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NO. 26911

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

HERBERT BROWN, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-0926)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, and Nakayama, JJ., and Acoba J., concurring separately, with whom Duffy, J. joins)

The defendant-appellant Herbert Brown appeals from the judgment of the circuit court of the first circuit filed on September 27, 2004, the Honorable Steven S. Alm presiding, convicting him of and sentencing him for two counts of sexual assault in the third degree, in violation of Hawaiʻi Revised Statutes (HRS) § 707-732(1)(b) (1993 & Supp. 2003). On appeal, Brown argues (1) that he was denied a fair trial when the circuit court permitted the State of Hawaiʻi [hereinafter, "the prosecution"] to present evidence of his prior conviction for robbery in the second degree, (2) that the circuit court erred in denying his motions for judgment of acquittal because there was insufficient evidence to prove that he had placed his hand on the complainants' vaginas, as charged in the indictment, and (3) that Hawaii's extended term sentencing scheme violates the sixth amendment to the United States Constitution.

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 as follows:

(1) The circuit court correctly allowed the prosecution to cross-examine Brown regarding his 1992 conviction for second-degree robbery because Brown "opened the door" to the evidence on direct examination when he stated unequivocally that it was "not even in my nature to be violent in any way like that." See State v. McElroy, 105 Hawai'i 352, 356-57, 97 P.3d 1004, 1008-09 (2004) (Thus, "[a]n accused may be cross-examined as to all matters which he himself has brought up on direct examination. The cross-examination of matters which were addressed in direct-examination is not objectionable, even if the answers affect a witness' credibility and character.") (quoting State v. Taylor, 508 S.E.2d 870, 878 (S.C. 1998)).

(2) The circuit court did not err in denying Brown's motions for judgment of acquittal, inasmuch as, viewing the evidence "in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence [was] sufficient to support a prima facie case so that a reasonable mind [could] fairly conclude guilt beyond a reasonable doubt," State v. Aplaca, 96 Hawai'i 17, 21, 25 P.3d 792, 796 (2001) (citations and internal quotation signals omitted), as to all elements of the offense of third-degree sexual assault, particularly sexual contact, regardless of the terminology for female genitalia invoked in the indictment. This court, in State v. Mueller, 102 Hawai'i 391, 393 n.3, 76 P.3d 943, 945 n.3

(2003), clarified the definitions of "vagina" and "vulva" "in the interest of technical accuracy" but in no way indicated that charging instruments using the "technically inaccurate" terminology would be fatally defective. The indictment charging Brown with subjecting the complainants to sexual contact by placing his hand on their vaginas was sufficient to apprise Brown of what he "must be prepared to meet." State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (quoting State v. Wells, 78 Hawai'i 373, 380, 894 P.2d 70, 77 (1995)). The indictment's use of the word "vagina" rather than "vulva" is "a simple matter of semantics unrelated to the substance of the offense charged." State v. Vanstory, 91 Hawai'i 33, 979 P.2d 1059 (1999) (quoting United States v. Willoughby, 27 F.3d 263, 266 (1994)). Furthermore, Brown does not dispute that he subjected the complainants to sexual contact by touching their vulvae, nor does he contest the other material element of the offense of third-degree sexual assault, i.e., that both complainants were less than fourteen years old, or that his state of mind was "knowing."

(3) Brown's arguments against his extended terms of imprisonment have been foreclosed by this court's decision in State v. Rivera, 106 Hawai'i 146, 150, 102 P.3d 1044, 1048 (2004), which held that Hawaii's extended term sentencing scheme is not incompatible with the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004). See also State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003); State v. Hauge, 103 Hawai'i 38, 79 P.3d 131 (2003). Therefore,

IT IS HEREBY ORDERED that the judgment and sentence of the circuit court filed on September 27, 2004 are affirmed.

DATED: Honolulu, Hawai'i, September 26, 2005.

On the briefs:

James S. Tabe, deputy public defender, for the defendant-appellant Herbert Brown

Mark Yuen, deputy prosecuting attorney, for the plaintiff-appellee State of Hawai'i