

\*\*\* NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER \*\*\*

NO. 25646

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

JESUS MARIA CHAPA, JR., Defendant-Appellant.

KHAMAKADO  
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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(Case No. TD 1A of 01/08/03)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant Jesus Maria Chapa, Jr. ("Chapa"), appeals from the first circuit district court's ("district court") January 8, 2003 judgment,<sup>1</sup> convicting him of the offense of operating a vehicle under the influence of an intoxicant, in violation of Hawai'i Revised Statutes ("HRS") § 291E-61(a)(1).<sup>2</sup> Chapa presents the following two points of error on appeal: (1) the district court erred by permitting Honolulu Police Officer Sean Kaipo Nahina ("Officer Nahina") to testify as to the results of a standardized field sobriety test ("SFST") inasmuch as the foundation for such testimony was insufficient; and (2) the district court erred by permitting Officer Nahina to testify as

<sup>1</sup> The Honorable Fa'auuga To'oto'o presided.

<sup>2</sup> HRS § 291E-61(a)(1) (Supp. 2002) provides that

[a] person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle . . . [w]hile under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty[.]

to the contents of a National Highway Traffic Safety Administration ("NHTSA") training manual insofar as the manual was not offered in evidence and was not available to the defense.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) although the district court abused its discretion by permitting Officer Nahina to testify that (a) he observed the onset of nystagmus prior to 45 degrees,<sup>3</sup> and (b) Chapa "failed" the WAT

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<sup>3</sup> We agree with Chapa that an improper foundation was laid for Officer Nahina's testimony that he observed nystagmus "in both eyes for each test." The NHTSA manual expressly instructs police officers to "[p]ractice until you can consistently estimate 45 degrees. Check yourself monthly with [an 8" x 15" square template or cardboard with a diagonal line drawn from one corner to another to demark 45 degrees] to be sure that your accuracy has been sustained." State v. Ito, 90 Hawai'i 225, 244 n.10, 978 P.2d 191, 210 n.10 (App. 1999) (brackets in original) (emphasis in original) (citing 1984 NHTSA Instruction Manual, reprinted in 1 Defense of Drunk Driving § 10.99[2], app. at 10-92). Additionally, Chapa submitted into evidence an excerpt from the 1984 NHTSA student manual, which explains why the measurement of a 45 degree angle is vital: "Since the extent of impairment is indicated by the angle at which nystagmus begins, you will need to learn how to estimate this angle . . . particularly the angle of 45-degrees, since that is the crucial point for estimating BAC." (Emphasis added.) Officer Nahina's failure to routinely verify the accuracy of his measurement of a 45 degree angle calls into question his conclusion that Chapa exhibited the onset of nystagmus prior to 45 degrees, and it precludes the conclusion that that portion of the HGN test was "properly administered." See Ito, at 244, 978 P.2d at 210 ("Before HGN test results can be admitted into evidence in a particular case, . . . it must be shown that (1) the officer administering the test was duly qualified to conduct the test and grade the test results, . . . and (2) the test was performed properly in the instant case.") (Internal citations omitted.) (Emphasis added.). Therefore, we conclude that the district court abused its discretion by permitting Officer Nahina to testify as such. See State v. Ferrer, 95 Hawai'i 409, 425, 23 P.3d 744, 760 (App. 2001), reconsideration denied, 95 Hawai'i 409, 23 P.3d 744 ("In the absence of foundational testimony establishing conformity to the NHTSA training standards, we conclude that the district court abused its discretion when it allowed [the police officer] to testify about [the defendant's] performance on the HGN test.").

and OLS tests,<sup>4</sup> the errors were harmless beyond a reasonable doubt;<sup>5</sup> and (2) Hawai'i Rules of Evidence ("HRE") Rule 1002<sup>6</sup> did not require the prosecution to produce the NHTSA manual, insofar as Officer Nahina's testimony regarding the manual was a collateral matter falling within the ambit of HRE Rule 1004(4).<sup>7</sup>

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<sup>4</sup> The excerpt from the 1984 NHTSA student manual submitted into evidence by Chapa requires that the WAT and OLS tests be administered on level ground. Inasmuch as both the prosecution and Chapa stipulated that the WAT and OLS tests were administered on ground with a slope of approximately 25 degrees, we cannot conclude that WAT and OLS tests were properly administered. Thus, the district court abused its discretion by permitting Officer Nahina to testify that Chapa "failed" those tests. See Ferrer, 95 Hawai'i at 429, 23 P.3d at 764 ("[I]t is permissible for a police officer to testify as a lay witness about his or her observations of a defendant's performance on various FSTs and to give an opinion, based on such observations, that the defendant was intoxicated. However, unless proper foundation is laid, it is improper for a police officer to testify that in his or her opinion, a defendant 'failed' or 'passed' a FST.").

<sup>5</sup> Here, the record indicates that: (1) Chapa was weaving between the right and center lanes on the freeway; (2) Chapa did not immediately respond to Officer Nahina's blue lights and siren, and Officer Nahina was forced to pull alongside Chapa's vehicle and yell at him to pull over; (3) when asked for his license, registration and insurance, Chapa "seemed confused, and his head was bobbing a little[;]" (4) Chapa's eyes were "red, watery, bloodshot[,] and "an odor of an alcoholic type beverage" emanated from his vehicle; (5) when instructed to take nine steps forward, heel to toe, turn, and return in the same fashion, Chapa "started too early," and he "took really quick steps. He missed heel to toe all nine. His arms were raised throughout the walking[;]" and (6) when instructed to stand on one leg for a certain period of time, Chapa "raised his arms. He swayed, and put his foot down[.]" Viewing the foregoing competent evidence in the light most favorable to the prosecution, see State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004) ("The test on appeal in reviewing the legal sufficiency of the evidence is whether, when reviewing the evidence in the light most favorable to the prosecution, substantial evidence exists to support the conclusion of the trier of fact."), we conclude that there was sufficient evidence to support Chapa's conviction for the offense of driving under the influence of an intoxicant, in violation of HRS § 291E-61(a)(1).

<sup>6</sup> HRE Rule 1002 (1993) provides that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

<sup>7</sup> HRE Rule 1004 (1993) provides that, "[t]he original or a duplicate is not required, and other evidence of the contents of a writing, recording, (continued...)

Therefore,

IT IS HEREBY ORDERED that the district court's January 8, 2006 judgment is affirmed.

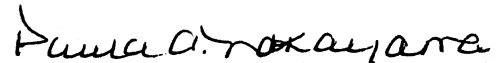
DATED: Honolulu, Hawai'i, December 13, 2006.

On the briefs:

Earle A. Partington  
for defendant-appellant  
Jesus Maria Chapa, Jr.



James M. Anderson,  
Deputy Prosecuting Attorney,  
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James E. Douglas, Jr.

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<sup>7</sup>(...continued)  
or photograph is admissible if . . . [t]he writing, recording, or photograph is not closely related to a controlling issue."