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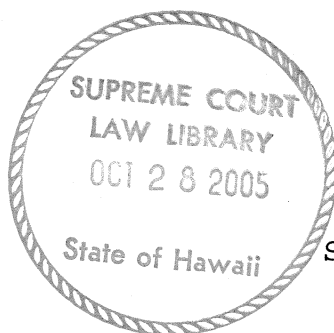
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH MARQUEZ, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1630)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim, and Nakamura, JJ.)

Defendant-Appellant Joseph Marquez (Marquez) appeals from the Judgment filed on March 18, 2003, in the Circuit Court of the First Circuit (circuit court). Marquez was charged by indictment with six counts of Sexual Assault in the Third Degree (Counts 2-6, and 8), in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993),¹ and one count of Sexual Assault in the First Degree (Count 7), in violation of HRS § 707-730(1)(b) (1993).² He was accused of molesting two of his granddaughters,

¹ Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993) provides:

(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 HRS § 707-730(1)(b) (1993) provides, in relevant part:

(1) A person commits the offense of sexual assault in the first degree if:

- (b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old

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Complainant 1 and Complainant 2, who were first cousins, on several occasions when the girls were younger than fourteen years old. The indictment alleged as follows:

INDICTMENT³

COUNT 2: On or about the 1st day of February, 2000, to and including the 31st day of August, 2000, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 2], who is less than fourteen years, by placing his hand on her buttocks, thereby committing the offense of Sexual Assault in the Third Degree

COUNT 3: On or about the 1st day of February, 2000, to and including the 31st day of August, 2000, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 2], who is less than fourteen years old, by placing his penis on her vagina, thereby committing the offense of Sexual Assault in the Third Degree

COUNT 4: On or about the 1st day of September, 2000, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 2], who is less than fourteen years old, by placing his hand on her breast, thereby committing the offense of Sexual Assault in the Third Degree

COUNT 5: On or about the 1st day of September, 2000, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 2], who is less than fourteen years old, by placing his hand on her buttock, thereby committing the offense of Sexual Assault in the Third Degree

COUNT 6: On or about the 1st day of September, 2000, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 2], who is less than fourteen years old, by placing his penis on her vagina, thereby committing the offense of Sexual Assault in the Third Degree

COUNT 7: On or about the 2nd day of August, 1995, to and including the 31st day of October, 1998, . . . JOSEPH MARQUEZ did knowingly subject to sexual penetration, [Complainant 1], who is less than fourteen years old, by inserting his finger into her vagina, thereby committing the offense of Sexual Assault in the First Degree

³ The indictment did not contain a Count 1.

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COUNT 8: On or about the 2nd day of August, 1995, to and including the 31st day of October, 1998, . . . JOSEPH MARQUEZ did knowingly subject to sexual contact [Complainant 1], who is less than fourteen years old, by placing his hand on her vagina, thereby committing the offense of Sexual Assault in the Third Degree

Marquez waived his right to a jury trial and proceeded to trial before the Honorable Sandra A. Simms, Judge of the circuit court. The circuit court found Marquez guilty of five counts of Sexual Assault in the Third Degree (Counts 2, 3, 4, 5, and 8). It acquitted him of one count of Sexual Assault in the First Degree (Count 7), the most serious charge, and also acquitted him of one count of Sexual Assault in the Third Degree (Count 6). The circuit court sentenced Marquez to concurrent terms of five years' probation on each of the five counts of conviction.

On appeal, Marquez argues that the circuit court erred in excluding evidence that he passed a polygraph examination and evidence that he took the polygraph examination. We affirm.

BACKGROUND

Complainant 1 lived in Hawai'i before moving with her family to the mainland in October 1998. She testified at trial that Marquez, her grandfather, sexually assaulted her on two occasions between August 1995 and October 1998, when she was seven to ten years old. Both incidents took place in Marquez's home.

In one of the incidents, Complainant 1 was standing next to Marquez, who was sitting at the living room table. Complainant 1 testified that Marquez stuck his hand up Complainant 1's shorts, placed his fingers in her vagina, and "was rubbing" inside her vagina for about ten seconds. Complainant 1 felt "weird" and "confused." She walked away from her grandfather and went to her grandmother but did not say anything out of fear that her grandfather would get mad.

Complainant 1 stated that another incident occurred while she was staying over at her grandparents' house and was sleeping on the living room floor, along with her brother, her aunt, Lisa Lockman (Lockman), and Lockman's boyfriend. In the early morning, when it was still dark, Complainant 1 awoke to find Marquez kneeling next to her, rubbing her vagina over her clothes with his hand. Everyone else was still sleeping. Complainant 1 got up and moved closer to her aunt, and Marquez left the house to go to work.

Marquez, who was a diabetic, underwent several surgeries which culminated in one leg being amputated below the knee in April 2000. Later that month, Marquez was admitted to the Tripler Center for the Aging (TCA). Complainant 2, along with her father and mother, visited Marquez at the TCA. Complainant 2 was seven years old at that time. Complainant 2 testified that on one occasion, she was alone with Marquez in his

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room, sitting face to face on his lap. Marquez began moving his body and Complainant 2 could feel Marquez's penis rub against her vagina through their clothes. Marquez then kissed Complainant 2 on the lips and put his tongue in her mouth. Complainant 2 felt "[g]ross, strange, weird," and tried to move away, but Marquez was holding her too tightly. Marquez also rubbed Complainant 2's buttocks. Marquez told Complainant 2 not to tell anybody.

Complainant 2's father, who was Marquez's oldest son, invited Marquez to stay over at Complainant 2's house for a weekend in September of 2000. Complainant 2, according to her mother, was physically mature for her age and had begun to develop breasts. Complainant 2 testified that while she and Marquez were alone in the house, Marquez asked Complainant 2 if her breasts were getting bigger. When Complainant 2 said "yes," Marquez said he wanted to feel them. Complainant 2 gave Marquez permission because she "didn't know what else to say." Marquez reached under Complainant 2's clothes and rubbed and pressed her breasts with his hands.

Later that evening, Marquez, with his one good leg, struggled to get up the stairs to use the bathroom. Complainant 2 testified that she followed behind in case her grandfather needed help. When Marquez reached the top of the stairs, he sat down and in a "scolding" voice, told Complainant 2 to come and hug him. Complainant 2 complied and sat on Marquez's lap, facing

him. Complainant 2 felt Marquez's penis against her vagina. Marquez also rubbed her buttocks with his hands.

Complainant 2's mother testified that while she was putting Complainant 2 to bed, Complainant 2 said, "Grandpa has been touching my private parts." Complainant 2 then burst into tears. After Complainant 2 went to sleep, her mother confronted Marquez, who denied the allegations. According to Complainant 2's mother, Marquez claimed that he only kissed Complainant 2 on the cheek and put his arms around her waist. The following morning, however, Marquez told Complainant 2's parents that he was "ashamed and embarrassed." Marquez said that nothing like that had ever happened before, that he did not know what had gotten into him, and that he thought "the devil" must have made him do it. Marquez assured Complainant 2's parents that "nothing bad happened" because he was impotent.

Complainant 2's mother called Complainant 1's mother on the mainland to alert her that Marquez had molested Complainant 2. Complainant 1's mother, who was married to Marquez's youngest son, testified that she sat her four children down and questioned them about Marquez. Complainant 1 "crumbled" in front of her mother's eyes, appearing tense and fearful. Complainant 1 cried as she told her mother that Marquez had molested her. This was the first time that Complainant 1 had told anyone about what Marquez had done.

Marquez testified in his own defense at trial. He denied all the allegations made against him by Complainant 1 and Complainant 2. Marquez stated that he apologized to Complainant 2's family to try and make things better, even though "nothing really happened." Marquez's two daughters, Jennifer Hansen and Lisa Lockman, testified that they had never seen their father touch any child inappropriately. Lockman also recalled the evening when she and her boyfriend had slept on the floor of Marquez's living room along with Complainant 1. Lockman testified that she got up when she heard her father getting ready to go to work and kissed him goodbye as he walked out the door. Lockman said that Complainant 1 was sleeping at that time and that Marquez did not touch Complainant 1's vagina.

DISCUSSION

I.

On October 16, 2002, about two weeks before trial, Marquez filed a notice of his intent to use the results of a psychophysiological detection of deception (PDD) examination. The PDD examination appears to be another name for a polygraph examination and indeed was referred to as a "polygraph test" by Marquez's counsel. Marquez attached the report of his PDD examination, which he took on July 17, 2002, to his written notice. The report opined that "no deception was indicated" in Marquez's negative response to each of the following questions:

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1. Other than what we talked about, did you ever touch either of those girls' breasts or buttocks?
2. Did you ever put your penis against [Complainant 2's] vagina?
3. Did you ever put your finger inside [Complainant 1's] vagina?

The circuit court held a pretrial hearing on Marquez's request to introduce the results of his polygraph examination. The State of Hawai'i (the State) objected to admitting the polygraph results, arguing that the polygraph examination was not "scientifically reliable" and would "invade the province of the trier of fact to determine reliability." The circuit court ruled that the results of the polygraph examination would not be admissible. The court found the polygraph results were not relevant and also relied upon "clear case law" holding that polygraph examinations "are not admissible, not useful, not reliable [or] otherwise admissible in trial proceedings."

II.

A.

On appeal, Marquez argues that the circuit court abused its discretion in excluding the polygraph results without holding a hearing to determine the reliability of polygraph examinations. We disagree.

Marquez acknowledges that in State v. Chang, 46 Haw. 22, 31-38, 374 P.2d 5, 11-14 (1962), the Hawai'i Supreme Court held that the results of polygraph tests are inadmissible whether

offered by the prosecution or the defense. Marquez, however, contends that State v. Montalbo, 73 Haw. 130, 828 P.2d 1274 (1992), implicitly overruled Chang by changing the standards for determining the reliability of expert evidence. He also asserts that there have been "tremendous advances in polygraph instrumentation and techniques" since Chang was decided in 1962.

We are unable to accept Marquez's claim that Chang is no longer good law. In State v. Okumura, 78 Hawai'i 383, 397, 894 P.2d 80, 94 (1995), a case decided after Montalbo, the Hawai'i Supreme Court reaffirmed Chang, citing it for the following proposition:

According to well-established precedent in this jurisdiction, polygraph results are not admissible at trial whether offered by the prosecution or the defense[.]⁴

Marquez's attempt to introduce his favorable polygraph test results also conflicts with Hawai'i Supreme Court precedents holding that expert testimony on a witness's credibility is inadmissible because it invades the province of the jury to determine who is telling the truth. State v. Batangan, 71 Haw. 552, 556-57, 799 P.2d 48, 51 (1990); State v. Klaufa, 73 Haw.

⁴ In State v. Okumura, 78 Hawai'i 383, 396, 894 P.2d 80, 93 (1995), the defendant claimed that the prosecution had violated its discovery obligations by failing to disclose the results of a polygraph examination taken by a prosecution witness. The Hawai'i Supreme Court concluded that because the polygraph results were not admissible, they could not have been material to the preparation of the defense. Id. at 397, 894 P.2d at 94. Accordingly, the court held that the prosecution did not breach its discovery obligations in failing to disclose the polygraph results. Id. at 397-98, 894 P.2d at 94-95.

109, 117, 831 P.2d 512, 517 (1992).⁵ "A fundamental premise of our criminal trial system is that the jury is the lie detector." United States v. Scheffer, 523 U.S. 303, 313 (1988) (plurality opinion) (internal quotations omitted). We see no reason to apply a different rule regarding the admissibility of expert testimony on a witness's credibility when the trier of fact is a judge. We conclude that the circuit court did not err in excluding Marquez's polygraph results.⁶

B.

Marquez argues that even if the polygraph results were inadmissible, the court erred in failing to admit evidence that Marquez took the polygraph test to show his "consciousness of innocence." We again disagree.

In Chang, the Hawai'i Supreme Court not only concluded that polygraph test results were inadmissible, but also that "a suspect's willingness or unwillingness to take such a test is inadmissible." Chang, 46 Haw. at 34, 374 P.2d at 12. In addition, we find persuasive the reasoning of Commonwealth v. Martinez, 769 N.E.2d 273, 278-79 (Mass. 2002). In that case, the

⁵ See also State v. Montalbo, 73 Haw. 130, 139, 828 P.2d 1274, 1280 (1992) (concluding that whether expert testimony "would usurp the jury's function as a finder of fact" is among the factors a court must consider in deciding whether to admit expert testimony).

⁶ We also reject the suggestion of Defendant-Appellant Joseph Marquez (Marquez) that the circuit court erred in excluding expert testimony regarding Marquez's physiological responses to the questions asked during the polygraph examination. This evidence was inadmissible for the same reasons that Marquez's polygraph examination results were inadmissible.

Supreme Judicial Court of Massachusetts held that the defendant's offer to the police to take a polygraph examination was inadmissible as follows:

[T]he judge excluded evidence that the defendant told police that he was willing to undergo a polygraph examination. The defendant sought to have the evidence admitted to show his state of mind, a consciousness of innocence. The judge's ruling was correct. Because in this Commonwealth polygraph evidence is inadmissible for any purpose in a criminal trial, a defendant's offer to submit to a polygraph examination as evidence of consciousness of innocence is not admissible. Such an offer is a self-serving act undertaken with no possibility of any risk. If the offer is accepted and the test given, the results cannot be used in evidence whether favorable or unfavorable. In these circumstances, the sincerity of the offer can easily be feigned, making any inference of innocence wholly unreliable.

Id. (footnote and internal citations omitted).

Here, the reasons for excluding evidence that Marquez took the polygraph examination are even stronger than for excluding the defendant's offer in Martinez. Marquez did not offer to undergo a polygraph examination conducted by the police but only submitted to an examination conducted by a private examiner Marquez hired. Under Chang, evidence that Marquez had failed the polygraph examination would not have been admissible at trial, and there is no showing that Marquez took the examination with a contrary belief. Nothing in the record suggests that the defense notified the State in advance that Marquez was taking the polygraph examination or stipulated in advance to the admission of the test results. Under these circumstances, we conclude that the circuit court properly

excluded evidence that Marquez had taken the polygraph examination.

CONCLUSION

The March 18, 2003, Judgment filed in the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

Alan J.T. Komagome,
Deputy Public Defender,
for Defendant-Appellant.

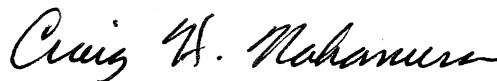
Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Acting Chief Judge



Associate Judge



Associate Judge