individually, or about the interpretation of BAC generally, that would have necessarily supported the inference that Albert was the first aggressor. And as in that case, the jury here was presented with other evidence of Albert's intoxication, reducing the additional probative value of the BAC. Accordingly, in my view, the circuit court acted within its discretion when it concluded that the BAC figure could be confusing without testimony explaining how that particular figure corresponded to behavior. I have no doubt that in appropriate cases, a trial court would not abuse its discretion by admitting the BAC without expert testimony. E.g., State v. Randles, 334 P.3d 730, 733 (Ariz. Ct. App. 2014) (holding that the trial court did not abuse its discretion by precluding expert testimony regarding the effects of alcohol when BAC was admitted). But the abuse of discretion standard requires that we only reverse the circuit court when it "clearly exceed[ed] the bounds of reason." Behrendt, 124 Hawai‘i at 102, 237 P.3d at 1168. The circuit court did not do so here.

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of an expert witness who testified to the defendant's BAC at the time of the relevant events and to the effects of alcohol on the defendant); Edwards v. Ellis, 478 So. 2d 282, 287 (Miss. 1985) ("Testimony of a pathologist as to the effect of blood alcohol content upon the intoxication of a person is competent evidence.").

B. The Circuit Court Did Not Infringe on David's Right to Present a Complete Defense

Moreover, David's right to present a complete defense was not infringed by the circuit court's decision to exclude Albert's BAC absent expert testimony. "David's constitutional right to present any and all competent evidence to support his defense," majority at 2 (emphasis in original), is not absolute or unfettered, as the majority seems to suggest. Rather, "the defendant's right to present relevant evidence 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" State v. Pond, 118 Hawai'i 452, 464, 193 P.3d 368, 380 (2008) (quoting Michigan v. Lucas, 500 U.S. 145, 149 (1991)). We explained in State v. Abion, "State evidentiary determinations ordinarily do not present federal constitutional issues," except that "under some circumstances, if a state court applies the State's evidentiary rules unfairly to prevent a defendant from presenting evidence that is critical to his defense," the rules of evidence must give way. 148 Hawai'i 445, 458, 478 P.3d 270, 283 (2020) (brackets omitted) (quoting Ellis v. Mullin, 326 F.3d 1122, 1128 (10th Cir. 2002)). "To determine whether a defendant was unconstitutionally denied his or her right to present relevant evidence, we must balance the importance of the evidence to the defense against the interests the state has in excluding the evidence." Id.

(brackets omitted) (quoting Ellis, 326 F.3d at 1128).

With respect to the interests in exclusion, as above, the circuit court reasonably concluded that the BAC would be confusing or misleading absent expert testimony to explain it, and the state has an interest ensuring that the jury receives sufficiently reliable and useful information. Indeed, we must be precise about what David was prohibited from admitting; he was not actually precluded from introducing the BAC. Rather, he was only precluded from introducing it without an expert who could explain its significance.[3] I am certainly not unsympathetic to the expense of finding a suitable expert, but the majority's framing of the issue – as to whether the circuit court erred by "excluding Albert's .252 BAC," majority at 28 – incorrectly characterizes the circuit court's ruling. The question is not whether there is any "logic to limiting the admissibility of reliable, objective evidence showing a person's intoxication level," majority at 25-26; the question is whether the circuit court reasonably concluded that "scientific,

[3] The majority points out that "David was entitled to present his own evidence about the extent and degree of Albert's intoxication." Majority at 26. The circuit court gave him the opportunity to do so – via an expert who could explain what a BAC of .252 meant. The circuit court also did not preclude David from further developing the evidence of Albert's intoxication through lay witnesses, either via defense witnesses or by cross-examining the State's witnesses; that the eyewitnesses to Albert's demeanor and drinking that night may have been "unsympathetic to David's plight," majority at 27, does not mean that, if probed while under oath, they would not have offered additional information on Albert's intoxication level.

technical, or other specialized knowledge" was necessary to "assist the trier of fact to understand" that particular reliable, objective evidence. HRE Rule 702. And indeed, that BAC is "reliable" and "objective" stems from the fact that it is "scientific in nature." Werle, 121 Hawai‘i at 282, 218 P.3d at 770.

With respect to the defendant's interest in the evidence, the majority exaggerates the "materiality of the excluded evidence to the presentation of the defense." Abion, 148 Hawai‘i at 458, 478 P.3d at 283 (quoting Richmond v. Embry, 122 F.3d 866, 872 (10th Cir. 1997)). Again, the added value of this evidence to the defense was marginal because ample evidence was adduced at trial about Albert's drinking during the events in question, including opinion testimony by eyewitnesses that Albert was drunk. In short, David was already able to "[p]resent[] a rational explanation for his conduct," majority at 29, by pointing to evidence of Albert's intoxication, and for the reasons explained above, the majority's arguments that this other evidence failed to suffice are unconvincing. The probative force of this evidence was certainly not of such magnitude that it was unconstitutional to exclude it.

I thus conclude that David was not denied a complete defense here.

III. CONCLUSION

For the foregoing reasons, I would affirm David's conviction. I therefore respectfully dissent.

/s/ Mark E. Recktenwald