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NO. CAAP-24-0000349

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
THOMAS G. DULLAM, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
KONA DIVISION
(CASE NO. 3DTA-23-00288)

SUMMARY DISPOSITION ORDER
(By: Nakasone, Chief Judge, Hiraoka and Guidry, JJ.)

In this appeal, Defendant-Appellant Thomas G. Dullam (**Dullam**) challenges his conviction for operating a vehicle under the influence of an intoxicant (**OVUII**), specifically marijuana, in violation of Hawaii Revised Statutes (**HRS**) § 291E-61(a)(2). We affirm.

Dullam appeals from the April 24, 2024 "Judgment and Notice of Entry of Judgment" (**Judgment**), entered by the District

Court of the Third Circuit (**District Court**),¹ following a bench trial.

On appeal, Dullam raises four points of error (**POEs**), contending that the District Court erred by: **(1)** denying Dullam's motion to suppress his responses to the medical rule-out (**MRO**) questions; **(2)** allowing the police officers to testify at trial "about the Standardized Field Sobriety Test [**(SFST)**] and the Drug Recognition Expert [**(DRE)**] evaluation because neither officer was qualified as an expert"; **(3)** allowing Officer Adam Roberg's (**Officer Roberg**) opinion testimony that "Dullam was impaired by cannabis"; and that **(4)** "[i]n the absence of improperly admitted evidence, there was insufficient evidence to support conviction."²

Upon review of the record on appeal and relevant legal authorities, giving due consideration to the issues raised and arguments advanced by the parties, we resolve the contentions as follows.

The trial record reflects that Hawai'i County Police Department (**HCPD**) Detective Jason Foxworthy (**Detective Foxworthy**) testified that on June 11, 2022, he observed Dullam sitting in the driver's seat of a running vehicle parked at Old Airport Park, passing around and smoking a bong with other occupants of the vehicle. Detective Foxworthy saw "clouds of smoke emanating after the bong was brought up towards the people's faces[,]" and as he approached the vehicle to investigate, he "could smell an odor of burned marijuana." He made contact with Dullam and asked him to step outside the

¹ The Honorable Kimberly B.M. Tsuchiya presided.

² Dullam's points "A" through "D" have been numbered. See Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4) (requiring numbered **POEs**).

vehicle. Without providing Miranda warnings, Detective Foxworthy asked Dullam the MRO questions. He then requested Dullam to participate in the SFSTs, and based on Dullam's performance, arrested him on suspicion of OVUII. Officer Roberg testified that he conducted a DRE evaluation on Dullam, and that in his opinion, Dullam was "impaired" by marijuana, and that Dullam admitted smoking "four or five . . . bong rips" of marijuana. The District Court found Detective Foxworthy and Officer Roberg "credible[,] " concluded the State had "met its burden[,] " and found Dullam guilty of OVUII.

(1) With regard to the suppression of Dullam's responses to the MRO questions, Dullam argues that Detective Foxworthy "was required to inform Dullam of his right against self-incrimination prior to asking the MRO questions" because he was in custody, where "probable cause had already developed to arrest Dullam for drug possession and OVUII."³ Dullam points to Detective Foxworthy's testimony at the August 9, 2023 suppression hearing as establishing that the detective "observed Dullam possess and consume what he believed to be marijuana," and that "[p]ossession of marijuana is a crime codified in HRS § 712-1249."⁴ Dullam argues that "probable cause to arrest exists

³ Although Dullam asserts that probable cause had already developed for both offenses, he advances no argument for his contention that probable cause had developed for OVUII, and his argument focuses on probable cause for the offense of promoting a detrimental drug in the third degree (**PDetD3**) under HRS § 712-1249. We confine our analysis to the PDetD3 argument. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

⁴ The offense of PDetD3 under HRS § 712-1249 (2014 & 2024 Supp.) classifies marijuana possession as either a petty misdemeanor or a violation depending on the amount of marijuana possessed, as follows:

- (1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount.

when a police officer observes a person possessing and actively consuming what the officer reasonably believes to be illegal drugs in public." Dullam also relies on State v. Skapinok, 151 Hawai'i 170, 179, 510 P.3d 599, 608 (2022), for the proposition that "MRO questions constitute interrogation for purposes of Miranda." Because Detective Foxworthy subjected Dullam to custodial interrogation without providing the required Miranda warnings, Dullam asserts that his motion to suppress his responses to the MRO questions should have been granted.

The State counters that "[Dullam was] not entitled to Miranda warnings" before being asked the MRO questions because "probable cause to arrest had not yet developed," and "based on the totality of circumstances, [Dullam] was not in custody." The State argues that "Detective Foxworthy's investigation was focused on the possible impairment of the driver, and there was [no] other crime for which probable cause had developed."

A defendant seeking to suppress a statement he or she made without the benefit of Miranda warnings "must establish that [his or her] statement was the result of (1) 'interrogation' that occurred while [he or she was] (2) 'in custody.'" State v. Hewitt, 153 Hawai'i 33, 43, 526 P.3d 558, 568 (2023). In this case, the State does not dispute that MRO questions are "interrogation" under Skapinok, 151 Hawai'i at 179, 510 P.3d at 608. The parties' dispute turns on whether Dullam was "in custody" for Miranda purposes. A person is "in custody" for Miranda purposes if "an objective assessment of the totality

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- (2) Promoting a detrimental drug in the third degree is a petty misdemeanor; provided that possession of three grams or less of marijuana is a violation, punishable by a fine of \$130.

(Emphasis added.)

of the circumstances reflects" that one of the following situations exist:

(1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "de facto" arrest without probable cause to do so.

Hewitt, 153 Hawai'i at 43, 526 P.3d at 568 (emphases added) (citation omitted). Dullam's argument that he was "in custody" rests on prong 2(a) of the above test, that "probable cause to arrest ha[d] developed" based on Detective Foxworthy's observation of Dullam "possess and consume what [Detective Foxworthy] believed to be marijuana."

Probable cause exists when "the facts and circumstances within the knowledge of police officers and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man or woman of reasonable caution to believe that a crime was being committed." State v. Kaleohano, 99 Hawai'i 370, 377, 56 P.3d 138, 145 (2002) (citation omitted). Under HRS § 712-1249, marijuana possession is a criminal petty misdemeanor offense or a violation, depending on the amount possessed. Possession of over three grams is a crime, but possession of three grams or less is a violation, which is not a crime. See HRS § 712-1249(2); Barker v. Young, 153 Hawai'i 144, 149, 523 P.3d 217, 222 (2023) (stating that "a 'violation' is not a 'crime'").

Here, Dullam conclusorily asserts that "[p]ossession of marijuana is a crime" under HRS § 712-1249, and does not address the amount-based distinctions between a crime and a violation in HRS § 712-1249. Mere possession of marijuana in a

bong, without any evidence of the amount of marijuana, is not criminal per se. Dullam does not point to, nor does the suppression hearing record reflect, any "facts and circumstances" regarding the weight of the marijuana in Dullam's possession to warrant a belief that Dullam was committing a criminal offense of possession of over three grams of marijuana.⁵ See Kaleohano, 99 Hawai'i at 377, 56 P.3d at 145. Accordingly, Dullam's assertion that he was "in custody" for Miranda purposes because probable cause existed to support the "crime" of marijuana possession under HRS § 712-1249 lacks merit, and the District Court was not wrong in denying Dullam's motion to suppress in this regard. See State v. Spies, 157 Hawai'i 75, 87, 575 P.3d 708, 720 (2025) ("A trial court's ruling on a motion to suppress evidence is reviewed de novo to determine whether the ruling was 'right' or 'wrong.'" (citation omitted)).

(2) With regard to the challenge to Detective Foxworthy's trial SFST testimony, Dullam claims that Detective Foxworthy "was not qualified as an expert" and that "[a]ll testimony regarding the SFST, clues of intoxication, and any opinions or inferences drawn therefrom lacked foundation." The State responds that sufficient foundation was laid and that Dullam's general objection did not establish "where an objection was made in the record that would properly preserve this issue on appeal."

"[A] 'lack of foundation' objection generally is insufficient to preserve foundational issues for appeal because such an objection does not advise the trial court of the

⁵ In his motion to suppress, Dullam noted that "[w]hat was determined after the illegal detention and possibly illegal arrest, was that the amount of alleged marijuana recovered was less than one (1) gram, which makes it a 'violation' under HRS [7]12-1249(2) [.]"

problems with foundation." Id. at 91, 575 P.3d at 724 (citation omitted). "Instead, a specific objection is required to inform the court of the error unless, 'based on the context, it is evident what the general objection was meant to convey.'" Id. "Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal." State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) (citation omitted).

Here, the record reflects that Dullam lodged a general lack-of-foundation objection to a factual question regarding whether medical doctors had been involved in Detective Foxworthy's SFST training, and did not specify how the foundation was lacking.⁶ Dullam's challenge is waived.

⁶ Dullam lodged the following objection during Detective Foxworthy's testimony, which the District Court overruled, as follows:

Q. [(BY STATE)] Did you make any observations when you conducted [the modified Romberg balance SFST] test on [Dullam] on June 11th, 2022?

A. [(BY DETECTIVE FOXWORTHY)] Yes.

Q. What were the observations that you made?

A. Um, he had an impaired perception of time.

. . . .

And then I also observed the presence of eyelid tremors and body tremors.

One category of drugs that causes these -- this involuntary phenomena, eyelid tremors, which is a fluttering of the eyelids, or body tremors, which is involuntary trembling of the muscles is cannabis.

Q. And do you have, um, experience, ah, as a police officer after your, ah, trainings that you've been through, um, with cannabis users or people that have ingested cannabis and seeing this before?

A. Yes. Many times.

. . . .

See Spies, 157 Hawai'i at 91, 575 P.3d at 724. We also decline to apply plain error review, where Dullam presents no supporting argument for it. See HRAP Rule 28(b)(7).

As to Dullam's challenge to Officer Roberg's qualifications to provide expert DRE testimony, the record similarly reflects that Dullam's lodged objections were "insufficient to preserve foundational issues for appeal." See Spies, 157 Hawai'i at 91, 575 P.3d at 724. Dullam objected on the basis that Officer Roberg was not qualified, where Officer Roberg's training as a DRE instructor had been "divided up" between "different instructors and different locations[,] and Dullam made additional unsustained objections.⁷ The trial

Q. It's also how you were trained; correct?

A. Yes. We were trained to look for that as a possible indicator of impairment.

Q. And in -- in accordance with some of [sic] training, ah, included doctors that trained you on that -- on those observations; correct?

[DEFENSE COUNSEL]: I'm going to object for leading. I'm going to object for lack of foundation as well. And lack of personal knowledge.

. . . .

THE COURT: On September 14th, 2023, Detective Foxworthy testified about his training. Ah, more specifically, recruit class regarding standardized field sobriety tests, ARIDE, DRE, preschool and DRE and DRE instructor training.

And he went through his training, ah, with the instructors for those trainings.

So overrule the objection.

(Emphases added.)

⁷ The record reflects that Dullam made the following overruled objection, as follows:

record shows that Dullam did not advise the District Court of the alleged problems with the foundation, and Dullam's challenge to Officer Roberg's DRE testimony is waived. See id.; Hoglund, 71 Haw. at 150, 785 P.2d at 1313. We decline Dullam's request for plain error review, which is not accompanied by supporting argument. See HRAP Rule 28(b)(7).

Q. [(BY STATE)] Okay. Can you please describe conducting step four [of the DRE] on [Dullam] and what your observations were?

A. [(BY OFFICER ROBERG)] Yes. Um, I noted that his eyes were -- um, had remained bloodshot and watery.

[DEFENSE COUNSEL]: I'm going to object, um, to the question, um, for a lack of foundation concerning the officer's, ah, qualifications to conduct the test examination to the qualifications of the, ah, different instructors, ah, that the officer had.

Um, especially given that they were divided up. Um, I believe the testimony was due to COVID, the different instructors and different locations. And I think there's missing foundation concerning, um, at least two of those instructors.

THE COURT: He testified about his training. Um, he had various forms of training related to, ah, what I'm just going to shorthand as DRE.

Ah, initially DRE course April 2017. And then April 2020 would be DRE instructor training.

With respect to those [sic] testimony, um, that was offered and received. Is that the witness earned the International Association of Chiefs of Police [(IACP)] certification in both courses after successful completion.

That the trainers in the April 2017 class were credentialled as IACP trainers for Drug Recognition Experts. And those trainers that he had were certified and then or [sic] qualified to train for this program. And pursuant to their training he passed the course and was credentialled himself.

So I'm going to overrule that objection.

(Emphases added.)

(3) Dullam argues the District Court "erred by allowing Officer Roberg to give opinion testimony that Dullam was impaired by cannabis," pursuant to State v. Jones, 148 Hawai'i 152, 174, 176, 469 P.3d 166, 188, 190 (2020) which held that "police officers may no longer testify, whether in a lay or expert capacity, that a driver appeared 'intoxicated'" because such testimony "expresses a legal conclusion and invades the province of the factfinder."

Dullam concedes he did not object to the testimony at trial and requests plain error review, without supporting argument for such review. This challenge is waived. See HRAP Rule 28(b)(7).

(4) Dullam argues that if improperly admitted evidence set forth in POEs 2 and 3 are excluded, "there remains essentially no admitted evidence that can support a finding of guilt in this case."

Here, assuming *arguendo* Dullam's responses to the MRO questions were improperly admitted at trial, the SFST evidence was still admissible. See State v. Manion, 151 Hawai'i 267, 272-73, 511 P.3d 766, 771-72 (2022). Assuming *arguendo* the impaired-by-cannabis testimony was improperly admitted, the record nevertheless reflects sufficient evidence to support Dullam's OVUII conviction, where Dullam was in the driver's seat of a running vehicle parked on a public road, smoking a bong; Dullam exhibited signs of impairment during the SFSTs, including swaying, inability to accurately estimate time, and a dazed appearance; and Dullam admitted smoking "four or five . . . bong rips" of marijuana. Considering such evidence in the strongest light for the prosecution, Dullam's conviction was supported by substantial evidence. See State v. Kalaola, 124 Hawai'i 43, 49, 237 P.3d 1109, 1115 (2010).

For the foregoing reasons, we affirm the District Court's April 24, 2024 Judgment.

DATED: Honolulu, Hawai'i, September 11, 2026.

On the briefs:

Seth Patek, Deputy Public Defender for Defendant-Appellant.	/s/ Karen T. Nakasone Chief Judge
Stephen L. Frye, Deputy Prosecuting Attorney County of Hawai'i for Plaintiff-Appellee.	/s/ Keith K. Hiraoka Associate Judge
	/s/ Kimberly T. Guidry Associate Judge