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SCWC-17-0000426

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

vs.

MACDON DONNY THROMMAN,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000426; CR. NOS. 3PC15100216K and 3PC16100299K)

DISSENT
(By: McKenna, J.)

I respectfully dissent. I would accept certiorari to address the second issue on certiorari regarding the admission of Exhibit 431, the media footage of the defendant being taken into custody after he surrendered. In the footage, the defendant is in handcuffs, escorted by several officers in bulletproof vests and SWAT gear. The defendant had asserted he fired shots after the pepper spray was deployed because he couldn't see and thought he was being shot at by police. Exhibit 431 was admitted in evidence over the defense's relevance and HRE Rule 403 objections based on the following proffer from the State:

Your Honor, the probative value the State is offering this evidence for is that it was challenged as to the defendant's eyes and as to after the OC rounds were deployed, whether or not he could effectively see, and so

the State is offering that as the defendant's face is actually observed in the 431. While brief, it is probative to that effect as nobody else can really give a good best picture of what the defendant looked like when he came out as opposed to discussing demeanor.

As pointed out by the defense at the time of proffer, however, the video was taken more than an hour after the pepper spray had been deployed, long after its effects had worn off. Therefore, any relevance, if it existed based on the State's proffer, was substantially outweighed by the danger of unfair prejudice, clearly violating HRE Rule 403. This type of footage should not be admitted absent exceptional circumstances, which simply do not exist here. See Palma Paciocco, Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk, 16 New Crim. L. Rev. 50, 51-52 (2013) (discussing the "perp walk" of "the alleged perpetrator of a crime before the press to be photographed or filmed . . . usually at the time of the arrest or arraignment.").

DATED: Honolulu, Hawai'i, August 4, 2022.

/s/ Sabrina S. McKenna

