NO. 22353

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

vs.

CLEMENT SOARES, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE FIFTH CIRCUIT
(CASE NO. 99-6532)

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

Defendant-Appellant Clement Soares (Soares) appeals the February 12, 1999 judgment of the District Court of the Fifth Circuit convicting and sentencing him for driving under the influence of intoxicating liquor in violation of Hawaiʻi Revised Statutes (HRS) § 291-4(a)(1)[1] and for inattention to driving in violation of HRS § 291-12.[2]

---

[1] Hawaiʻi Revised Statutes (HRS) § 291-4(a)(1) (Supp. 1999) provides that "[a] person commits the offense of driving under the influence of intoxicating liquor if . . . [t]he person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty[.]"

[2] HRS § 291-12 (1993) provided that "[w]hoever operates any vehicle without due care or in a manner as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than $500 or imprisoned not more than six months, or both."

Because we note *sua sponte* that the court failed to engage Soares in the so-called Tachibana[3] colloquy and obtain an on-the-record waiver of his constitutional right to testify, we vacate the judgment and remand for a new trial consistent with this opinion. We take the opportunity to remind the court also that every convicted defendant has a due process right to allocution before the court imposes sentence.

Background.

At the February 12, 1999 bench trial, the State's first witness was Koani Ebinger (Ebinger).

Ebinger testified that on March 27, 1998, he and some friends from Oʻahu were golfing at the Wailua Golf Course on Kauaʻi. When they finished their play at about 5:00 p.m., they visited the golf course restaurant and bar.

At about 7:00 p.m., Ebinger saw a couple arguing in front of the entrance to the restaurant. He identified Soares as the male disputant. Ebinger approached the couple and asked if they needed any help. When they demurred, Ebinger rejoined his friends nearby, but kept an eye on the couple, "just watching to see what was going on."

The couple continued their argument. Then Soares jumped into his car, a silver Ford Taurus station wagon which was parked in the restaurant parking lot. He locked the door, revved

[3] Tachibana v. State, 79 Hawaiʻi 226, 900 P.2d 1293 (1995).

the engine, put the car in reverse, reversed rapidly out of the parking stall and hit the car parked just to the right of his. He then sped off noisily down the parking lot road and took a left onto Kūhiō Highway heading southbound toward Līhuʻe.

About five minutes later, Ebinger was talking on his cell phone near his truck, which was parked overlooking the jailhouse located across Kūhiō Highway just opposite the golf course entrance. He saw Soares driving at high speed northbound on Kūhiō Highway toward Kapaʻa. Soares suddenly "took a left," crossed the Līhuʻe-bound lane and hit the guardrail in front of the jailhouse head-on. The collision caused "a big dent" in the guardrail. The front bumper of Soares's car was scraped and "kind'a pushed in."

After the collision, Soares backed up, made a left turn into the golf course entrance and returned to the restaurant. He parked right in front of the restaurant. As he did, Stanley Kua (Kua), an off-duty police officer, emerged from the restaurant.

Kua testified next.

Kua was in the Fairway Restaurant at the Wailua Golf Course at about 8:00 p.m. on March 27, 1998. He related that "[t]here was a domestic in the parking lot of the restaurant. . . . I went to check it out. As I was walking in the back of a stationwagon, I saw Mr. Soares and a lady standing outside of the vehicle. Mr. Soares was in the driver's seat, started his car and began to drive off. . . . [H]e revved his

engine a few times, put the vehicle in reverse and burned rubber out of the parking stall[.]"

It was Kua's car that was parked just to the right of Soares's vehicle. Kua was standing right next to his car when Soares accelerated out of the parking stall, and he had to jump out of the way to avoid being hit. As Soares backed out of the parking stall, his right bumper "nudged" the tire of Kua's car. Soares then drove away "at a high rate of speed, reckless, almost colliding into other parked vehicles in the parking lot."

After Soares left, Kua went back into the restaurant. A few minutes later, he saw several men outside the restaurant walking toward the edge of the parking lot overlooking the lower parking lot. He went outside to see what the attraction was and found that it was Soares. After Soares parked in front of the restaurant, Kua approached him, identified himself as an off-duty policeman and instructed him to stay at the side of his vehicle because the police had been notified and were on their way. Soares responded, "[F]uck you, what you gonna do, what the fuck you gonna do?"

When Soares attempted to get back into his car, Kua restrained him with an arm lock because Soares's wife was still in the restaurant and he was concerned that Soares had driven off after "the domestic" in order to get "something" – perhaps weapons or golf clubs.

Soares resisted the restraint "a few times" and was angry and frustrated, yelling and swearing at Kua. He did ask to use the bathroom and Kua held him by the arm the entire way. Kua did not observe any indication that Soares was intoxicated. When asked whether he had smelled any odor emanating from Soares, Kua admitted, "I had a few beers myself, I cannot tell you that."

The State's last witness was Officer Ezera Kanoho (Kanoho).

Kanoho testified that at about 8:15 p.m. on March 27, 1998, he was assigned with Officer Kenneth Carvalho (Carvalho) to patrol the sector that encompassed the Wailua Golf Course. The following exchange ensued:

> Q [PROSECUTOR] Did you get dispatched to Wailua Golf Course that night?
>
> A [KANOHO] Yes, it was for -- we had several calls, first it was an argument.
>
> [DEFENSE COUNSEL] Your Honor, can I object as hearsay?
>
> [PROSECUTOR] (indiscernible) the truth of the matter.
>
> [THE COURT] (indiscernible) the objection is overruled, it's all for the truth of the matter. Go ahead, officer.
>
> A [KANOHO] Initially we had a call about a domestic occurring there, then there was a call of a traffic accident.

Kanoho then testifed that when they pulled into the golf course parking lot, they saw a car parked fronting the restaurant with damage to its windshield and front bumper. When

Kanoho was asked whether he found out the identity of the driver of the car, the following colloquy transpired:

> A [KANOHO] Yes, we were informed that the operator of the vehicle ---
>
> [DEFENSE COUNSEL] Your Honor, can I object as hearsay.
>
> [PROSECUTOR] It's again, all being used for the truth of the matter. We just ---
>
> [DEFENSE COUNSEL] If we don't object ---
>
> [THE COURT] You know, for the limited purpose, we're not gonna use the hearsay for purposes of establishing that he, in fact, was the driver, but in fact for other purposes. I will overrule the objection.

Continuing, Kanoho related that they found Kua and Soares in the men's bathroom. When Kanoho was asked about his observations of Soares's physical appearance, he answered that Soares's eyes were red and watery. The following objection and resolution followed:

> [DEFENSE COUNSEL] Your Honor, can I object as irrelevant and no foundation. He's here for driving under the influence of alcohol, and unless there's some foundation that there is indeed some medical correlation between consumption of alcohol and the appearance of one's eyes, then there is no foundation. If you're going to allow it, then I'd like to voir dire the officer.
>
> [THE COURT] Objection is overruled, you can do that on cross, actually.

Kanoho went on to testify that Soares's speech was slurred, which triggered a successful request from defense counsel that he be granted "a continuing objection to all

this[.]" Kanoho related further that a "moderate odor of liquor was coming from [Soares's] facial area." Kanoho also said that Soares was leaning against the bathroom sink as an aid to balance. Kanoho did say, however, that when they took Soares out to the walkway in front of the bathroom, his perambulation was "okay." Kanoho described Soares's fickle demeanor – combative at times, indifferent at times and at other times attentive and cooperative.

Kanoho was then asked whether he received information that Soares was driving the car parked in front of the restaurant, and he responded:

> A [KANOHO] Yes, that was through Officer Kua.
>
> [DEFENSE COUNSEL] Once again, your Honor, I'd object and move to strike as hearsay.
>
> [PROSECUTOR] It's all for the truth of the matter.
>
> [THE COURT] Objection is overruled.

Kanoho then testified that because of the information received from Kua and his own observations, he asked Soares to perform a "DUI field maneuver test." This testimony elicited the following exchange:

> [DEFENSE COUNSEL] Your Honor, I apologize doing this, but I feel that it's appropriate. May I object to any testimony of any field, physical maneuver test as there's been no appropriate foundation.

> I think we can all conclude that had the officer had a lie detector with him and said, Mr. Soares, will you take this lie detector test, that the Court would not allow a lie detector to come into Court under the Kelly (indiscernible) cases and their progeny.
>
> Therefore, unless there is some scientific foundation for the use of any field, physical maneuver test, then I would say that there is no foundation, that they're generally recognized in the scientific community and therefore are irrelevant.
>
> [THE COURT] Your objection will be noted. You can have a continuing objection on this. The Court's overruling the objection.

Kanoho explained that there are several such tests, but that he had Soares do only two of them, "first the counting test and then the finger counting test." Kanoho mentioned that he usually administers three tests, but limited the number in this case because Carvalho had already subjected Soares to another test. This last bit of testimony drew another defense hearsay objection, which was overruled when Kanoho told the court that he saw Carvalho administer the test to Soares.

When asked about training he received in administering "field maneuver tests," Kanoho related that he was given about forty hours of training while he was with "the traffic unit." Kanoho added that he has administered the field sobriety test over twenty times during his thirteen-year police career. At this point, defense counsel interposed another objection:

> [DEFENSE COUNSEL] Your Honor, before these come in, may I object as, once again,

> no foundation. I believe the Department of Transportation rules say that the field sobriety, quote, unquote, field sobriety tests are for probable cause only and not for -- probable cause for arrest only for further investigation.
>
> Once again, there's been no foundation of any indicia indicated by the field sobriety test that would indicate that someone had or had not been drinking, therefore they're irrelevant, and there's been no appropriate foundation under 702 of the Rules of Evidence.
>
> [THE COURT] Objection is noted, it's overruled.

Before describing the field sobriety tests he administered to Soares, Kanoho confirmed that he first asked Soares whether he had any physical defects or speech impediments. At first, Soares denied that he did, but when Kanoho asked if he would take a "walk-and-turn" test, Soares maintained that he had an unspecified injury to his leg. As to medications being taken at the time, Kanoho recounted Soares's response: "He related that he was taking belporac acid (sic), I'm not sure if that's the correct pronunciation." When Kanoho asked Soares if he was under the care of a doctor or dentist for any condition, Soares responded that he suffered from epilepsy.

Kanoho then described the administration of the counting test. The counting test involves counting back from fifty to zero. The count may be done at any speed, but it must be done at a steady pace without stopping at any time. Kanoho instructed Soares on the performance of the test and confirmed

his understanding of it. Kanoho reported that although Soares did not miss any numbers, his normal one-second counting interval lengthened to three seconds at numbers forty, thirty-nine, twenty-nine, twenty-one, twenty and fifteen. Kanoho concluded that Soares failed the counting test because his enumeration was not at a constantly steady pace.

Kanoho's testimony about the counting test was interrupted by another objection:

> [DEFENSE COUNSEL] Your Honor, may I ask, is the officer testifying from his own memory? Is he reading from the, is he reading from something?
>
> [THE COURT] I don't know, I can't see.
>
> [DEFENSE COUNSEL] Well, are you reading from something?
>
> [KANOHO] The incident happened approximately a year ago . . .
>
> [DEFENSE COUNSEL] Yeah, yeah, I understand that.
>
> [KANOHO] . . . so I can only go by what I have in my report.
>
> [THE COURT] Yeah, but right now you're not reading off your report?
>
> [KANOHO] I'm not reading anything from my -- I don't have the report with me.
>
> [THE COURT] You can ask him that on voir, I mean on your cross-examination, Mr. Murphy, but if he's not reading something right now ---

Kanoho next described the finger-count test. The subject must look straight ahead with both hands out to one side. Then, as Kanoho described it:

> Using your thumb as a counting finger, you start off with your pinky, counting it as one, you count your ring finger as two, middle finger as three, index finger as four, you go back down to your middle as five, ring as six, pinky as seven.
>
> Go back up to your ring as eight, index, oh, sorry, middle as nine, and your index as ten, and you finish with an okay sign. Then I would tell the person, I would repeat it again without stopping[.]

Kanoho confirmed that he instructed Soares on the performance of this test as well, and that Soares understood the instructions without question. During his performance of the finger-count test, Soares did not stop at the count of ten, but went all the way up to the count of twenty. In addition, Soares apparently intentionally performed the test in such a way that he would be giving Kanoho the sign of the erect middle finger at regular intervals. Given this performance, Kanoho concluded that Soares failed the finger-count test as well. Kanoho thereupon arrested Soares.

During his cross-examination of Kanoho, defense counsel established that Kanoho had received only "one night" of training in the relationship between amount of alcohol consumed and level of performance on the field sobriety test. Defense counsel commented to the court that "[t]his would have been my voir dire

had I voir dired him." Defense counsel went on to confirm that Kanoho had no academic credentials in the "biomechanical effects of alcohol" and had never been qualified as an expert in that field.

Defense counsel then established that Kanoho had no knowledge of the physiological mechanism by which alcohol consumption produces red and watery eyes. At this point, the court interjected:

> [THE COURT] [Defense counsel], I'm gonna ---
>
> [DEFENSE COUNSEL] Yes, I'm gonna go through each and everyone of them to show that there is no foundation, that he's ---
>
> [THE COURT] He's not an expert witness, [defense counsel]. If you wanna do that, I'm gonna sustain the objection of the Prosecutor because I don't find that relevant to the police officers -- what he's here for.
>
> He's here to testify to his observations and what he's taught. If you're going to the underlined basis and everything like that, he's not been qualified as an expert, and the Prosecutor has not offered him as an expert on the whys ---
>
> [DEFENSE COUNSEL] I understand that and that's exactly the point I'm making. Eventually, at the end of this case, I'm gonna say that the Prosecution hasn't shown that there's any correlation whatsoever between alcohol, red eyes, slurred speech, that that's the reason I objected as no foundation at the beginning, therefore it is irrelevant, and it's more prejudicial than appropriate. It's not -- we don't have the burden to prove all this stuff.
>
> [THE COURT] I understand that.

[DEFENSE COUNSEL] Yes, sir. So, may we presume that I went through each of them, the red eyes, the slurred speech?

[THE COURT] You can presume that and you can also presume that the officer will probably answer that no, he does not know the exact scientific effects, the cause-and-effect relationships, but this is what he was taught.

[DEFENSE COUNSEL] And that's what I based my no foundation on, for the Prosecution to offer that evidence.

[THE COURT] And your objection was overruled, and it's still overruled.

On further cross-examination, defense counsel obtained the following admission from Kanoho:

Q [DEFENSE COUNSEL] You don't have any independent recollection whatsoever of Mr. Soares doing the field sobriety test, you're just testifying because you read the report -- we've sat around here since 8:30 this morning, right?

A [KANOHO] Yes, just whatever's listed there in the report.

Q [DEFENSE COUNSEL] And you have no present recollection, right? You have no present recollection of giving him the field sobriety test and how he performed, you just looked at your report, right?

A [KANOHO] Yes.

Q [DEFENSE COUNSEL] And you just recently reviewed that, right?

A [KANOHO] Yes, I did.

After Kanoho was excused from the witness stand, defense counsel essayed the following motion:

[DEFENSE COUNSEL] At this time, your Honor, I have a motion and I will cite to the Court, State versus – I'm assuming the State rests.

[THE COURT] No, I don't know yet.

[PROSECUTOR] I rest.

[DEFENSE COUNSEL] I'm citing to the Court, State versus DeBenadetto (spelled phonetically). It's 80 Hawaii, 138. It's a 1995 case and it says: officer's testimony inadmissable [sic], where a police officer's testimony regarding a previously administered field sobriety test was based upon what he had recently read in his report, exactly what [Kanoho] testified to, and the officer had no present recollection of the test.

The Court's decision to allow such evidence to be considered by the jury; in this case to be the Judge; the trier of fact was wrong, and the officer's testimony relating to the field sobriety test should have been stricken and the jury instructed to disregard such testimony.

So, I would make a motion to strike based on the officer's candid testimony, I salute [Kanoho] for saying that. He did the same thing at the ADLRO, he was extremely honest at the hearing.

I would move to strike all of the officer's testimony based on my previous objection and also on State-Debenadetto, therefore, I would move for a motion for judgment of acquittal.

. . . .

[THE COURT] Okay, as far as [defense counsel's] motion, I've looked at the case cited which is State-DeBenedetto, which is 80 Hawaii, 138. It does say that but the Court doesn't really recall [defense counsel] having an objection to the actual testimony of the officer concerning the field sobriety

test on the grounds that he's stating. I mean, he's saying it's a motion to - there wasn't a motion to strike his testimony on this basis.

[DEFENSE COUNSEL] Well ---

[THE COURT] No, no, no, let me finish this, okay? Although my ruling may be incorrect I'll leave that up for the appeals court to determine, but I'm gonna deny the motion because I don't think that proper -- you argued the full grounds, there was a -- you know, when you do a motion to strike I think you gotta put a little bit more on so the Court, as well as the Prosecutor, is more apprised of it.

[DEFENSE COUNSEL] Well, Judge, it's hard to formulate the words, to get them to come out of your mouth when the Judge tells you do not ask the question. I asked, may I voir dire the witness, the Judge says no.

Part of the voir dire is, do you have any independent recollection of what you're talking about, do you have this, do you have that, and the Judge tells you no. Then later on when you make the objection the Judge tells you, well don't voir dire him, you can do that on cross-examination ---

[THE COURT] Okay, and when I established that on cross-examination, then you say -- did you say you wanted to renew your motion to strike? I don't remember hearing that. Well, you know, like I said, you can argue that later but I'm gonna deny that motion to strike the officer's testimony.

Not just on that basis too, but I can see the officer -- I don't think he would have any independent recollection about the exact pauses between the exact numbers, that seems a little stretching it for him to say that, but as far as the general test itself -- concerning the other -- I don't think the officer had absolutely no recollection of that at all. Okay, now that

> we've dealt with that motion, do you want to make another motion?
>
> [DEFENSE COUNSEL] Motion for judgment of acquittal.
>
> [THE COURT] In the evidence in the light most favorable to the State I'm gonna deny the motion. Do you have any -- are you gonna put on any evidence? What charges do we have? We have an inattention to driving, and we have a -- how many counts of driving under the influence?
>
> [DEFENSE COUNSEL] Inattention to driving and driving under the influence, (indiscernible) sufficient to impair his normal mental faculties. May I have a second to speak with Clement?
>
> After briefly chatting with Mr. Soares I think at this point it wouldn't benefit us any to put on any evidence. I don't think that there is -- I think we can rest.

Immediately after this exchange, the court heard closing arguments.

The record on appeal yields no indication whatsoever that the court engaged Soares in a Tachibana colloquy or obtained on the record his waiver of his constitutional right to testify at trial.

Immediately after it heard closing arguments, the court made the following oral ruling:

> Evidence before the Court is as follows: March 27th, 1998, incident occurred at the Wailua Golf Course, which is in the County of auai, State of Hawaii. [Soares], was at the parking lot and there was evidence that he was participating, or was involved in a domestic disagreement with another party.

This is what I heard, from the testimony of the witnesses, and this is -- I don't have any doubt in my mind as to the sequence of these events; that [Soares] did rev his engine, he pulled out of the parking lot, in the process striking a bumper, striking the tire of the adjacent vehicle which was parked about three feet away from him.

In the process of his pulling out, the off-duty officer, [Kua], had to jump out of the way to avoid being hit. After that, [Soares] drove off, admittedly in the right direction and he went up the street. I don't find anything strange about [Soares] going up and coming back. The concern of the off-duty officer was that he had gone to get some kind of weapon or something because of the potential for violence in the domestic argument situation.

The testimony of [Ebinger] was that he did see [Soares] strike the guardrail across from the parking lot where he had been standing. This is when he made a turn, whether he slowed down to make a turn or whether he just went into it full tilt, he did strike the guardrail.

There is evidence based upon the testimony of the officer, [Kanoho], that the damage was sufficient so that there was paint transfer marks, and the guardrail was pushed one to two feet in. That [Soares] was able to get into the parking lot after he had stuck the guardrail, and reversed, and come back into the parking lot without any further incidents is remarkable in the Court's mind, but that incident did occur.

I don't agree with the argument that there is no evidence of damage or [Soares] striking the guardrail. On that -- there is no doubt in my mind that [Soares] was the operator of the vehicle that struck the guardrail. As far as the inattention to driving goes I find that all elements of the offense have been proven beyond a reasonable doubt.

When you go to the driving under the influence charge the evidence appears to be: the officer did detect an odor of alcohol coming from the facial area of [Soares]. The officer also noted slurred speech, wet and watery eyes.

Although the defense counsel is correct, that there is no testimony which shows a correlation between these indicia and the degree of impairment that may be caused by the ingestion of alcohol to one's driving ability or one's ability to care for himself, taken into the context of what happened with [Soares] driving off and actually doing his u-turn maneuver, striking the guardrail, and then driving back into the parking lot, I have no doubt in my mind that [Soares'] mental capacity or faculty to care for himself or guard against casualty was impaired.

I'm not relying upon the field sobriety test that was given about the failure, you know, the counting backwards, the three second pauses, you know, although these two tests that were given are sometimes described as the least, some people argue that these tests are designed to fail, but these two tests are not the most offensive tests in that regard, like the one-legged stand and some of the other tests are more difficult, and I've even seen police officers themselves fail to do that when they come to Court.

But taken into fact that [Soares] did strike that guardrail, and in the manner in Which he did that, I have no doubt in my mind that his mental faculties were impaired to that extent and will find him guilty of counts one and counts two. Do you want to have a PSI on this, a record check?

Immediately after the foregoing ruling, the following byplay occurred:

> [PROSECUTOR] Yeah, we can have a record check, unless you want – does he want to be sentenced today?
>
> [DEFENSE COUNSEL] You want to be sentenced today?
>
> [SOARES] The Judge never hear everything.
>
> [DEFENSE COUNSEL] That's true. You want to be sentenced today?
>
> [SOARES] I don't know.

The court then heard brief arguments from the two attorneys and immediately pronounced its sentence. After being sentenced, Soares asked questions and made comments about how he might fulfill the provisions of the sentence. The court never asked him whether he wanted to make allocution before sentence was imposed. Soares did not at any time question or comment in any way that might be construed as allocution.

Issues Presented.

Soares presents ten separate issues on appeal. The issues may, however, be consolidated on common underlying conceptual bases into five issues on appeal.

a. Soares argues that the court erred three times in allowing hearsay evidence. The first instance he identifies is Kanoho's testimony about the dispatch information that led them to go to the golf course in the first place. The second instance is Kanoho's testimony that upon arrival at the golf course he and

Carvalho were informed of the identity of the driver of the station wagon. The third instance is Kanoho's testimony that Kua told him that Soares was the driver of the station wagon.

b. Soares also contends the court erred in admitting evidence that his eyes were red and watery and that his speech was slurred. He asserts that such testimony is expert testimony which cannot be admitted unless a foundation is first laid showing if and how the ingestion of alcohol results in those physical manifestations. Because the State laid no such foundation and because Kanoho was not qualified as an expert witness, Soares claims the evidence lacked foundation and was therefore irrelevant and inadmissible.

c. Soares further asserts that the court erred in admitting evidence about his performance on the field sobriety tests. He avers that before evidence of a defendant's performance on the field sobriety tests can be admitted a foundation must be laid establishing the scientific validity of the tests. He further argues that a minimally sufficient foundation also requires evidence that the administering officer possessed adequate knowledge and expertise regarding the tests and their procedures. Soares asserts that neither foundational component was established at trial and that the evidence was therefore irrelevant and inadmissible.

d. Soares also complains that Kanoho's testimony regarding the field sobriety tests was incompetent because he

admitted on cross-examination that he had no present recollection of the tests independent of what he had read in his police report and thus lacked personal knowledge of the administration of the tests. In this connection, Soares contends the court erred in not allowing his counsel to voir dire Kanoho on the issue at the beginning of his testimony and in not granting his motion to strike Kanoho's testimony regarding the field sobriety tests.

e. Finally, Soares claims that the court erred in denying his motion for judgment of acquittal because the evidence remaining after redacting the evidence he claims was erroneously admitted was not sufficient to convict him of the DUI charge or the inattention to driving charge.

Discussion.

In the proceedings below, Soares did not complain in any way about the court's failure to advise him concerning his constitutional right to testify at trial. However, Hawai‘i Rules of Penal Procedure (HRPP) Rule 52(b) (1999) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Soares does not present any issue on appeal concerning his right to testify at trial. But Hawai‘i Rules of Appellate Procedure Rule 28(b)(6) (1999) excepts "plain error" from its general disregard of issues not presented on appeal. The Hawai‘i Supreme Court takes notice of Tachibana error as plain error even

though the dereliction was not complained of in the lower court or presented as an issue on appeal. State v. Staley, 91 Hawai'i 275, 286-87, 982 P.2d 904, 915-16 (1999).

Without question, the court violated a substantial right when it violated Soares's constitutional right to testify by failing to advise him of his right to testify and obtain his waiver of that right on the record.

In Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), the Hawai'i Supreme Court held that "in order to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." Id. at 236, 900 P.2d at 1303 (footnotes omitted).

The mere absence of such a colloquy constitutes a violation of a criminal defendant's right to testify. Id. at 237-38, 900 P.2d at 1304-5 ("[i]f our holding in this case were to apply retrospectively, we would be compelled to affirm the circuit court's conclusion that Tachibana's right to testify was violated based solely on the lack of such a colloquy").

Hence the only issue remaining is whether Soares's convictions and sentences must be vacated. In considering that issue, the question is whether the court's failure to conduct a Tachibana colloquy was harmless beyond a reasonable doubt. Id. at 240, 900 P.2d at 1307 ("[o]nce a violation of the

constitutional right to testify is established, the conviction must be vacated unless the State can prove that the violation was harmless beyond a reasonable doubt")(citation omitted).

In other words, "the question is 'whether there is a reasonable possibility that error may have contributed to conviction.' 'If there is . . . a reasonable possibility . . ., then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.'" State v. Akahi, 92 Hawai'i 148, 150-51, 988 P.2d 667, 669-70 (App. 1999)(citations omitted).

The record does not indicate what Soares would have said on the witness stand. We therefore cannot conclude without inappropriate surmise that there is no reasonable possibility that the Tachibana violation contributed to his convictions. By the same token, we cannot conclude that the violation of Soares' constitutional right to testify at trial was harmless beyond a reasonable doubt and his convictions and sentences must be vacated. See State v. Silva, 78 Hawai'i 115, 126, 890 P.2d 702, 713 (App. 1995).

Given the foregoing disposition of this case, we need not pass upon the remaining issues Soares presents in this appeal, save one. "[C]hallenges to the sufficiency of the evidence must always be decided on appeal." State v. Malufau, 80 Hawai'i 126, 132, 906 P.2d 612, 618 (1995).

> On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. ***State v. Ildefonso***, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); ***State v. Tamura***, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" ***Ildefonso***, 72 Haw. at 576-77, 827 P.2d at 651 (quoting ***Tamura***, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' ... is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." *See id.* 72 Haw. at 577, 827 P.2d at 651 (quoting ***State v. Naeole***, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). "Furthermore, 'it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]'" Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306 (citation omitted).

In considering the sufficiency of the evidence in this case, we ignore the evidence that Soares contends in his other points on appeal was erroneously admitted at trial, with one exception. We disagree with Soares's objection to the admission of evidence of his slurred speech and red and watery eyes. With respect to such observations, there is no predicate akin to the foundation required for an opinion regarding a subject's performance on field sobriety tests. "[A] lay witness may

express an opinion regarding another person's sobriety, provided the witness has had an opportunity to observe the other person." State v. Nishi, 9 Haw. App. 516, 519-25, 852 P.2d 476, 478-81 (1993)(internal quotation marks and citation omitted)(although police officer's opinion that the defendant failed three field sobriety tests lacked the necessary foundation for admissibility, contemporaneous observations regarding "red glassy bloodshot" eyes, an emanating odor of alcohol and even balance and coordination problems during the field sobriety tests were taken into account by the reviewing court in examining the sufficiency of the evidence). In this connection, we also observe in passing that the court, in reaching its verdict, did not consider Kanoho's testimony regarding the field sobriety tests.

Taking the evidence in the light most favorable to the State yields the following summary of the evidence.[4]

Nonhearsay testimony from Ebinger and Kua established that Soares was involved in a domestic argument in front of a restaurant and bar. He then got into his station wagon and drove it. The same sources established that he was driving erratically, even recklessly, and that in doing so in the parking

[4] Soares admits on appeal that "[a] review of the properly appropriately redacted record, via appropriate court rulings and exclusion of evidence, discloses the following evidence put forth by witnesses for the prosecution: (1) Defendant's car touched a neighboring tire in a parking lot while backing up, and touched a guard rail [sic] as it was making a u-turn on a roadway; (2) this happened after defendant had an argument with another person; (3) despite having committing no crimes, defendant was put in an arm lock [sic] by an off duty KPD officer and moved fifty to sixty feet; (4) defendant had the moderate odor of alcohol on his breath; (5) defendant, in Kanoho's opinion, did not pass the field maneuver tests given."

lot he nearly struck Kua and did in fact nudge the tire of Kua's vehicle with the station wagon. Soares thereafter sped noisily off onto Kuhio Highway, returned, and in a bizarre maneuver crossed an opposing lane and collided with the guardrail, leaving a "big dent."

In addition, Kanoho testified from direct observation that Soares had red and watery eyes, that his speech was slurred and that a "moderate odor of liquor" emanated from his facial area. Kanoho also noted that Soares at one point needed support to maintain his balance. Finally, Kanoho described Soares's labile demeanor.

Given the foregoing, we conclude there was substantial evidence for the court to find and conclude beyond a reasonable doubt that Soares operated a vehicle while under the influence of intoxicating liquor in an amount sufficient to impair his normal mental faculties or his ability to care for himself and guard against casualty, and that in doing so he caused a collision with and damage to property. Hence there was sufficient evidence to find him guilty of DUI and of inattention to driving, and the court was justified in denying his motion for judgment of acquittal.

As a final note, we reiterate our observation that the court, in sentencing Soares, did not afford him his due process right to allocution. This was error which would, independent of other trial errors, require that the sentences be vacated. HRS

§ 706-604(1);[5] HRPP Rule 32(a);[6] State v. Carvalho, 90 Hawai'i 280, 285-86, 978 P.2d 718, 723-24 (1999).

Disposition.

For the foregoing reasons we vacate the court's judgment of convictions and sentences. We remand for a new trial and proceedings consistent with this opinion.

DATED: Honolulu, Hawaii, August 4, 2000.

On the briefs:

John H. Murphy, for defendant-appellant.

Bryant Zane, Deputy Prosecuting Attorney, for plaintiff-appellee.

JAMES S. BURNS
Chief Judge

CORINNE K. A. WATANABE
Associate Judge

JOHN S. W. LIM
Associate Judge

---

[5] HRS § 706-604(1) (1993) provides that "[b]efore imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition."

[6] Hawai'i Rules of Penal Procedure Rule 32(a) (1999) provides, in relevant part, that "[b]efore suspending or imposing sentence, the court shall address the defendant personally and afford a fair opportunity to the defendant and defendant's counsel, if any, to make a statement and present any information in mitigation of punishment."