

NO. 23943

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
TERRENCE P. VASQUEZ, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 00-01-0123)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Terrence P. Vasquez (Vasquez) appeals the November 16, 2000 judgment of the circuit court of the second circuit, the Honorable Joseph E. Cardoza, judge presiding, that convicted him of manslaughter, in violation of Hawaii Revised Statutes (HRS) § 707-702(1)(a) (1993)¹ (count one), and consuming intoxicating liquor while operating a motor vehicle or moped, in violation of HRS § 291-3.1 (Supp. 2001)² (count two). The court sentenced Vasquez to a twenty-year, indeterminate term of imprisonment on count one, to run concurrently with a one-year jail term on count two. Vasquez

¹ Hawaii Revised Statutes (HRS) § 707-702(1)(a) (1993) provides that "[a] person commits the offense of manslaughter if: He recklessly causes the death of another person[.]" (Enumeration omitted).

² HRS § 291-3.1(b) (Supp. 2001) provides that "[n]o person shall possess, while operating a motor vehicle or moped upon any public street, road, or highway, any bottle, can, or other receptacle containing any intoxicating liquor which has been opened, or a seal broken, or the contents of which have been partially removed[.]"

filed a timely notice of appeal on December 14, 2000.

On appeal, Vasquez stakes out two points of error:

1. The trial court plainly erred in accepting the parties' stipulation to admit into evidence Vasquez' BAC [(blood alcohol content)] of .193 where the court failed to establish through an on-the-record colloquy with Vasquez his knowing and intelligent waiver of his constitutional rights.

. . . .

2. The lower court erred in permitting jury questioning.

We disagree, and affirm.

I. Background.

Trial commenced on September 5, 2000. Before jury selection started, Vasquez's trial attorney (Defense Counsel) objected to juror questioning:

THE COURT: Additionally, the defense wanted to note an objection with respect to allowing the jurors to ask any -- or to submit any questions during the course of the trial. [Defense Counsel]?

[DEFENSE COUNSEL]: I think I'm going to object. I believe, first, that it ruins the adversarial process. It's the burden of the State to provide all the evidence that they think is appropriate to the jury. And when the jury then gets to fill in blanks that they didn't hear or things that the prosecutor didn't do, it adversely affects the defense, if the defense is a lack of evidence.

Secondly, there may be reasons why we don't ask questions to witnesses and when we don't ask a question to a witness there may be a strategic reason for not asking the question to [a] witness, and if the jury wants to hear it and it's an admissible question, it's my understanding the Court will ask the question.

And the third thing is that -- hold on -- that's all for now, your Honor.

THE COURT: All right. The Court has -- the Court will allow jurors to submit written questions. The procedure that the Court will follow is that the Court will ask the bailiff if there are any written questions at the conclusion of a witness' testimony. If there is a question, that question will then, which will be written on a form provided to the jurors, Court will then have that presented to the Court by the bailiff.

The parties will have the opportunity to examine it and note their objections. If the Court sustains

the objection, the question will not be asked. If the Court overrules an objection or if there is no objection to the question, then the question will be read to the witness.

The parties will be allowed to ask follow-up questions after -- if a question is asked of a witness, the parties will be allowed to follow-up with the subsequent questions.

[DEFENSE COUNSEL]: I have two more questions. One is how does the Court instruct the jury that their question will not be asked?

THE COURT: The Court will provide a standard instruction at the beginning of the trial concerning the questions and that will -- the jury will be informed that the question may be asked or may not be asked, and if it's not asked --

[DEFENSE COUNSEL]: What is the standard that the Court uses as to whether or not it will allow the question?

THE COURT: Essentially what the Court will do is examine the question, entertain any objections, and determine whether such a question is one that relates to matters that are -- would fall within the scope of the Rules of Evidence, and I'll certainly consider any objection to the question itself.

The Court will not change the language or the wording of any question. The question being asked is presented or not being asked.

[DEFENSE COUNSEL]: So if it's [(sic)] form is improper, it's [(sic)] form violates the Rules of Evidence we'll say we're --

THE COURT: The question is asked as submitted or not at all.

[DEFENSE COUNSEL]: Okay.

Before the presentation of evidence, the court gave the jury preliminary instructions that included instructions regarding juror questioning of witnesses:

Now, the other thing that will occur during the course of this trial is you will be given the opportunity, if you want to, to ask questions of the witnesses who will testify.

Let me provide you with my instructions concerning that particular aspect of the trial.

During this trial you will be allowed to submit questions for witnesses. You may do so under the following procedure only.

One, your questions must be written. No oral question will be allowed.

Two, the questions must be directed to a witness, not to the attorneys or the judge. The purpose of the question must be to clarify the facts of the case, not to explain theories of your own or to

discredit a witness.

Three, if any juror has a question, the bailiff will collect the question and I will consider whether it will be allowed under our Rules of Evidence and whether it is relevant to the subject matter of the witness' testimony.

We do have forms for questions and the bailiff does have those forms. So he will provide those to you. After I'm through with these instructions, the bailiff can do so.

Four, after each witness has been examined by the attorneys I will ask if any juror has a question for the witness. If there are no questions, the witness will be excused.

Five, please remember that you are under no obligation to ask questions. If you have questions, please write them on the form that we will provide to you. Do not put your name or juror number on the question. Do not discuss your question with your fellow jurors.

Six, if the Court does not ask your question because it is not within the Rules of Evidence or not relevant, it is not a reflection of any kind upon you. If a particular question can not be asked, you must not speculate about what the answer may have been or hold it against either party.

Opening statements followed the court's preliminary instructions to the jury. The deputy prosecuting attorney (DPA) led off his opening statement, thus: "This case is about a reckless driver who killed another person because he was highly intoxicated, he was speeding and he ran a red light." The DPA told the jury, "the evidence will also show, ladies and gentlemen, that about an hour after this collision, [Vasquez] was taken to Maui Memorial Hospital where his blood was drawn. The blood test came back with a result of .193."

Defense Counsel opened as follows:

Let me tell you what this case is about. This case is about finding a scapegoat because somebody dies. [The DPA] alluded to the fact that they are going to prove in their case in chief that my client ran a red light. Yet you won't hear anybody come up and tell you that he ran the red light. I can tell

you the evidence will not show that.

The evidence is going to show that my client was drunk. There's no doubt about that. His blood alcohol was .193. There's no doubt about that.

But what the evidence is going to show is, or not show is, we don't really know who had the red light or the green light, except for one person. Mr. Boteilho is going to tell you that as he came on to -- as he came here, right here, what does he do up here? He looks to his left. Now, he doesn't -- not only doesn't he see another car, he doesn't see a scooter, he doesn't see anything. That's what he's going to testify to. He saw nothing other than a car up here.

And then he's going to tell you, I don't know if it was a red light or green light. I slow down every time I come to an intersection. But he will tell you something very, very important. That I looked to my left and I decided, I decided I had enough room to make it out to here and over to here without causing any interference to this person.

He's not going to cause any interference to 'em. We know this guy had the green light. That's what the evidence is going to show.

. . . .

But, ladies and gentlemen, the fact is regardless of how drunk my client is and you're going to hear that he was, he was speeding through a green light and as he sped through a green light he collided with Jaiom Berger's scooter and Jaiom Berger passed away as a result.

Prosecution witness Toni Martin (Martin) testified that she and the deceased, Jaiom Berger (Berger), were at a restaurant called Casanova's for a couple of hours on the night of November 27, 1998. Berger had one or two beers, and he and Martin left before midnight. Berger, on his motor bike and wearing a helmet, took Martin to her car. He told her he was going home.

There were no juror questions for Martin.

At half-past midnight on November 28, 1998, Maui Police Department (MPD) officer Howard Rodrigues (Officer Rodrigues) was at Valley Isle Ford investigating a burglary. As he was checking a security alarm, Officer Rodrigues heard the winding of an

engine, which prompted him to look in the direction of Pu'unene Avenue. He saw a light-colored station wagon pass by on Pu'unene Avenue. Officer Rodrigues remembered, "Well, as far as the speed goes, I know that in that area it's 30 miles an hour and through my experience I have stopped vehicles going 50 plus miles an hour, and I know -- I would just say he was going -- I know he was going over 50." The officer did not notice any other traffic coming or going on Pu'unene Avenue. While he was still at Valley Isle Ford, Officer Rodrigues received a call from police dispatch about an accident at Pu'unene Avenue and Dairy Road, which is about "a mile or a little less" from Valley Isle Ford. He testified that less than five minutes had passed from the time he saw the station wagon near Valley Isle Ford to the time he received the call about the collision. Officer Rodrigues went to the scene of the crash. There was a vehicle at the scene that looked like the vehicle he saw speed by Valley Isle Ford.

There were five juror questions for Officer Rodrigues. The court heard the parties' positions regarding the juror questions, noting Defense Counsel's general objection "to all the jury questions." In the end, the court approved and propounded only one of the questions.³

³ This question was: (1) "Where did the officer see the station wagon stopped. Middle of intersection?" Maui Police Department (MPD) officer Howard Rodrigues testified that the vehicle ended up past the intersection in the Kihei direction, off on the Dairy Road side of Pu'unene Avenue. Only the deputy prosecuting attorney (DPA) had followup questions. The other questions, which the court declined to propound, were: (2) "The prosecuting

MPD lieutenant Cal Shinyama (Lieutenant Shinyama) testified that on November 28, 1998, at a little past midnight, he was dispatched to the scene of an accident at the intersection of Pu'unene Avenue and Kuihelani Highway (Kuihelani Highway becomes Dairy Road at its intersection with Pu'unene Avenue. Upon his arrival at the scene, Lieutenant Shinyama noticed debris in the intersection. He did not see any vehicles in the intersection. He walked into the intersection and noticed a body on the roadway embankment. He walked over to the body and saw that the individual was dead. Lieutenant Shinyama notified police dispatch of his findings. He saw a light-colored, compact station wagon on the shoulder of the roadway, a vehicle that appeared to be the same vehicle that he, too, had seen earlier traveling at a high rate of speed on Pu'unene Avenue. Lieutenant Shinyama approached the car. He noticed damages to the front end of the vehicle. There was a male standing outside of the car who had suffered some facial injuries, primarily around the forehead. The male, Vasquez, told Lieutenant Shinyama that he was the driver of the station wagon. Lieutenant Shinyama could detect an odor of alcohol on Vasquez's breath. Because of Vasquez's injuries, Lieutenant Shinyama had him sit back in his vehicle.

attorney said the truck driver made the turn on Puunene Ave and the station wagon screeched next to him -- was the station wagon on Puunene Ave past the intersection or did the station wagon stop at the intersection where the officer said it was?" (3) "If the car was facing Kahului then did it turn around because it was said that the car was traveling toward Puunene[?]" (4) "Had the car been moved prior to the officer arriving on the scene [(sic)]?" And, (5) "The jurors at this end cannot see the display!"

There were no juror questions for Lieutenant Shinyama.

William John Boteilho (Boteilho), a truck driver, happened to be at the intersection of Pu'unene Avenue and Kuihelani Highway at around 12:37 a.m. on the morning of November 28, 1998. As he entered the intersection, Boteilho slowed down to make a right turn onto Pu'unene Avenue in the Kihei direction, and looked to his left. He saw headlights on Pu'unene Avenue from a car approaching the intersection. He estimated that the vehicle "was pretty good size away," so he made his turn. There were no other cars in the intersection. After Boteilho made his turn, he "started switching over to the left lane" on Pu'unene Avenue. At that point, he heard "a loud impact and a crash." He did not hear any braking or screeching of tires just before the loud impact. When Boteilho heard the noise, he stepped on his brakes and looked in his rear-view mirror. On the right side of his truck, he saw a "car coming between me and the guardrail, coming down." Boteilho pulled over. The car was "rolling" down Pu'unene Avenue in the right lane, veering left. Boteilho got out of his truck and he, along with other persons in the vicinity, went to check on the driver of the vehicle. Boteilho remembered that the driver was all right, "but he just kept saying, it's not my fault. Not my fault." Boteilho saw the motor bike "up . . . against the guardrail and the guy [(Berger)] in the cane field." The police arrived when Boteilho was with

the driver. Boteilho said that, when he entered the intersection, he did not notice the color of the traffic lights in the intersection.

There were four juror questions for Boteilho. After hearing argument and noting objections from the parties, the court approved and propounded two of the four questions.⁴

MPD officer Champ K. Wright (Officer Wright), of the traffic accident investigation squad, was the primary investigator on the case. At around 1:07 a.m. on November 28, 1998, Officer Wright spoke to Vasquez at the Maui Memorial Medical Center emergency room. Officer Wright testified that he informed Vasquez of his constitutional rights, utilizing a form provided by MPD. According to Officer Wright, Vasquez appeared to understand his rights as Officer Wright explained them to him. Vasquez then waived his Miranda rights.⁵ Thereupon, Officer Wright took Vasquez's statement, in the presence of another police officer and a police chaplain. Officer Wright informed Vasquez that he was there to "investigate the crash." In

⁴ The questions propounded were: (1) "When truck driver pulled over and walked up to car, exactly where was that car located? Please point out on map (Exhibit 1)." And, (2) "As you were approaching the intersection before your turn onto Puunene what color was the light[?]" In answer to the first question, witness William John Boteilho (Boteilho) recounted that "[the station wagon] was half and half on each lane[.]" Boteilho answered the second question as follows: "I'm not really sure on the traffic light, the color. I just approached and I seen the car coming, so I slowed down and I made my turn. I wasn't really paying attention of [(sic)] the light." Neither party had any followup questions. The two questions not propounded were: (3) "What color was the light when Mr. Boteilho was turning onto Puunene?" And, (4) "May we see pictures?"

⁵ Miranda v. Arizona, 396 U.S. 868 (1969).

response to Officer Wright's questions, Vasquez said "that he was heading home to Kula and he was hit on the side by something that hit him on the driver's side. He said all he knows is that when the vehicle came to a stop that his door jammed[.]" Officer Wright also asked Vasquez if he had been drinking or taking any medication. Vasquez responded that "he was not taking any type of medication, nor did he have anything to drink."

Officer Wright asked Vasquez to describe his day on November 27, 1998. Vasquez, a truck driver, told Officer Wright that he had worked that day. After work, he stayed at the company base yard and had two to three Budweisers with friends until six or seven in the evening. Vasquez then left the base yard and headed to an establishment called Sal's Place and met up with some other friends. Vasquez told Officer Wright that there he had "maybe another two or three Budweisers." Vasquez maintained that he stayed at Sal's Place until about 8:00 p.m. Then, while on his way to Hapa's in Kihei, Vasquez was on Pu'unene Avenue, driving at about twenty to twenty-five miles an hour. Vasquez claimed that when he reached the intersection of Pu'unene Avenue and Dairy Road, he had the green light. When he entered the intersection, he was hit on the driver's side by a "motorcycle." Vasquez remembered that after his vehicle was struck, it spun, and when it came to a stop, he realized that his door was jammed.

The DPA read a stipulation of the parties to the jury during Officer Wright's testimony:

[DPA]: Thank you, your Honor.

The State and defense stipulate that State's Exhibit Number 6 be entered into evidence.⁶

[DEFENSE COUNSEL]: That's correct, your Honor.

[DPA]: It is also stipulated that following the collision at the intersection of Puunene Avenue and Dairy Road a blood sample was drawn from the defendant, Terrence Vasquez, at 1:30 a.m. on November 28, 1998, by licensed medical technologist, Dione Zurburg.

The defendant's blood sample was refrigerated, secured and maintained at Clinical Labs in Maui Memorial Hospital. On December 2nd, 1998, licensed medical technologist and analyst, Karen Kimura, tested the defendant's blood sample for the purpose of determining blood alcohol content.

At the time of the collision on November 28th, 1998, the defendant's blood yielded a BAC or blood alcohol content of .193 grams of alcohol per 100 milliliters or cubic centimeters of blood.

THE COURT: [Defense Counsel], is that [(sic)] stipulation?

[DEFENSE COUNSEL]: That is the stipulation, your Honor.

THE COURT: Thank you very much.

For the record, [Defense Counsel], the parties have stipulated to the admission of the [State's] Exhibit Number 6?

[DEFENSE COUNSEL]: That's correct, your Honor.

THE COURT: [State's] Exhibit Number 6 is received in evidence.

(Footnote supplied.)

There were three juror questions for Officer Wright. Two were propounded by the court.⁷

⁶ State's Exhibit 6 is the written report on the blood test performed on Vasquez, showing the result of the analysis of his blood as "0.193 % [blood alcohol content (BAC)]."

⁷ These questions were: (1) "It was stated that the defendant said his door was jammed on the driver's side. Did he say how that happened?" And, (2) "Also, did you say the defendant said he was driving at 20-25 mph? [A]t the intersection?" The court noted Defense Counsel's objection to the second question. Except for his "running objection" to juror questioning in general, Defense Counsel did not object to the first question. In response to the first question, MPD officer Champ K. Wright (Officer Wright) clarified that Defendant-Appellant Terrence P. Vasquez (Vasquez) did not mention how his

Calvin Matsuura (Matsuura), a traffic signal technician for the State Department of Transportation, testified that he maintains the traffic signals on all State and County highways on the island of Maui. He programmed the traffic signals located at the intersection of Pu'unene Avenue and the main highway, Kuihelani Highway/Dairy Road. Matsuura explained that when there is no traffic -- in the very early morning hours, for example, the main highway always has the green light. Because the main highway has the default green light, there are sensors only on Pu'unene Avenue, which are triggered when a car approaches the intersection. When a sensor is triggered, the traffic signal controller changes the green light servicing the main highway to yellow for four seconds, then all lights in the intersection are red for a full second, and then the light servicing Pu'unene Avenue turns green. The speed of the vehicle that triggers the sensor is of no consequence. There will always be a five-second delay after a sensor is triggered before the light servicing Pu'unene Avenue turns green.

According to Matsuura, there had not been any complaints or problems regarding the traffic signals at the

door had jammed. As for the second question, Officer Wright remembered that Vasquez said he was traveling between twenty and twenty-five miles per hour, but that "[t]here was no reference as to whether he was doing that speed at the intersection." Vasquez's attorney (Defense Counsel) asked a followup question after Officer Wright answered the second question. The court sustained a defense objection to the remaining juror question. The question not propounded was: (3) "In terms of beer or whiskey how much is 0.193 alcohol level?"

intersection of Pu'unene Avenue and Kuihelani Highway/Dairy Road since the system was upgraded in December 1996, with a few minor exceptions. As far as Matsuura was aware, there were no problems with the traffic signals on the day of the collision. On cross-examination, Matsuura acknowledged that, since the system automatically resets itself in the event there is a "lock up" -- in other words, when the green light servicing Pu'unene Avenue stays on longer than it should -- there is no way of knowing there was a problem unless someone was there to witness the malfunction and report it.

There were four juror questions for Matsuura, all of which were propounded by the court.⁸

After two foundational witnesses testified, for whom the jury had no questions, the State called Dr. Anthony Manoukian

⁸ These questions were: (1) "[I]s the sensor controlled by weight or movement? Can anything else besides a vehicle or motorcycle activate the sensors[?] [I].e[.,] cat[,] bird[,] dog[?]" (2) "Once the light on Puunene has been tripped, how long will it stay green?" (3) "During what hours did you say the light always stays green on Dairy Rd & K-Highway?" (4) "Is a moped/motorbike able to trip a sensor?" Defense Counsel had no objection to the first juror question, other than his "running" objection to juror questioning in general. Defense Counsel had specific objections to the other three juror questions. State traffic signal technician Calvin Matsuura answered the questions, respectively, as follows: (1) "The sensor . . . picks up the cars by movement. . . . [I]t generates the magnetic field as high as about two feet, . . . and when the vehicle . . . goes through it, it disrupts the field and changes the frequency. A four[-]to[-]five cycle change will show the vehicle to the controller. And dogs and cats can not activate the sensors." (2) "Depends on the volume of traffic on Puunene. If there's only one car, the controller gives a minimum, which I program of [(sic)] five seconds, then it will change back yellow, red, and if there's no other cars, it goes back to Dairy Road and Kuihelani." (3) "There's no set hours. What happens is if there's no cars at the intersection, the light defaults to the main highway, which is Dairy Road and Kuihelani." (4) "We've tested it up to a small motorcycle. As for [a] moped, I'm not sure." The DPA and Defense Counsel each asked a few followup questions.

(Dr. Manoukian), a pathologist at Maui Memorial Medical Center. The court qualified Dr. Manoukian as an expert in the field of pathology, and as an expert on the physiological effects of alcohol on the human body, without objection from the defense.

Dr. Manoukian performed the autopsy on Berger. He reported that Berger died of "severe traumatic injuries to his brain, chest and abdomen." His neck was broken. Also broken were his ribs, one of which pierced his heart. His diaphragm was ruptured and the abdominal contents were pushed up into his chest. His liver and his spleen were torn. Several other bones of his upper body were broken.

During a break in Dr. Manoukian's testimony, MPD officer William Hankins (Officer Hankins) testified that he performed a "survey" at the intersection in question on September 1, 1999. He drove his car on Pu'unene Avenue to the intersection at varying speeds and found that "the faster you were going the longer you had to wait at the intersection" for the green light. At speeds above twenty miles per hour, he had to stop his vehicle to await the green light. Officer Hankins had helped the other police officers at the scene the night of the fatal collision. He remembered that on that night, the traffic lights at the intersection were "defaulted for green" on Dairy Road/Kuihelani Highway and "defaulted to red" on Pu'unene Avenue.

The jurors had one question for Officer Hankins, which the court propounded.⁹

The State and the defense then stipulated that numerous exhibits be entered into evidence, including State's Exhibit 5. The next witness, MPD officer Leighton Kanaele (Officer Kanaele), testified that Exhibit 5 is a photograph of an "open Bud Light brand beer bottle" he found on the driver's side floorboard in Vasquez's vehicle on the night of the collision. Officer Kanaele remembered that there was liquid in the beer bottle "resembling and smelling of liquor." During Officer Kanaele's testimony, the parties further stipulated that Vasquez was the operator of the station wagon at the time it was involved in the collision, and that the vitreous humor sample taken from the eyes of Berger during his autopsy tested negative for alcohol and drugs.

Officer Kanaele testified that on November 28, 1998, he was assigned to the MPD traffic division's accident investigative specialist unit. After a lengthy presentation of Officer

⁹ This question was: "Please clarify what you meant when you said the light was "defaulted" to green on Puunene . . . Ave and what you further stated . . . about the other direction." With respect to this question, Defense Counsel reiterated his "standard objection" to juror questioning. MPD officer William Hankins (Officer Hankins) answered, "What I mean by defaulted is if there's no vehicles in the intersection, one side has to stay green and one side has to stay red. [If t]here's no vehicles in the intersection the light stays green for vehicles travelling [on Dairy Road/Kuihelani Highway]. The light stayed red for vehicles travelling [on Pu'unene Avenue], unless someone travelling [in that direction] trips the light sensor to change their side to green." The DPA had one followup question. Defense Counsel had a further objection to Officer Hankins' response to the followup question. The objection was resolved by an instruction to the jury that the answer was based upon Officer Hankins' observation of the operation of the traffic signals on the night of November 28, 1998.

Kanaele's credentials, and without objection from the defense, the court certified Officer Kanaele as an expert witness in the fields of traffic accident investigation and accident reconstruction. On the morning of November 28, 1998, Officer Kanaele received a call from police dispatch to investigate the collision and to diagram the crash site. Officer Kanaele reported that the posted speed limit within the vicinity of the intersection is thirty miles per hour for both cross streets. He also testified, "Approximately 400 feet [before] the intersection[, on Pu'unene Avenue driving in the Kihei direction,] is where you can pretty much get a clear view of the traffic signal lights."

During a break in Officer Kanaele's testimony, Dr. Manoukian resumed his testimony. He opined that when a person's BAC gets above the 0.15 to 0.29 level, "there's a noticeable increase in a person's lack of neuromuscular coordination." Furthermore, he estimated that if someone were to have a BAC reading of 0.193, the minimum amount of drinks that person would have consumed is ten drinks. Dr. Manoukian opined that, "based on the guidelines for the physiological effects[,] . . . I would say most definitely blood alcohol concentration of .193 milligrams per deciliter would impair one's ability to operate a motor vehicle. . . . It would affect their ability to guide their vehicle, operate their vehicle in traffic, and also impair their ability to respond to stimuli in the environment, and it

would decrease their attentiveness to what they are doing.”

The court refused to propound the one juror question posed for Dr. Manoukian.¹⁰

After Dr. Manoukian finished his testimony, Officer Kanaele continued his. Based on the damages to the two vehicles, Officer Kanaele determined that the front of Vasquez's station wagon broadsided the right side of Berger's motor scooter first, and that “there was no impact coming from the side [of Vasquez's station wagon] preliminarily all of the impact came from the front and not the side.” The initial impact occurred approximately forty feet into the intersection in the Kihei direction. Officer Kanaele maintained that all of the damages on the driver's side of Vasquez's vehicle were damages that occurred past the intersection as a result of secondary impacts, after the station wagon had broadsided Berger's motor bike.

Based on a complicated formula he explained to the jury, Officer Kanaele stated, “I can safely say that [Vasquez] was traveling at a minimum of 80 miles an hour in order to travel 299 feet after impact.” Officer Kanaele also concluded the traffic light serving Pu'unene Avenue was red as Vasquez's vehicle sped through the intersection.

On cross-examination, Officer Kanaele confirmed that all of his opinions about the crash were based upon his

¹⁰ The question was: “Was there a test done to see if or was there any alcohol in [Jaiom Berger's [(Berger)] system?”

assumption that Berger had the green light. Officer Kanaele knew that Dairy Road/Kuihelani Highway always has the default green light. After continuous prodding from Defense Counsel, Officer Kanaele conceded that he did not know as a matter of fact whether Berger ran the red light.

There were eight juror questions for Officer Kanaele. Seven of them were propounded.¹¹

After Officer Kanaele's testimony was done, the State rested. The defense then rested.

In closing argument, Defense Counsel relied upon the argument that Vasquez had the green light. The argument was, in essence, as follows:

Should [Vasquez] have been driving that night while he was drunk? Absolutely not. Should he have been speeding that night? Absolutely not. Is he

¹¹ These questions were: (1) "How fast was [Berger's] scooter going?" (2) "Because of the large trees in the median, at what point (how many feet) is it clear and possible to see the traffic coming [(sic)] from Dairy Rd. when you are driving on Puunene Ave?" (3) "Did you rule out the possibility that another car may have crossed the intersection of Dairy Rd. & Puunene Ave. just before Mr. Vasquez and may have caused the light to remain green when Mr. Vasquez approached that intersection?" (4) "At what time was the photo taken, Board 1 Photo #4?" (5) "Was it just after the accident?" (6) "In what direction are we looking?" And, (7) "Was the intersection secured?" Other than his objection to juror questioning in general, Defense Counsel had no specific objection to any of the proposed juror questions. As to question number one, MPD officer Leighton Kanaele (Officer Kanaele) responded, "I don't know." In response to question number two, Officer Kanaele answered that he could not give an exact distance. With respect to question number three, Officer Kanaele answered, "Yes, I did rule that out." As to question number four, Officer Kanaele replied, "I don't know the exact time." Five, Officer Kanaele estimated that he got to the scene of the collision about one hour after it occurred. On question number six, Officer Kanaele clarified the exhibit in question. And seven, Officer Kanaele responded, "Yes, the intersection was secured around on [(sic)] the entire intersection was coned off by patrol officers with their cars and cones." The question not asked was, "Is there a way in your opinion of telling how fast the motor scooter was going?" The DPA asked followup questions of Officer Kanaele. Defense Counsel did not.

guilty of manslaughter? Absolutely not.

Because the point is if he's going into that intersection as we all do every day in our lives we aren't expecting somebody else to run the red. And just because somebody else dies doesn't make [Vasquez] guilty, and doesn't make [Vasquez] the one who ran the red.

The jury retired to its deliberations on September 12, 2000. The next day, the jury found Vasquez guilty as charged on both counts.

II. Discussion.

On appeal, Vasquez first argues that "[t]he trial court plainly erred¹² in accepting the parties' stipulation to admit into evidence Vasquez' BAC of .193 where the court failed to establish through an on-the-record colloquy with Vasquez his knowing and intelligent waiver of his constitutional rights." (Footnote supplied.) Vasquez refers us to his "constitutional rights to confrontation and proof by the prosecution of every element of the crime charged beyond a reasonable doubt under Article I, sections 5 and 14 of the Hawai'i Constitution." We disagree.

¹² "This court's 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. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (citation omitted). "This court 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. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (brackets, citation and internal quotation marks omitted). Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a) (2000) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." HRPP Rule 52(b) (2000) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

It is a well-pedigreed principle that, although “[t]he right of confrontation is a fundamental right of the accused[,] . . . this right is not absolute and defense counsel can waive certain aspects of the right where such waiver is considered a matter of trial tactics and procedure[,] in which event the trial court is not required to determine whether defendant had knowingly and voluntarily waived his right.” State v. Oyama, 64 Haw. 187, 188, 637 P.2d 778, 779-80 (1981) (citations omitted). Accord, Thompson v. Yuen, 63 Haw. 186, 190, 623 P.2d 881, 884 (1981); State v. El’Ayache, 62 Haw. 646, 648, 618 P.2d 1142, 1143 (1980); State v. Casey, 51 Haw. 99, 101, 451 P.2d 806, 808 (1969); Territory v. Yamba, 37 Haw. 477, 478 (1947). See also State v. Richie, 88 Hawai’i 19, 39, 960 P.2d 1227, 1247 (1998) (trial decisions such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced, are strategic and tactical decisions that should be made by defense counsel, after consultation with the client where feasible and appropriate); State v. Gomes, 93 Hawai’i 13, 20 n.5, 995 P.2d 314, 321 n.5 (2000).

Where evidence not material to the principal defense of a defendant is stipulated into evidence by defense counsel, the trial court does not err in admitting the stipulated evidence without first determining whether the defendant knowingly and intelligently waived his or her right of confrontation. Oyama,

64 Haw. at 189, 637 P.2d at 780 (where trial counsel stipulated to the testimonies of ten State witnesses, none of whom were present for trial, concerning the recovery of the victim's body and the preparation and gathering of demonstrative evidence, there was no error by the trial court in admitting the stipulated evidence without ensuring that the defendant was knowingly and intelligently waiving his right to confrontation, because trial counsel's decision was an appropriate tactical decision in light of the defendant's principal defense of insanity); El'Ayache, 62 Haw. at 650, 618 P.2d at 1144 (in a shoplifting case, trial counsel's decision to stipulate into evidence the testimonies of all of the State's witnesses, save that of a witness to the value of the goods taken, was an appropriate tactical judgment in light of the principal defense that the value was less than the felony threshold; hence, the trial court did not err in admitting the stipulated evidence without determining whether the defendant was knowingly and voluntarily waiving her right to confrontation).

In his principal and only defense, Vasquez conceded that he was drunk and speeding through the intersection, but asserted that Berger was the one who ran the red light, thus denying that Vasquez's reckless conduct was the cause of Berger's death. Defense Counsel alerted the jury to this defense during his opening statement, geared his cross-examination of the State's witnesses to this defense, and urged this defense upon the jury during his closing argument. Hence, Defense Counsel's

decision to stipulate into evidence Vasquez's 0.193 BAC test result, conceded evidence not material to his principal defense, was an appropriate tactical decision, and the court did not err in admitting the stipulated evidence without first ascertaining, in an on-the-record colloquy, that Vasquez was knowingly, intelligently and voluntarily waiving his constitutional right of confrontation.

This is not a case like Casey, in which trial counsel for a defendant charged with the commission of the same offense as her husband, stipulated into evidence for the defendant's afternoon trial all of the evidence that was presented in her husband's trial that morning, without more. Naturally, the Casey court held that

under the facts appearing of record in this case, the stipulation went beyond the permissible bounds of waiver relating to tactical and procedural matters, and, in approving it merely upon counsel's presentation without ascertaining whether it represented the will of appellant, the court committed reversible error.

Casey, 51 Haw. at 102-3, 451 P.2d at 809. That magnitude of concession, nay, surrender, did not occur here. We conclude that the court did not err, plainly or otherwise, in this respect.

Vasquez's other contention on appeal is that the court erred in allowing juror questioning. Here again, we disagree.

Vasquez first argues generally against the practice of juror questioning, informing us that

the federal courts are unified in their strong disapproval of the practice of juror questioning.

Similarly, in a large number of the states that permit juror questioning, appellate courts in these jurisdictions have used the strongest language in discouraging or limiting juror questioning.

In Hawai'i, however, juror questioning is not precluded if appropriately handled by the trial court. State v. Culkin, 97 Hawai'i 206, 227, 35 P.3d 233, 254 (2001). Hawai'i Rules of Penal Procedure (HRPP) Rule 26(b) (2000) provides:

At the discretion of the court, jurors may be allowed to suggest questions to be asked of witnesses. Each juror question must be in writing and delivered to the court through appropriate court personnel. Upon receipt of a question, the court shall review the propriety of submitting the question to the witness with the parties or their attorneys on the record, but outside the hearing of the jury. If the court deems the question appropriate and subject to the Hawai'i Rules of Evidence (HRE), the court may ask the question. The parties shall have an opportunity to examine matters touched upon by any juror question submitted to a witness, subject to the HRE. Any party may object to the asking of a question, but the court may ask the question over any objection after the objection has been placed on the record. The jury shall be pre-instructed about the procedure for asking questions.

Here, the court scrupulously followed the procedures outlined in HRPP Rule 26(b). Vasquez nevertheless questions the court's handling of the juror questioning in his trial.

We review a trial court's handling of juror questioning under the abuse of discretion standard. Culkin, 97 Hawai'i at 229, 35 P.3d at 256. "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. at 213, 35 P.3d at 240 (citation and internal quotation marks omitted).

Specifically, Vasquez argues that

the juror questioning transformed the jurors from fact-finders into advocates, thereby compromising their neutrality. . . , many of the questions posed by the jurors were not merely requests to clear up ambiguity or confusing testimony, but were probing inquiries asking the witnesses for additional information or explanation.

This, Vasquez concludes, "violated Vasquez' [s] right to due process and a fair trial." We disagree. While Vasquez cites some propounded juror questions that tracked theories pursued at trial by the State, none transgressed the boundary between clarification and advocacy, and certainly none rendered the court's allowance of them an abuse of discretion. Cf. Culkin, 97 Hawai'i at 228 n.23, 35 P.3d at 255 n.23 ("To the contrary, pursuit of such evidence [supporting the parties' various theories] is precisely what juror questioning was designed to promote." (Citation omitted)).

Vasquez also complains that "the juror questioning herein invited the jurors to prematurely begin the deliberative process." This point, stated and argued in a conclusory manner, and in the absence of any indication in the record of premature deliberation, cannot rebut the presumption that the jury followed the court's instructions, to decide only "[a]fter the jury has heard all the evidence in this case and the arguments of counsel and has received the instructions of the Court as to the law applicable to this case," and to discuss the case only after "the case is submitted to you with the Court's instructions[.]" Cf.

Culkin, 97 Hawai'i at 228 n.23, 35 P.3d at 255 n.23 ("However, the circuit court carefully instructed the jurors to refrain from forming opinions or making judgment about the case until deliberation. The jurors are presumed to have complied with this instruction." (Citations omitted)).

Finally, Vasquez avers that because "jurors often develop a sense of cohesiveness over the course of a long trial[,] . . . jurors may attach more significance to the answers to questions asked by their fellow jurors than to those asked by the attorneys." We must summarily disagree with this assertion, as it is purely speculative and devoid of support in the record.

In this case, the questions posed by the jurors were carefully reviewed by the court, and several were disallowed after the court found them to be irrelevant or cumulative. The attorneys' objections to the proposed juror questions were placed on the record and heard outside the presence of the jury. Counsel were allowed followup questioning of the witnesses on matters touched upon by the juror questions. Although Defense Counsel maintained a "standing objection" to all juror questioning, he, too, participated in the followup questioning. The jury was pre-instructed by the court regarding the procedure and cautions governing juror questioning. In particular, the jury was instructed that "[t]he purpose of the question must be to clarify the facts of the case, not to explain theories of your own or to discredit a witness." And, that "if the Court does not

ask your question because it is not within the Rules of Evidence or not relevant, it is not a reflection of any kind upon you. If a particular question can not be asked, you must not speculate about what the answer may have been or hold it against either party." Given these general precautions, the court *a fortiori* did not abuse its discretion in conducting the juror questioning. See Culkin, 97 Hawai'i at 228-29, 35 P.3d at 255-56.

III. Conclusion.

The November 16, 2000 judgment of the court is affirmed.

DATED: Honolulu, Hawaii, October 16, 2002.

On the briefs:

Joyce Matsumori-Hoshijo,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Tracy A. Jones,
Deputy Prosecuting Attorney,
City and County of Honolulu, for
plaintiff-appellee.

Associate Judge

Associate Judge