NO. 22742

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellee, v.
CLIFFORD COFFMAN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 96-2336)

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

Defendant-Appellant Clifford Coffman (Coffman) appeals the circuit court of the first circuit's[1] July 27, 1999 Findings of Fact, Conclusions of Law, and Order Summarily Denying Defendant's Motion for Rule 35 Relief From Illegal Sentence, Filed on July 7, 1999, Without a Hearing. We affirm.

I. Background.

On November 18, 1996, the State charged Coffman with four counts of sexual assault: (Count I) sexual assault in the first degree (by placing his mouth on the vagina of the victim, who was less than fourteen years old at the time), in violation of Hawaiʻi Revised Statutes (HRS) § 707-730(1)(b) (1993);[2] (Count

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[1/] The Honorable Victoria S. Marks, judge presiding.

[2/] Hawaiʻi Revised Statutes (HRS) § 707-730(1)(b) (1993) provides, in pertinent part, that "[a] person commits the offense of sexual assault in

(continued...)

II) sexual assault in the third degree (by placing his hand on the vagina of the victim, who was less than fourteen years old at the time), in violation of HRS § 707-732(1)(b) (1993);[3] (Count III) sexual assault in the third degree (by placing his hand on the breast of the victim, who was less than fourteen years old at the time), in violation of HRS § 707-732(1)(b); and (Count IV) sexual assault in the third degree (by placing the victim's hand on his penis when she was less than fourteen years old), in violation of HRS § 707-732(1)(b).

On January 21, 1997, as part of a plea bargain with the State, Coffman pled no contest to one count of sexual assault in the second degree (Count I) and guilty to three counts of sexual assault in the third degree (Counts II through IV). Count I was reduced from sexual assault in the first degree to sexual assault

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[2/](...continued)
the first degree if . . . [t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]"

HRS § 707-700 (1993) provides, in pertinent part, that "'[s]exual penetration' means vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense."

[3/] HRS § 707-732(1)(b) (1993) provides that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he 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[.]"

HRS § 707-700 provides, in pertinent part, that "'[s]exual contact' means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."

in the second degree, a violation of HRS § 707-731(1)(a) (1993 & Supp. 2000).[4] The judgment was filed on May 5, 1997. Coffman was sentenced to incarceration for ten years on Count I, and for five years on each of Counts II through IV, with all terms to run concurrently.

On July 7, 1999, Coffman moved, *pro se,* for correction of his sentence under Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (1999).[5] Coffman relied upon HRS § 701-109 (1993), the included offense statute, in asserting that the four counts of conviction and sentence should "be consolidated as one offense, thereby sentencing [Coffman] to One Count of Sexual Assault in the Third Degree, with a maximum sentence of Five (5) years of incarceration[.]"

Coffman appeals, *pro se*, the circuit court's July 27, 1999 order denying his HRPP Rule 35 motion. Coffman contends on appeal that his convictions and sentences for the four counts of sexual assault were illegal because: (1) under HRS § 701-109, three of the counts of sexual assault should have been considered included offenses of a single count of sexual assault; (2) the acts for which he was convicted should have been considered a

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[4/] HRS § 707-731(1)(a) (1993 & Supp. 2000) provides that "[a] person commits the offense of sexual assault in the second degree if . . . [t]he person knowingly subjects another person to an act of sexual penetration by compulsion[.]"

[5/] Hawai'i Rules of Penal Procedure Rule 35 (1999) provides, in relevant part, that "[t]he court may correct an illegal sentence at any time[.]"

single, continuous offense, thus, the four counts of sexual assault should have merged into a single count; and (3) multiple punishments for the same crime are barred by constitutional double jeopardy principles. Coffman concludes that his "sentence should be remanded [(sic)] to one of the 'lesser included' offenses of Sexual Assault in the Third Degree, and his sentense [(sic)] reflect the same."

Coffman did not detail, in his motion below, what is alleged to have happened in the incident underlying the charges against him. Nor does he on appeal. And the record does not contain that information.

II. Standards of Review.

A. Illegal Sentence.

Because Coffman attacks the legality of his sentences and cites no issues of fact in support of his arguments, the issues presented are questions of law. We review questions of law *de novo*, under the right/wrong standard. Under that standard, this court "examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it." State v. Kapiko, 88 Hawai'i 396, 401, 967 P.2d 228, 233 (1998) (citation and internal quotation marks omitted; some brackets in the original).

B. Included Offenses.

Whether one offense is an included offense of another under HRS § 701-109 is a question of law reviewed *de novo* under the right/wrong standard. State v. Friedman, 93 Hawai'i 63, 68, 996 P.2d 268, 273 (2000).

C. Double Jeopardy.

The question whether the trial court violated the constitutional prohibition against double jeopardy is reviewed under the right/wrong standard. State v. Ontiveros, 82 Hawai'i 446, 452, 923 P.2d 388, 394 (1996); State v. Toyomura, 80 Hawai'i 8, 15, 904 P.2d 893, 900 (1995).

III. Discussion.

A. Each count of sexual assault was based on a different criminal act and cannot be an included offense of any other count under HRS § 701-109. Further, neither sexual assault in the second degree nor sexual assault in the third degree can be an included offense of the other under HRS § 701-109.

First, Coffman contends that all four counts of sexual assault "involv[ed] the same facts[.]" Hence, he argues, pursuant to HRS § 701-109, that he could be convicted of only one of the four offenses because the other three are lesser included offenses. Coffman does not identify which three offenses are the lesser included offenses and which offense is inclusive, other than to argue that he should have been sentenced to only five years in prison on one sexual assault in the third degree count. We disagree with Coffman's contention.

HRS § 701-109 provides, in pertinent part:

> **Method of prosecution when conduct establishes an element of more than one offense.** (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:
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> (a) One offense is included in the other, as defined in subsection (4) of this section[.]
>
> . . . .
>
> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
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> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
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> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
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> (c) It 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.

As is evident from the plain language of the statute, in general, HRS § 701-109 is only applicable where a defendant is charged multiple times for the same conduct. However, the record here indicates that Coffman committed four separate criminal acts. Coffman (1) placed his mouth on the victim's vagina, (2) placed his hand on the victim's vagina, (3) placed his hand on

the victim's breast, and (4) placed the victim's hand on his penis.

"Where . . . different criminal acts are at issue, supported by different factual evidence even though separated in time by only a few seconds, one offense by definition cannot be 'included' in the other. The [defendant] can properly be punished for [all], under different, or the same, statutory provisions." State v. Pia, 55 Haw. 14, 19, 514 P.2d 580, 584-85 (1973) (citations and italics omitted). Each count in this case involved a different type of sexual contact (Counts II through IV) or sexual penetration (Count I). Thus, each count addressed a separate prohibited act, even if all were committed seconds apart in the same criminal episode.

Moreover, the sexual assault in the second degree offense allegedly occurred on or about November 22, 1990, to and including July 1, 1994, while the three counts of sexual assault in the third degree occurred on or about November 22, 1993, to and including July 1, 1994. Differing dates for the sexual assault in the second degree count and the sexual assault in the third degree counts further indicate that the second and third degree charges are founded upon disparate acts.

In any event, neither sexual assault in the second degree nor sexual assault in the third degree can be a lesser included offense of the other under the three-prong test of HRS § 701-109.

Under the first prong of the statute, HRS § 701-109(4)(a) (what might be called "same facts test"), "the general rule is that an offense is included if it is impossible to commit the greater without also committing the lesser." Friedman, 93 Hawai'i at 72, 996 P.2d at 277 (citation and internal quotation marks omitted).

To prove the offense of sexual assault in the third degree, the prosecution must establish that the defendant (1) knowingly (2) had sexual contact (3) with a person under fourteen years of age. HRS § 707-732(1)(b). Sexual assault in the second degree requires proof that a defendant (1) knowingly (2) subjected another to sexual penetration (3) by compulsion. HRS § 707-731(1)(a).

Neither sexual penetration nor compulsion, both material elements of second degree sexual assault, need be proved to establish the offense of sexual assault in the third degree. Hence, sexual assault in the second degree is not an included offense of sexual assault in the third degree under the same facts test.

Conversely, proof that the victim was under fourteen years of age is a material element of sexual assault in the third degree, but not of sexual assault in the second degree. Thus, sexual assault in the third degree cannot be an included offense of sexual assault in the second degree under the same facts test.

Therefore, neither offense can be an included offense of the other under the first prong of the statute. Cf. State v. Buch, 83 Hawai‘i 308, 313, 926 P.2d 599, 604 (1996) (holding that sexual assault in the fourth degree is not a lesser included offense of sexual assault in the third degree because sexual assault in the fourth degree requires proof of an additional fact, compulsion, not required to establish sexual assault in the third degree).

With respect to the second prong of the statute, all of the sexual assaults charged were completed acts. Hence, HRS § 701-109(4)(b) (an attempt offense is always included in the completed offense) is not applicable.

The final prong of the statute, HRS § 701-109(4)(c), is also not applicable here, as both sexual assault in the second degree and sexual assault in the third degree have the same degree of culpability. The *mens rea* required to establish sexual assault in the second degree, "knowingly," is the same as that required to establish sexual assault in the third degree. HRS § 707-731(1)(a); HRS § 707-732(1)(b). Thus, the requirement of "a different state of mind indicating lesser degree of culpability" is lacking here. HRS § 701-109(4)(c).

Nor can we say that sexual contact with a person less than fourteen years of age (sexual assault in the third degree) poses any less or any more "serious injury or risk of injury"

than sexual penetration by compulsion (sexual assault in the second degree). Id.

In summary, Coffman's contention that two of the counts of sexual assault in the third degree and the one count of sexual assault in the second degree are included offenses of a single count of sexual assault in the third degree must fail.

A. *As none of the sexual assaults committed by Coffman were "necessary and incidental" to any other sexual assault, the four separate counts of sexual assault cannot merge into a single count of sexual assault. Further, the legislature did not intend to grant immunity to a person who commits one sexual assault from prosecution for further criminal acts committed during the same encounter.*

Coffman next argues that he intended to commit a single sexual assault; that all four counts of sexual assault were necessarily and incidentally committed in the course of the intended single sexual assault, and therefore, that all four counts of sexual assault should merge into a single continuing offense. As he puts it, "It seems obvious, that one has to touch a person on certain parts of the body to create arousal, and to perform sexual intercourse. Therefore, touching and actually performing the act are part of one another and must be considered as one and the same offense, if any."

It is true that a crime necessarily and incidentally committed during the commission of another crime will be considered a lesser included offense under the same facts test of HRS § 701-109(4)(a). State v. Correa, 5 Haw. App. 644, 649, 706

P.2d 1321, 1325 (1985). However, taking Coffman's argument at face value, we fail to see how it was necessary for Coffman to (1) place his mouth on the victim's vagina, (2) place his hand on the victim's vagina, (3) place his hand on the victim's breast, or (4) place the victim's hand on his penis, in order to carry out any of the other sexual assaults. Nor can we discern how any of the foregoing acts was intrinsically incidental to any of the others.

Further, Hawai'i courts have consistently held that each act constituting a sexual assault is punishable as a separate and distinct offense. See, e.g., State v. Horswill, 75 Haw. 152, 155, 857 P.2d 579, 581 (1993) (affirming defendant's conviction of four counts of sexual assault in the course of a brief criminal transaction, for (1) placing his mouth on the victim's breast, (2) placing the victim's hands on his penis, (3) placing his penis in the victim's vagina, and (4), after a nap, placing his penis in the victim's vagina a second time); State v. Molitoni, 6 Haw. App. 77, 80, 711 P.2d 1303, 1306 (1985) (held that three separate criminal acts were committed in a brief transaction where the defendant (1) squeezed and sucked the victim's breasts, (2) touched and put his fingers in the victim's vagina, and (3) inserted his penis into the victim's vagina).

The Hawai'i Supreme Court has held that the legislature's intent, as reflected in the statutory scheme, is a factor, in addition to degree of culpability and end result, in

evaluating whether a offense is included under HRS § 701-109(4)(a). Friedman, 93 Hawai‘i at 72-73, 996 P.2d at 277-78. The supreme court has also held that the legislature's intent with respect to included offenses must trump an "overliteral reading of the words of HRS § 701-109(4)(a) and (c)" if such a reading "would accomplish an absurd result, obviously unintended by the legislature." State v. Smythe, 72 Haw. 217, 220, 811 P.2d 1100, 1102 (1991). The supreme court in State v. Arceo, 84 Hawai‘i 1, 21-22, 928 P.2d 843, 863-864 (1996), held that sexual assault in the third degree and sexual assault in the first degree cannot be continuing offenses and "that each distinct act in violation of these statutes constitutes a separate offense under the [Hawai‘i Penal Code]." The Arceo court stated that the legislature could not have intended to grant immunity to a criminal who committed one sexual assault upon a victim, from prosecution for further criminal acts committed during the same encounter. Id. at 22, 928 P.2d at 864. Coffman seeks exactly this type of immunity. Based on the foregoing, Coffman's claim that all four counts of sexual assault should have merged into a single count cannot be sustained.

C. *None of the four counts of sexual assault were based on the same conduct element; thus, there was no double jeopardy violation.*

Third, and finally, Coffman contends that the four counts of sexual assault are multiple punishments for the same crime, in violation of double jeopardy principles.

The double jeopardy clause of the federal and Hawai‘i constitutions protects a defendant against "a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." State v. Lessary, 75 Haw. 446, 454, 865 P.2d 150, 154 (1994) (citation and internal quotation marks omitted). Coffman's case can implicate only the protection against multiple punishments for the same offense, because he was prosecuted only once.

In Hawai‘i, the "same conduct" test applies where the double jeopardy protection against multiple prosecutions for the same offense is at issue. It is broader and gives the criminal defendant more protection than its federal counterpart. Id. at 459, 865 P.2d at 156. And it is arguably more protective than is warranted by the double jeopardy protection against multiple punishments for the same offense. Id. at 457, 865 P.2d at 155 ("individuals should be protected [by the `same conduct' test] against multiple prosecutions even when multiple punishments are permissible under the `same elements' test"). Therefore, it is

the fail-safe test here: "The double jeopardy clause of the Hawai'i Constitution prohibits the State from pursuing multiple prosecutions of an individual for the same conduct. Prosecutions are for the same conduct if any act of the defendant is alleged to constitute all or part of the conduct elements of the offenses charged in the respective prosecutions." Id. at 462, 865 P.2d at 157.

The constitutional protection against double jeopardy was not violated because Coffman was not subjected to multiple charges or punishments for the same conduct, but rather was charged, convicted and punished under a single count of sexual assault for each separate and distinct criminal act. "The 'same conduct' test . . . , protects individuals from multiple prosecutions for the same act without unnecessarily restricting the ability of the State to prosecute individuals who perform separate acts that independently constitute separate offenses." Id. at 459, 865 P.2d at 156. As we have detailed previously, the four sexual assault counts in this case were based, respectively, on four disparate and distinct acts. Each count involved a different type of sexual contact (Counts II through IV) or sexual penetration (Count I). None of them share the same conduct element. Thus, there was no double jeopardy violation.

IV. CONCLUSION.

Based on the foregoing, the July 27, 1999 order of the circuit court denying Coffman's HRPP Rule 35 motion is affirmed. We observe, however, that the May 5, 1997 judgment incorrectly convicted Coffman of sexual assault in the first degree under Count I. We therefore remand for entry of an amended judgment convicting Coffman of sexual assault in the second degree under Count I, with mittimus amended accordingly, *nunc pro tunc* to May 5, 1997, all other provisions thereof to remain the same.

DATED: Honolulu, Hawaii, August 8, 2001.

On the briefs:

Chief Judge

Clifford Coffman,
defendant-appellant, pro se.

James M. Anderson,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Associate Judge

Associate Judge