NO. 25191

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WOLFGANG EISERMANN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 91-2964)

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

On October 21, 1994, Defendant-Appellant Wolfgang Eisermann (Defendant or Eisermann) was sentenced for various offenses, which included Kidnapping, Hawaii Revised Statutes (HRS) § 707-720 (1986), and multiple counts of Sexual Assault in the First Degree, HRS § 707-730 (2001). Eisermann appeals from the Circuit Court of the First Circuit's June 20, 2002 Findings of Fact, Conclusions of Law and Order Summarily Denying Defendant's Rule 35 Motion to Correct Illegally Imposed Sentence (June 20, 2002 FsOF, CsOL, and Order), Judge Karen S. S. Ahn presiding.[1] We affirm.

BACKGROUND

The June 20, 2002 FsOF, CsOL, and Order state, in relevant part, as follows:

[1] The notice of appeal was filed on July 3, 2002. This appeal was assigned to this court on February 4, 2003.

[Eisermann] filed his Rule 35 Motion to Correct Illegally Imposed Sentence on March 27, 2002. Having considered the records and files under Cr. No. 91-2964, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 27, 1991, the grand jury indicted Defendant for Counts 1 through 3: Sexual Assault in the First Degree; Count 4: Attempted Sexual Assault in the First Degree; Count 5: Kidnapping; Counts 6 through 9: Sexual Assault in the Third Degree. All offenses were alleged to have taken place on or about July 4, 1991.

2. Following jury trial, Defendant was found guilty as charged.

3. Judgment herein was filed on October 21, 1994. Defendant was sentenced to imprisonment of 20 years for each of Counts 1 through 4; ten years for Count 5; and five years for each of Counts 6 through 9, all terms to run concurrently.

4. Defendant filed his notice of appeal on November 22, 1994. By memorandum opinion filed on April 25, 1997, the Intermediate Court of Appeals (hereinafter "ICA") affirmed the trial court's judgment. That opinion suggests that Defendant's points on appeal centered upon insufficiency of the evidence to support the jury's verdicts. On June 9, 1997, the ICA entered notice and judgment on appeal.

5. On February 23, 1999, Defendant filed a Motion for Rule 35 Relief From Illegal Sentence, in which he argued that, based upon Section 701-109, Hawaii Revised Statutes (hereinafter "HRS"), he was improperly sentenced for nine separate offenses stemming from "the commission of the same crime." Defendant contended that all offenses shared the same elements and that he should have been convicted of one unidentified offense because the other eight were included offenses.

6. On March 19, 1999, the Honorable Victoria Marks, judge for the Circuit Court of the First Circuit, State of Hawaii, summarily denied Defendant's Motion for Rule 35 Relief from Illegal Sentence, concluding that the nine offenses did not share the same elements and were not included offenses of one another, and that Defendant’s sentences were legal.

7. On March 7, 2000, in a memorandum opinion, the ICA affirmed Judge Marks' findings, conclusions, and order. Citing Section 701-109, HRS, as the relevant statute, the ICA determined that the record revealed that each count was supported by evidence of a separate and distinct act. The ICA rejected Defendant's argument, based upon State v. Castro, 69 Haw. 633 (1988), that all acts underlying the convictions were one continuous act with one general impulse, intent, and plan.

8. On March 27, 2002, Defendant filed the instant Rule 35 Motion to Correct Illegally Imposed Sentence. He alleges that being convicted for Kidnapping and Sexual Assault in the First

Degree violated his rights against double jeopardy. He also claims that, under Section 701-109, HRS, and State v. Castro, 69 Haw. 633, these two offenses were based upon the same conduct and shared the same element, and that, as one could not be committed without committing the other, Kidnapping is included within Sex Assault in the First Degree. Further citing to Section 701-109, HRS, Defendant appears to claim that Kidnapping differs from Sexual Assault in the First Degree in the respect that "the lesser included offense differs from the offense charged only in that a less serious injury or risk of injury to the same person . . . or public interest, or a different state of mind indicating lesser degree of culpability suffices to establish its commission." Defendant moved the Court to "overturn" his conviction for "First Degree Sexual Assault" and resentence him for the "lesser included offense of Kidnapping" or to remand the case for retrial for Kidnapping.

CONCLUSIONS OF LAW

1. Defendant's second claim was resolved by Judge Marks' March 19, 1999, order and the ICA's affirmation thereof.

2. As to Defendant's first claim, in State v. Caprio, 85 Haw. 92 (1997), the ICA discussed Federal and State double jeopardy issues in the context of a Kidnapping conviction for the intentional or knowing restraint of another person with intent to inflict bodily injury upon that person or subject that person to a sexual offense, the Kidnapping subsection at issue in this case, and a Sexual Assault in the Third Degree conviction for knowingly, by strong compulsion, having sexual contact with another person. The ICA found that conviction for the two offenses did not offend the Federal double jeopardy prohibition because both offenses required proof of a fact which the other did not, making them different offenses. Id. at 85 Haw. 103. It further found that, for State double jeopardy purposes, the two offenses were intended to prevent a substantially different harm or evil, making them different offenses. Id. There being no material differences for purposes of these double jeopardy tests between Sexual Assault in the First Degree and Sexual Assault in the Third Degree, applying Caprio, the Court concludes that neither Defendant's Federal nor State double jeopardy rights were violated by conviction and punishment for Kidnapping and Sexual Assault in the First Degree.

3. As to Defendant's third point, as a matter of law, Kidnapping does not differ from Sexual Assault in the First Degree only in the respect that a less serious injury or risk of injury to the same person or public interest or a different state of mind indicating a lesser degree of culpability suffices to establish its commission. The two offenses do not differ only in the respect that a less serious injury or risk of injury to the same person or public interest is involved. Further, Kidnapping, involving an intentional or knowing state of mind, does not have a different state of mind from Sexual Assault in the First Degree, which requires a knowing state of mind, indicating a lesser degree of culpability. See, State v. Buch, 83 Haw. 308, 313 (1996).

Therefore, Defendant's Rule 35 Motion to Correct Illegally Imposed Sentence is summarily denied without hearing.

IT IS SO ORDERED.

POINTS ON APPEAL

In his opening brief, Eisermann contends the following:

1. By charging him with both Kidnapping and Sexual Assault in the First Degree, the State violated the "Multiplicity Doctrine" encompassed within the federal prohibition against double jeopardy.

2. By convicting him of both Kidnapping and Sexual Assault in the First Degree, the court (a) violated the federal and the State prohibition against double jeopardy; and (b) violated HRS § 701-109 (1993) because Kidnapping is a lesser included offense of Sexual Assault in the First Degree (i) insofar as both offenses are based on the same conduct, and one offense cannot be committed without also committing the other, and (ii) insofar as Kidnapping differs from Sexual Assault in the First Degree only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

STANDARDS OF REVIEW

1. Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong standard. A conclusion of law that is supported by the trial

court's findings of fact and that reflects an application of the correct rule of law will not be overturned. Dan v. State, 76 Hawai‘i 423, 428, 879 P.2d 528, 533 (1994) (citations and internal quotation marks omitted).

2. Legality of Sentencing

"The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or constitutional commands have not been observed." Barnett v. State, 91 Hawai‘i 20, 26, 979 P.2d 1046, 1052 (1999) (citations and internal quotation marks omitted). In other words,

> [w]hile a sentence may be authorized by a constitutionally valid statute, its imposition may be reviewed for plain and manifest abuse of discretion.
>
> Admittedly, the determination of the existence of clear abuse is a matter which is not free from difficulty[,] and each case in which abuse is claimed must be adjudged according to its own peculiar circumstances. Generally, to constitute an abuse[,] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Gaylord, 78 Hawai‘i 127, 144, 890 P.2d 1167, 1184 (1995) (citations omitted).

DISCUSSION

1. The Multiplicity Doctrine

Eisermann argues that the circuit court erred in convicting him of both Kidnapping and Sexual Assault in the First Degree because charging him with both crimes was multiplicitous.

While Eisermann argued in circuit court, generally, that his convictions may have violated the prohibition against double jeopardy, he did not raise the issue of whether the charges against him were multiplicitous. In general, issues not properly raised will be deemed to be waived. See Bitney v. Honolulu Police Dept., 96 Hawai‘i 243, 251, 30 P.3d 257, 265 (2001). In this situation, however, we will discuss the issue.

"Multiplicity occurs when a single crime has been arbitrarily divided or separated into two or more separate counts or indictments." United States v. Urlacher, 784 F. Supp. 61, 62 (W.D.N.Y. 1992) (citations omitted). "Multiplicitous indictments or counts are prohibited by the double jeopardy clause of the United States Constitution, which assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Id. at 63 (citations, brackets, and internal quotation marks omitted).

In Urlacher, the defendant committed a single crime, but was charged with multiple violations of the same statute. See id. In the instant case, Eisermann was charged with one count of Kidnapping and three counts of Sexual Assault in the First Degree. Aside from the fact that the offenses of Kidnapping and Sexual Assault in the First Degree are enacted under different statutes, they are also clearly distinguishable as being separate offenses under the "same elements" test. See

discussion infra. Further, in a prior appeal by Eisermann (No. 22407), this court, on March 6, 2000, decided that the Kidnapping charge, and each charge of Sexual Assault in the First Degree, was supported by evidence of a separate and distinct act. Therefore, the charges of Kidnapping and Sexual Assault in the First Degree did not result in multiple punishments for a single offense, and the argument that the charges were multiplicitous is without merit.

2. Convictions of Kidnapping and Sexual Assault in the First Degree

a.

Whether convicting Eisermann of both Kidnapping and Sexual Assault in the First Degree violated the prohibition against double jeopardy

Eisermann argues that the circuit court erred in convicting him of both Kidnapping and Sexual Assault in the First Degree because such convictions violate the prohibition against double jeopardy.

i.

Federal Double Jeopardy Protection

"The Fifth Amendment to the United States Constitution guarantees that no person shall be subject for the same offence to be twice put in jeopardy of life or limb." State v. Caprio, 85 Hawai‘i 92, 100, 937 P.2d 933, 941 (App. 1997) (brackets and internal quotation marks omitted). This prohibition against double jeopardy is intended to protect a criminal defendant

against "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense, even in a single prosecution." See id. (citation and emphasis in original omitted). It is this third form of protection, the protection against multiple punishments, that is at issue in this case.

In order to determine whether being convicted of two offenses would constitute multiple punishments for the same offense, the "Blockburger" (also known as the "same elements") test is applied. See id. at 102, 937 P.2d at 943 (citing State v. Mendonca, 68 Haw. 280, 711 P.2d 731 (1985)). Under the Blockburger test, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Id. at 101, 937 P.2d at 942 (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932)). Therefore, "if a statute defining one of the offenses requires proof of a fact that the other statute does not, the offenses are considered to be distinct and a defendant's conviction or acquittal of either offense does not exempt the defendant from prosecution and punishment under the other [statute]." See id. (quoting

Blockburger, 284 U.S. at 304, 52 S.Ct. at 182) (internal quotation marks omitted).

Applying the Blockburger "same elements" test, it is clear that the offenses of Kidnapping and Sexual Assault in the First Degree are not the "same offense" for double jeopardy purposes. Kidnapping, as defined under HRS § 707-720(1)(d) (1993), requires proof of (1) intentional or knowing restraint of another person with (2) intent to (a) inflict bodily injury upon that person or (b) subject that person to a sexual offense. On the other hand, Sexual Assault in the First Degree, as defined under HRS § 707-730(1)(a) (1993), requires proof that the defendant (1) knowingly subjected another person to an act of sexual penetration (2) by strong compulsion.[2] Since both offenses require proof of a fact that the other does not (i.e., Kidnapping requires the "restraint of another," while Sexual Assault in the First Degree requires "an act of sexual penetration."), the offenses are different and Eisermann's federal double jeopardy guarantee is not violated by his conviction and punishment for both offenses.

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[2] "Strong compulsion" is defined as "the use of or attempt to use one or more of the following to overcome a person: (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another will be kidnapped; (2) A dangerous instrument; or (3) Physical force." Hawaii Revised Statutes (HRS) § 707-700 (1993). As such, it is possible that a single application of physical force could be used to constitute both the "strong compulsion" element of Sexual Assault in the First Degree and the "restraint" element of Kidnapping. However, as shall be discussed in the following section, the facts of this case do not support such a conclusion.

ii.

State Double Jeopardy Protection

Similar to the Fifth Amendment to the United States Constitution, Article I, Section 10 of the Hawai‘i Constitution states, "nor shall any person be subject for the same offense to be twice put in jeopardy[.]" See id., at 100, 937 P.2d at 941.

In Mendonca, the Hawai‘i Supreme Court noted that the federal test for determining whether two offenses constitute the "same offense" for double jeopardy purposes is "less rigorous than that imposed by Hawaii law." Caprio, 85 Hawai‘i at 102, 937 P.2d at 943 (citing State v. Pia, 55 Haw. 14, 18, 514 P.2d 580, 584 (1973)). According to the Pia opinion, the test applied under Hawai‘i law adopts the Blockburger "same elements" rule, but adds an additional requirement that "the law defining each of the offenses is intended to prevent a substantially different harm or evil."[3] See id. (citing Pia, 55 Haw. at 18, 514 P.2d at 584).

[3] It should be noted that, while federal double jeopardy protection relies solely on the "same elements" test, Hawai‘i law applies different standards, depending on which protection is involved. In cases involving the protection against multiple punishment, Hawai‘i law applies the "same elements" test. However, in cases involving the protections against successive prosecution, Hawai‘i law applies the "Grady" or "same conduct" test. See State v. Lessary, 75 Haw. 446, 459, 865 P.2d 150, 156 (1994) (citing Grady v. Corbin, 495 U.S. 508 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993)).

iii.

Whether Kidnapping and Sexual Assault in the First Degree are the "Same Offense" for Double Jeopardy Purposes

The Hawai'i Supreme Court has stated that "[t]he main thrust of the kidnapping statute is to prohibit the intentional restraint of another's freedom of movement." State v. Hoopii, 68 Haw. 246, 251, 710 P.2d 1193, 1196 (1985). With regard to Sexual Assault offenses, however, the supreme court has stated that "rape and sodomy statutes are primarily concerned with preventing another from being forced to engage in sexual acts." Id. at 251, 710 P.2d at 1196-97. It is apparent that the offenses of Kidnapping and Sexual Assault in the First Degree are intended to prevent a substantially different harm or evil. Therefore, Eisermann's conviction and punishment for both offenses are not barred by the State double jeopardy rule.

b.

Whether Kidnapping is a lesser included offense of Sexual Assault in the First Degree

Eisermann argues that the circuit court erred in convicting him of both Kidnapping and Sexual Assault in the First Degree, because Kidnapping is a lesser included offense of Sexual Assault in the First Degree. In support of this argument, Eisermann cites HRS § 701-109 (1993), which states that:

> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

> (a) One offense is included in the other, as defined in subsection (4) of this section[.]

Under this statute, a defendant may not be convicted of two charged offenses if one is an "included" offense, as defined under subsection (4). See State v. Horswill, 75 Haw. 152, 162, 857 P.2d 579, 584 (1993) (citing State v. Decenso, 5 Haw.App. 127, 134-35, 681 P.2d 573, 579 (1984)).

i.

HRS § 701-109(4)(a)

Eisermann's first argument is based on HRS § 701-109(4)(a) (1993), which states that an offense is a lesser included offense if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]"

Eisermann asserts that his convictions for Kidnapping and Sexual Assault in the First Degree were based on the same conduct, and that one offense could not be committed without also committing the other. In making this argument, Eisermann implicitly challenges the circuit court's findings of fact nos. 6 and 7 and conclusion of law no. 1.

This is not the first time that Eisermann has made such an argument before this court. In a prior appeal (No. 22407), Eisermann appealed the circuit court's March 19, 1999 Findings of Fact, Conclusions of Law, and Order Summarily Denying Defendant's Motion for Rule 35 Relief from Illegal Sentence. Eisermann

argued that some of his convictions were lesser included offenses of one unspecified offense. Eisermann argued that these offenses stemmed from "the commission of the same crime," that they shared the same elements, and therefore should have been considered lesser included offenses under HRS § 701-109(4)(a). This court rejected Eisermann's argument, holding, *inter alia*, that each of Eisermann's convictions was supported by evidence of a separate and distinct act, and that Kidnapping was not a lesser included offense of Sexual Assault in the First Degree.

Eisermann's current argument is essentially the same as the one he made in his prior appeal. The only apparent difference is that he now specifically asserts that Kidnapping is a lesser included offense of Sexual Assault in the First Degree. As this court has already decided this issue in Eisermann's prior appeal, the doctrine of the "law of the case" applies. Under this doctrine, "a determination of a question of law made by an appellate court in the course of an action becomes the 'law of the case' and may not be disputed by a reopening of the question at a later stage of the litigation." Robinson v. Ariyoshi, 65 Haw. 641, 652, n.9, 658 P.2d 287, 297, n.9 (1982). As such, the issue is precluded.

ii.

HRS § 701-109(4)(c)

Eisermann also makes a related argument, asserting

that, under HRS § 701-109(4)(c), Kidnapping should be considered a lesser included offense of Sexual Assault in the First Degree. In making this argument, Eisermann implicitly challenges the circuit court's findings of fact nos. 6 and 7 and conclusions of law no. 3.

According to HRS § 701-109(4)(c) (1993), an offense is a lesser included offense of another if "[i]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission." Under HRS § 701-109(4)(c), the following factors are considered in determining whether an offense is included in another: (1) the degree of culpability, (2) the degree of injury or risk of injury, and (3) the end result. See State v. Burdett, 70 Haw. 85, 90, 762 P.2d 164, 167 (1988). HRS § 701-109(4)(c) requires that the lesser included offense produce the same end result as the charged offense. See id. at 91, 762 P.2d at 168.

Examining these factors in the instant case, Kidnapping is not a lesser included offense of Sexual Assault in the First Degree as defined under HRS § 701-109(4)(c). Regarding the degree of culpability, Kidnapping and Sexual Assault in the First

Degree are both Class A felonies.[4] HRS § 707-720(1) (1993) states that Kidnapping involves an intentional or knowing state of mind. Similarly, HRS § 707-730(1)(a) (1993) states that Sexual Assault in the First Degree requires a knowing state of mind. Therefore, Kidnapping does not involve a lesser degree of culpability.

Similarly, there is no indication that Kidnapping involves a lesser degree of injury or risk of injury than Sexual Assault in the First Degree.

However, as stated earlier, the Kidnapping statute prohibits the intentional restraint of another's freedom of movement, whereas the Sexual Assault statutes prohibits forcing another to engage in a sexual act. See Hoopii, 68 Haw. at 251, 710 P.2d at 1196-97. Therefore, Kidnapping does not produce the same end result as Sexual Assault in the First Degree, and is not a lesser included offense of it.

CONCLUSION

Accordingly, we affirm the circuit court's June 20, 2002 Findings of Fact, Conclusions of Law and Order Summarily

[4] However, HRS § 707-720(3) provides that "it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial."

Denying Defendant's Rule 35 Motion to Correct Illegally Imposed Sentence.

DATED: Honolulu, Hawai‘i, March 23, 2004.

On the briefs:

Wolfgang Eisermann, *pro se*
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Chief Judge

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Associate Judge

Associate Judge