

NOT FOR PUBLICATION

NO. 24636

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SIXTO MANUEL, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-2103)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Sixto Manuel (Manuel) appeals the Judgment filed on October 17, 2001 in the Circuit Court of the First Circuit (circuit court).¹ Manuel was convicted of and sentenced on four counts of Sexual Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993).²

^{1/} The Honorable Gail C. Nakatani presided.

^{2/} Hawaii Revised Statutes (HRS) § 707-732 (1993) provides in relevant part:

§707-732 Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

. . . .
(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

. . . .
(2) Sexual assault in the third degree is a class C felony.

In the points of error section of his Amended Opening Brief,³ Manuel contends (1) the circuit court erred by denying his Motion for Bill of Particulars, (2) the State failed to present exonerating evidence to the grand jury, (3) the circuit court erred by retrying him on the same charges after his first trial, (4) the circuit court erred in its ruling on Manuel's motion in limine regarding the previous Hawaii Rules of Evidence Rule 404(B) stipulation, (5) the circuit court improperly limited expert witness testimony, (6) contradictory testimony by a complaining witness established there was insufficient evidence to convict Manuel, and (7) the Prosecutor committed prosecutorial misconduct.

However, in the argument section of his Amended Opening Brief, Manuel presents arguments on only the denial of his motion for a bill of particulars, the circuit court's failure to give a specific unanimity instruction on all sexual acts charged, and prosecutorial misconduct.

^{3/} Defendant-Appellant Sixto Manuel's Amended Opening Brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 32(b) (argument on pp. 13-15 is single spaced); Rule 28(b)(3) (transcript cites unreliable, e.g., p. 13, line 3 should read "7/9/01 TR at 6-7"; point of error A. cites to 10/10/00 transcript pages instead of record on appeal pages); Rule 28(b)(7) (no case names or citations to case quotations in argument section at pp. 21-29 & 34); and Rule 28(b)(11) (no statement of related cases attached). Manuel's counsel was warned on October 21, 2004 that future violations of HRAP Rule 28 "may" result in sanctions against him. Counsel is hereby warned that future violations of HRAP Rules 32(b) and 28 will result in sanctions against him.

Manuel's points of error (2) failure to present exonerating evidence to the grand jury, (3) acquittal of one-third of the charges after the first trial, (4) motion in limine re previous HRE 404(B) stipulation, and (5) limitation on expert witness testimony are deemed waived pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).⁴

Manuel's argument on the failure to give a unanimity instruction to the jury is not addressed or raised as a point of error; therefore, it will be disregarded pursuant to HRAP Rule 28(b)(4).⁵

^{4/} HRAP Rule 28(b)(7) provides:

(b) Opening brief. . . . [T]he appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .
(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

^{5/} HRAP Rule 28(b)(4) provides:

(b) Opening Brief. . . . [T]he appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .
(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation

(continued...)

Turning to Manuel's contention that the circuit court erred in denying his Motion for Bill of Particulars, filed January 4, 2001, we note that

[p]ursuant to Hawai'i Rules of Penal Procedure (HRPP) 7(g) [2000], it is within the trial court's discretion to direct the prosecution to file a bill of particulars informing the defendant of the specifics of the charges he must defend against at trial. The court's discretion should be exercised in light of the purposes of a bill of particulars, which is designed to enable the defendant to prepare for trial and prevent surprise.

State v. Reed, 77 Hawai'i 72, 78, 881 P.2d 1218, 1224 (1994)

(internal quotation marks, citations, and brackets in original omitted).

In State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996), the Hawai'i Supreme Court stated:

In general, the precise time and date of the commission of an offense is not regarded as a material element. Accordingly, this court has long recognized that, in cases involving sexual abuse of minors, it is sufficient, in the indictment, to allege that the offense occurred over a particular time span.

Id. at 13, 928 P.2d at 855 (internal quotation marks, citation, and brackets omitted). The circuit court therefore did not abuse

⁵(...continued)

of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

its discretion in not directing the State to file a bill of particulars as a bill of particulars was not required to enable Manuel to prepare for trial and prevent surprise.

Manuel's contention that remarks made by the Prosecutor during her closing argument were prosecutorial misconduct that prejudiced his right to a fair trial is without merit.

The Judgment filed on October 17, 2001 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 28, 2005.

On the briefs:

Andre' S. Wooten
for defendant-appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge