***** NOT FOR PUBLICATION *****

NO. 26571

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROBERT SHEREZ, Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(TR 57P, HPD No. 5647984MO)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson and Acoba, JJ.; and Nakayama and Duffy, JJ., dissenting)

On September 26, 2005, the defendant-appellant-petitioner Robert Sherez filed an application for a writ of certiorari urging this court to review the summary disposition order (SDO) of the Intermediate Court of Appeals (ICA) in State v. Sherez, No. 26571 (Aug. 25, 2005) [hereinafter, "the ICA's SDO"]. The ICA affirmed the judgment and order of the district court of the first circuit (1) convicting Sherez of reckless driving in violation of Hawai'i Revised Statutes (HRS) § 291-2 (1993)[1] and (2) sentencing him to pay a fine of $300.00 and attend a driver's education course. On September 30, 2005, we granted certiorari.

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[1] HRS § 291-2 provides in relevant part: "Whoever operates any vehicle . . . recklessly in disregard of the safety of persons or property is guilty of reckless driving of vehicle . . . ." Effective July 20, 1998, the legislature amended HRS § 291-2 in respects not material to the present matter. See 1998 Haw. Sess. L. Act 287, § 2 at 956.

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In his application, Sherez contends that the ICA gravely erred in affirming his conviction in the absence of sufficient evidence.

Inasmuch as the ICA's SDO reflects grave errors of law and is inconsistent with the ICA's own recent decision in State v. Moser, 107 Hawai'i 159, 111 P.3d 54 (App. 2005), see HRS § 602-59(b) (1993), we reverse the ICA's SDO, vacate the district court's judgment and sentence, and remand this matter to the district court for the entry of a judgment of acquittal.

I. BACKGROUND

Sherez's bench trial came before the district court on April 16, 2004. During the trial, the plaintiff-appellee-respondent State of Hawai'i [hereinafter, "the prosecution"] adduced the following evidence.

The prosecution's witness, Honolulu Police Department (HPD) Sergeant Kurt Ng, testified that, on December 11, 2003, at approximately 7:49 p.m., he was on duty and operating "a motorized patrol car." Traffic into Waikīkī was "rather congested." Sergeant Ng was "in the makai most [right] lane" on Kalākaua Avenue, heading into Waikīkī. According to Sergeant Ng, while the approaching traffic light was yellow, Sherez, who was operating a motorcycle, "cut[] in front of [Sergeant Ng]" from the center lane, "causing [Sergeant Ng] to brake suddenly." Sergeant Ng testified that Sherez was not speeding, but that "[t]here wasn't a sufficient area to clock." On redirect examination, the deputy prosecuting attorney (DPA) asked Sergeant

Ng, "Did you feel [Sherez] was driving an appropriate speed with the conditions, considering the traffic, at that time," to which Sergeant Ng answered "No."

Sergeant Ng "decided to stop [Sherez] after the light turned green, on the opposite side" of Ala Wai Boulevard. After the light changed, Sergeant Ng observed Sherez "cut across two lanes, crossing the safety zone area, . . . causing the vehicle next to [Sergeant Ng] to brake suddenly, and causing the other vehicle in the mauka most [left] lane to brake suddenly to avoid a collision with him." When the DPA asked Sergeant Ng how he "kn[e]w that they braked suddenly," Sergeant Ng answered that "the nose[s] of their vehicles had dipped a little, and I could see their brake lights on." Sergeant Ng next testified that, after Sherez "swerved over towards on the makai direction again, . . . [Sergeant Ng] could see it was safe for [him] to pull [Sherez] over." Sergeant Ng pulled Sherez over at the intersection of Kalākaua and Ala Moana Boulevard.

On redirect examination, the DPA asked Sergeant Ng how he decided for what offense to cite Sherez. Sergeant Ng responded as follows:

> Well, I take into [consideration] what the person does first, okay. In this scenario . . . Sherez had forced me to brake suddenly, okay. So first on his failure to yield the right of way. Okay.
>
> The second one he did was failure to signal his lane change, and he crossed over the center median. And also failure to yield to the right of way of the other two vehicles. Okay. So that's approximately another two to three citations.
>
> . . . [T]hen also taking in the fact that it was rather dangerous what he had done, seeing that he did have a passenger . . . on his motorcycle.
>
> To me, that encompassed reckless driving. So instead of citing him for five to six other citations, I just cited

him for the reckless driving.

Sherez called Sayuri Ogawa, his passenger on his motorcycle on the date of the alleged offense, to testify. Ogawa, and later Sherez himself, testified that, while the two of them waited at the traffic light at Kalākaua and Ala Wai, "the car on our left was behind the line. So we had a little bit of a gap there." Ogawa testified that Sherez "gave the signal to go to the left . . . [a]nd also he gave . . . the arm turn signal." According to Ogawa, "[b]efore the light went green, the driver of the middle lane acknowledge[d] our wish to go to the left lane," at which point Sherez steered into the middle lane, into the gap in front of the adjacent car. Ogawa testified that, after the light turned green, Sherez again activated the left turn signal and moved into the left lane with "a clearance of at least 50, 60 feet."

Sherez testified on his own behalf that he had pulled into the right lane on Kalākaua about fifty feet from the intersection with Ala Wai and that he had "signalled right, stuck out [his] hand, and . . . moved in." Once stopped at the light, Sherez signalled to the driver in the middle lane, and moved his vehicle partially into that lane. Sherez testified that after the light changed, he continued straight ahead in the middle lane, then "signalled, and . . . made a left into th[e far left] lane." At that time, Sherez stated, the closest car behind him in the left lane "was at least 25 feet . . . behind me."

The district court orally "f[ound] [Sergeant Ng]'s version more credible than that of [Sherez] and [Ogawa]":

> [F]irst of all, [Sergeant Ng] was in the back, having a better sight of what was going on in front. And . . . [Sergeant Ng] could have cut across all the way to the mauka lane, but of course, according to him, it . . . wasn't safe for him to try to do that. So he stayed in the lane where he was, and tried to follow you.
>
> And in addition . . . according to [Sergeant Ng], the other cars in front of him . . . had to brake. And . . . even [Sergeant Ng] himself had to brake to avoid any accident when [Sherez] cut in front of him . . . .

The district court found Sherez guilty as charged and sentenced him to a fine of $300.00, plus a compensation fee of $25.00, court costs, and driver education. On May 12, 2004, Sherez timely filed a notice of appeal.

On appeal, Sherez argued that the prosecution was required to prove that he "consciously disregarded a substantial and unjustifiable risk that he was operating his motorcycle in a reckless manner, such that it amounted to a gross deviation from the standard of conduct that a law abiding person would observe in the same situation." (Citing HRS § 702-206(3) (1993).)[2]

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[2] HRS § 702-206(3) states in relevant part:

> **Definitions of states of mind.**
>
> . . . .
>
> (3) "Recklessly."
>
> (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
>
> (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
>
> (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
>
> (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and

(continued...)

Sherez argued, inter alia, that, insofar as "there was no evidence of how close the cars were to the motorcycle, nor . . . even a near-accident . . . [nor] speeding, squealing brakes, or honking horns," the prosecution did not produce sufficient "evidence of any gross deviation from the standard of conduct that a law-abiding person should have observed."

Sherez further argued that the prosecution produced insufficient evidence that he was "aware that his conduct created a risk of harm" and therefore "there was insufficient evidence . . . that . . . Sherez had the requisite state of mind of recklessness . . . ."

The prosecution countered that the district court found Sergeant Ng's testimony more credible than that of Sherez and Ogawa. The prosecution argued that

> [a]t the speed [Sherez] was traveling, with the congested traffic conditions and . . . night lighting conditions, his actions of cutting in front of 3 different drivers where there was an unsafe distance between h[im] and other cars, his repeated failure to signal lane changes, driving over a safety zone and the center median, cutting off other vehicles, [and] swerving across lanes of traffic on Kal[ā]kaua Avenue show his actions to be a gross deviation from the standard a law abiding person would have observed.

With respect to Sherez's awareness of the risk, the prosecution argued that

> [e]xceeding the speed limit, cutting off cars, almost causing several vehicle collisions, simultaneously cutting across multiple lanes of traffic in congested traffic conditions without signaling his intention, driving over a

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[2](...continued)
purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

> safety zone area and center median amounts to sufficient evidence that [Sherez] consciously disregarded a substantial and unjustifiable risk of the safety of other persons and property. Other drivers barely avoided motor vehicle collisions because of his reckless driving.

The ICA affirmed Sherez's conviction in its SDO filed on August 25, 2005. The majority, comprised of the Honorable Corinne K.A. Watanabe and the Honorable Daniel R. Foley, held that "there was 'substantial evidence to support the conclusion of the trier of fact' that Sherez was guilty of reckless driving in violation of HRS § 291-2[, see supra note 1].'" (Quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996).)

The Honorable Chief Judge James S. Burns dissented, arguing that Sherez's driving involved, at most, six traffic infractions, not the criminal offense of reckless driving. Chief Judge Burns disagreed that Sherez's conduct, "[c]onsidering the evidence in the strongest light for the prosecution," rose to "a substantial risk that . . . persons would be injured and/or that property would be damaged." Chief Judge Burns asserted that

> the risk of what would happen is exactly what happened in this case -- no personal injury and no damage to property.
>
> Even assuming there is substantial evidence that there was a substantial risk . . . , is there evidence that the disregard of that substantial risk involved a "gross deviation" from the standard of conduct that a law-abiding person would observe in the same situation?

Finally, Chief Judge Burns posed the rhetorical question, "When did what Sherez did change from various traffic infractions to one traffic crime?" Based on the foregoing reasons, Chief Judge Burns "conclude[d] that the evidence d[id] not support the findings necessary to support a conclusion that Sherez committed a traffic crime."

On September 26, 2005, Sherez timely filed an application for a writ of certiorari.

II. STANDARDS OF REVIEW

Appeals from the ICA are governed by HRS § 602-59(b) (1993), which prescribes that

> an application for writ of certiorari shall tersely state its grounds which must include (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistences dictating the need for further appeal.

In re Doe, Born on June 20, 1995, 95 Hawai'i 183, 189, 20 P.3d 616, 622 (2001).

III. DISCUSSION

Sherez's states in his application that "[t]he ICA gravely erred in affirming the conviction where there was not substantial evidence that . . . Sherez operated his vehicle in disregard of a substantial and [un]justifiable risk to the safety [of] persons or property nor that he acted in conscious disregard of such a risk." Sherez argues that

> [e]ven assuming that . . . Sherez changed lanes without signaling so that other cars had to "brake suddenly," such conduct, without more, does not create a substantial risk . . . of harm or injury. . . . Sherez's lane changes were not so abrupt as to cause tires to screech or trigger the drivers to honk their horns. There was no evidence of how close the cars were to the motorcycle. Thus, there was no evidence establishing the likelihood or probability of a collision.

Sherez further argues that there was not sufficient evidence of his "subjective awareness":

> The [ICA] based its decision . . . on . . . S[ergeant] Ng's perception of the driving conditions . . . . S[ergeant] Ng perceived the cars braking suddenly. But, he testified he

> was aware that the cars were braking suddenly only because he was able to see their tail lights come on and the noses of the cars dip slightly. There was no evidence that . . . Sherez perceived the braking response by the other drivers. . . . There was no sound of screeching tires, horns honking, or remonstrations from the drivers. Significantly, there was no evidence that . . . Sherez had to take any action himself to avoid contact with the other vehicles. And, . . . Sherez was traveling below the speed limit . . . . In fact, [the] trial court later stated at the sentencing phase . . . that . . . Sherez "may have thought it was safe[,"] acknowledging . . . Sherez's subjective state of mind.

We agree with Sherez's arguments; we further note that the ICA's SDO is inconsistent with the ICA's own recent decision in Moser. For the following reasons, we reverse the ICA's SDO, vacate the district court's judgment and sentence, and remand the matter to the district court for the entry of a judgment of acquittal.

The district court, as the trier of fact, had discretion to believe one version of the facts over another. See State v. Batson, 73 Haw. 236, 249, 831 P.2d 924, 931 (1992). Nonetheless, the facts as construed most favorably for the prosecution do not show the requisite state of mind for recklessness pursuant to HRS § 702-206(3), see supra note 2.

> Given the difficulty of proving the requisite state of mind by direct evidence in criminal cases, "[w]e have consistently held that . . . proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the [defendant's conduct] is sufficient. . . . Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances."

Batson, 73 Haw. at 254, 831 P.2d at 934 (quoting State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982) (citations omitted)). In the present matter, the prosecution adduced no evidence of behavior or omissions by Sherez that would manifest

his own awareness of any risk. Sergeant Ng did not testify as to the distance between Sherez's motorcycle and either of the cars Sherez allegedly cut off. Furthermore, there was no evidence of screeching tires, honking horns, nor any other warning that should have been perceptible to Sherez. Sergeant Ng, from his vantage point behind Sherez and the adjacent cars, saw the adjacent cars brake "suddenly"; nevertheless, the record does not support the inference that Sherez knew whether "the safety of persons or property" was in peril. Cf. State v. Cadus, 70 Haw. 314, 315-16, 320, 769 P.2d 1105, 1107, 1110 (1989) (affirming conviction for reckless driving where the defendant "sped through . . . crowded intersections with screeching tires, prevented many pedestrians from traversing the crosswalks, caused other pedestrians already on the road to jump back onto the curb, and disregarded the right-of-way which other vehicles had possessed"). At most, the evidence "is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion," see Batson, 73 Haw. at 248-49, 831 P.2d at 931, that Sherez committed several traffic infractions, i.e., failing to yield three times, failing to signal two lane changes, and driving across the safety zone.

Futhermore, we agree with Chief Judge Burns's conclusion that there was insufficient evidence of a "'gross deviation' from the standard of conduct that a law-abiding person would observe in the same situation." By affirming the district court's conviction, the ICA diverged from its own recent construction of the term "gross." In Moser, the ICA explained

that

> "Gross deviation" is not defined in the disorderly conduct statute, nor does Hawai'i case law explain the meaning of the term. Black's Law Dictionary defines "gross" as "[o]ut of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or negligence. Such conduct as is not to be excused." Black's Law Dictionary 702 (6th ed. 1990) (citation omitted). See also State Bd. of Dental Exam'rs v. Savelle, . . . 8 P.2d 693, 696 ([Colo.] 1932) (adopting above definition of "gross").

107 Hawai'i at 172, 111 P.3d at 67. Assuming arguendo that "all failures to yield the right-of-way . . . involve an unjustifiable risk," (emphasis added), the evidence does not show any risk that was "substantial," i.e., "gross," i.e., "beyond allowance . . . not to be excused." Sherez's behavior of changing lanes in front of three cars, and driving across a safety zone, was at most evidence of several traffic infractions, not reckless driving.

We believe that the ICA gravely erred in affirming Sherez's conviction, insofar as the prosecution failed to adduce substantial evidence that Sherez "consciously disregard[ed]," HRS § 702-206(3), see supra note 2 (emphasis added), any risk to "the safety of persons or property," HRS § 291-2, see supra note 1. Moreover, even viewed "in the strongest light for the prosecution," the evidence was not "of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion," Batson, 73 Haw. at 248-49, 831 P.2d at 931, that Sherez's driving "involve[d] a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation," HRS § 702-206(3)(d), see supra note 2 (emphasis added).

***** NOT FOR PUBLICATION *****

IV. CONCLUSION

In light of the foregoing analysis, we reverse the ICA's SDO, vacate the April 16, 2004 judgment and sentence of the district court, and remand the matter to the district court for the entry of a judgment of acquittal.

DATED: Honolulu, Hawai'i, October 18, 2005.

DISSENTING OPINION

(By: Nakayama and Duffy, JJ.)

Inasmuch as we agree with the ICA majority that there was substantial evidence to support the conclusion of the trier of fact, we would dismiss the application for writ of certiorari as improvidently granted.

On the writ:

Deborah L. Kim,
Deputy Public Defender,
for the defendant-appellant-
petitioner, Robert Sherez