

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ABRAHAM SPENCER, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 97-2893)

MEMORANDUM OPINION

(By: Burns, C.J., Foley, J. and Circuit
Judge Sakamoto in place of Watanabe, J.,
recused, and Lim, J., disqualified)

On November 25, 1997, Defendant-Appellant Abraham Spencer (Spencer) was charged by indictment with: Count I, Sexual Assault in the Third Degree, in violation of Hawai'i Revised Statutes (HRS) § 707-732(1)(e) (1993)¹; and Count II, Attempted Sexual Assault in the First Degree, in violation of HRS §§ 705-500 and 707-730(1)(a) (1993)². Spencer was tried by jury

¹ HRS § 707-732(1)(e) states 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:

. . . .

(e) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor[.]

² HRS § 705-500 states:

§705-500 Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances

in the Circuit Court of the First Circuit (the circuit court), the Honorable Marie N. Milks presiding, on September 16, 17, 20, 22, and 23, 1999. The jury returned a guilty verdict on September 23, 1999, as to the included offense of Sexual Assault in the Fourth Degree, HRS § 707-733,³ for both Counts I and II.

were as the person believes them to be; or
(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

HRS § 707-730 states in relevant part:

§707-730 Sexual assault in the first degree. (1) A person commits the offense of sexual assault in the first degree if:

(a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]

³ HRS § 707-733 states as follows:

§707-733 Sexual assault in the fourth degree. (1) A person commits the offense of sexual assault in the fourth degree if:

(a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion;

(b) The person knowingly exposes the person's genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury; or

(c) The person knowingly trespasses on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.

(2) Sexual assault in the fourth degree is a misdemeanor.

(3) Whenever a court sentences a defendant for an offense under this section, the court may order the defendant to submit to

Spencer was sentenced to one year of probation for each count (to run concurrently) and ordered to pay a Criminal Injuries Compensation Commission fee of \$100.00 and to participate in the Hawai'i Sex Offender Treatment Program.

On October 4, 1999, Spencer filed a Motion to Dismiss Indictment or in the Alternative for New Trial on Charge of Sexual Assault in the Fourth Degree based upon prosecutorial misconduct. Spencer's motion was denied, and judgment was entered January 7, 2000. On appeal, Spencer contends the circuit court erred in failing to dismiss the indictment based on prosecutorial misconduct and the circuit court subjected him to double jeopardy by failing to dismiss either Count I or Count II following the jury's verdict.

We disagree with Spencer's contentions and affirm the January 7, 2000, Judgment of the circuit court.

I. BACKGROUND

Valarie Hunkin (Hunkin) testified that on the morning of March 23, 1997, she boarded a bus in Pearl City to go to her job at the Ultrazone, located in the Ilikai Hotel. Hunkin sat in the front of the bus in one of the handicapped seats. Hunkin began to doze off because she had worked late the night before.

a pre-sentence mental and medical examination pursuant to section 706-603.

As Hunkin fell asleep, the bus driver (Spencer) asked where she was getting off the bus and told her that he would wake her when the bus arrived at her stop. When Hunkin woke up, the bus was stopped with the engine and interior lights off, and she saw nobody else on the bus. Hunkin had fallen asleep on her back laying across the handicapped seats on the bus; when she awoke, Spencer was on top of her and the weight of his body prevented her from getting up. Spencer pressed both his hands against Hunkin's breasts. He then used one of his hands to try to unzip her shorts, while repeatedly telling her that she "wanted it." Hunkin felt Spencer press his penis against her vagina and told him, "No, no" and "Get off of me." Hunkin pushed and kicked at Spencer, whereupon he fell off of her. Hunkin grabbed her belongings and ran off the bus. She ran up the street and caught the first crowded bus she saw back to the Ilikai.

Hunkin testified that when she got to work, she reported the incident to her assistant manager and then to her mother. The police were notified, and, after they arrived at her workplace, Hunkin told one of the officers what had happened to her. Hunkin sat in a bus company supervisor's van with a police officer as they waited for Spencer's bus to reach the area.

Honolulu Police Officer Leland Cadoy (Officer Cadoy) testified that he sat with Hunkin in the bus company van in front

of the Ilikai. Another police officer, Officer Barnett, stopped the bus that Spencer was driving next to the van. As the bus door opened, Hunkin could see Spencer and identified him as the person who attacked her.

Spencer's version of the incident varies between his statements. On March 24, 1997, in a written statement, Spencer asserted that a girl, who was falling asleep, was on his bus on the morning in question. Spencer stated that he told this girl he would wake her up when they arrived at her stop. Spencer reported that he forgot to wake up the girl and that she swore at him. Spencer, in this statement, denied touching the girl. Spencer stated that his father (an elderly man with grey hair) and another woman (Joanne Villani, hereinafter "Villani") were also on the bus at the time the alleged incident occurred.

Investigator Michael Orian⁴ testified that on April 25, 1997, he interviewed Spencer. At this interview, Spencer stated that he and Hunkin kissed and that he touched her breasts. Spencer also said there was contact with Hunkin's vaginal area, but he did not specify the contact.

⁴ It is unclear from the record who is Orian's employer. The jury asked the circuit court to "re-identify Michael Orian's role"; the response from the court was that "Mr. Michael Orian was an investigator who was requested to interview Abraham Spencer."

On March 23, 1997, in a videotaped interview, Spencer stated: "But I left a couple minutes early because one, the lady was kind of irate, 'eh? And I no like screw with her 'cause she was a Samoan looking girl, 'eh?" In a September 29, 1998, videotaped interview, Spencer stated that Hunkin was swearing at him, and that as he walked to the stairwell of the bus and apologized to her, he said:

You know, I said I was sorry. And I mean it. What more do you want? What's your problem? What more you want? And she said, "Kiss me." And I go, "What?" She said, "Just kiss me." And I go, "You crazy." She said, "Why? What's wrong with me?" And I go, "Nothing." So, you know -- yeah, you know, I got -- I'm a, you know, nice guy, I guess. So I said, "Sistah," so I grabbed her and I gave a kiss on her lips and I go, 'Kay, sistah, come on. Come on, we go be friends already. Just drop this. You know, I said I was sorry. Be cool." It was a sisterly, brotherly kiss. That's all it was. You know, hugged her, give her a kiss, pau. That was it. And after that she said, "Ass all?" And I go, "Ey." I think that's what made her mad; I say, "You know, sistah, where I come from, we have names for people like you." You know, she said, "Fuck you, asshole." And then I said, "Put out your cigarette, jump back in the seat, we leaving."

During this interview, Spencer denied touching Hunkin's breasts or vagina and denied any contact with Hunkin while she was sitting in her seat on the bus.

On October 29, 1998, Detective Kyle Luke (Luke) of the Honolulu Police Department interviewed Spencer. During this interview, Spencer admitted that he did fondle Hunkin's breasts. Luke also understood from Spencer that there was a "prolonged

kiss" with Hunkin. Spencer also alleged at this time that Hunkin fondled his penis.

In closing argument, the prosecutor argued that "the judge already read you the law, okay, so I'm not going to spend a lot of time on that" and "this case is really not about the law, ladies and gentlemen. What it's about is [who is] telling the truth." The prosecutor argued that Hunkin's statements were truthful and Spencer's statements were not truthful. The prosecutor asserted that Hunkin had no motive to lie and that since Hunkin was not suing The Bus, "[t]his isn't about money." The prosecutor stated that Hunkin's story never changed, but that Spencer "changed his story every chance he got." The prosecutor argued that Spencer had much to gain by lying -- Spencer could lose his wife and his job, and Spencer could be sued.

During the prosecutor's closing argument before the jury, Spencer's counsel objected when the prosecutor used a visual aid that suggested Spencer had been coached by his attorney and a private investigator before giving a statement. The objection was sustained by the circuit court. Later in the prosecutor's closing argument, the prosecutor intimated that Spencer's counsel had said things to Villani regarding a picture of Hunkin admitted into evidence. The circuit court admonished the jury to disregard the argument and ordered the prosecutor to

apologize to Spencer's counsel before the jury. The prosecutor did so.

During deliberations, the jury asked the circuit court to "clarify that the definition of Sexual Assault in the Fourth Degree is the same with respect to Count I as it is with respect to Count II." The circuit court replied that "[t]he definition of Sexual Assault in the Fourth Degree is the same with respect to Count I as it is with respect to Count II." The jury returned verdicts of guilty to the included offenses of Sexual Assault in the Fourth Degree as to both Counts I and II.

II. STANDARDS OF REVIEW

A. Prosecutorial Misconduct

Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction.

State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (internal quotation marks omitted) (quoting State v. Sawyer, 88 Hawai'i 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998)).

"Prosecutorial misconduct warrants a new trial or the setting aside of a guilty verdict only where the actions of the prosecutor have caused prejudice to the defendant's right to a fair trial." State v. McGriff, 76 Hawai'i 148, 158, 871 P.2d 782, 792 (1994).

"In order to determine whether the alleged prosecutorial misconduct reached the level of reversible error, we consider the nature of the alleged misconduct, the promptness or lack of a curative instruction, and the strength or weakness of the evidence against defendant." State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992).

B. Double Jeopardy

Whether a conviction constitutes a violation of the protection against double jeopardy is a question of constitutional law, which we review de novo under the right/wrong standard. Rogan, 91 Hawai'i at 411, 984 P.2d at 1237.

C. Jury Instructions

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996) (internal quotation marks omitted); see also State v. Kupau, 76 Hawai'i 387, 393, 879 P.2d 492, 498 (1994). If the instructions requested by the parties are inaccurate or incomplete but are necessary "in order for the jury to have a clear and correct understanding of what it is that they are to decide[,]" then the trial court has the duty either to correct any defects or to

fashion its own instructions. State v. Okumura, 78 Hawai'i 383, 411, 894 P.2d 80, 108 (1995) (internal quotation marks omitted); accord State v. Kinnane, 79 Hawai'i 46, 50, 897 P.2d 973, 977 (1995).

III. DISCUSSION

A. Prosecutorial Misconduct

Spencer alleges five instances of prosecutorial misconduct: (1) the prosecutor's argument that the complainant was a "good kid" (implying that she was chaste) was not supported by evidence and was therefore improper; (2) the prosecutor's statement that the complaining witness had no reason to fabricate because she did not file suit against Spencer or Oahu Transit Services (The Bus) was improper because it gave the impression that the complainant had not and would not file such a suit; (3) the prosecutor's assertion that Spencer lied because Spencer's statements changed over time was improper; (4) the circuit court's instruction to disregard improper argument by the prosecutor regarding Villani's identification of Hunkin was insufficient; and (5) the prosecutor's rebuttal argument was improper because it inflamed the jury against Spencer as being a racist.

The State has wide latitude to make arguments regarding the state of the evidence, including drawing all reasonable

inferences from the evidence, highlighting inconsistencies in testimony offered by a defendant, and belittling and pointing to the improbability and untruthfulness of specific testimony. State v. Caprio, 85 Hawai'i 92, 107, 937 P.2d 933, 948 (App. 1997); see also State v. Clark, 83 Hawai'i 289, 304-05, 926 P.2d 194, 209-210 (1996) (the State may infer and argue that the other side is lying and denounce the activities of the defendant).

1. The prosecutor's comment that Hunkin was a "good kid" was not improper.

Spencer argues the prosecutor impermissibly implied Hunkin was "chaste" when the prosecutor commented that she was a "good kid." The prosecutor stated that at the time of the incident, Hunkin "was working, she was going to school, she had worked the night before. She was up in the morning. This is a good kid. She's just where anybody else has a right to be going to work in the morning." The defense did not object to this comment at trial. It is within the bounds of legitimate argument for prosecutors to draw all reasonable inferences from the evidence. Clark, 83 Hawai'i at 304, 926 P.2d at 209. This statement was a reasonable inference from the evidence and was not a clear assertion of chastity.

2. The prosecutor's statement that the complaining witness had no reason to fabricate because she did not file suit against Spencer was not improper.

Spencer argues that since Hunkin did file a civil suit against him after trial, the prosecutor's argument at trial that Hunkin had no motive to lie because she had nothing to gain (this "isn't about money") whereas Spencer had much to be gained by lying (he could lose his wife and his job and could be sued) was factually misplaced and improper. The Hawai'i Supreme Court has held that a prosecutor may argue a defendant has "the highest stake in the outcome of the case, [and] ha[s] the greatest motive to lie." State v. Apilando, 79 Hawai'i 128, 142, 900 P.2d 135, 149 (1995). Furthermore, the state of the evidence at trial was that Hunkin had not filed a civil suit against Spencer at that time. The prosecutor's argument was not improper.

3. The prosecutor's assertion that Spencer lied because Spencer's statements changed over time was not improper.

Spencer made an initial statement to investigators stating that nothing occurred between Hunkin and him. Later, Spencer gave statements admitting that he had sexual contact with Hunkin, but contended that it was consensual. "Where the evidence presents two conflicting versions of the same events, a party may reasonably infer, and thus, argue, that the other side is lying," and may "denounce the activities of defendant."

Clark, 83 Hawai'i at 304-05, 926 P.2d at 209-210 (quoting State v. Abeyta, 120 N.M. 233, 901 P.2d 164, 177 (1995) and People v. Sutton, 260 Ill. App. 3d 949, 197 Ill. Dec. 867, 876, 631 N.E.2d 1326, 1335 (1994)). The prosecutor's inference that Spencer had lied and acted improperly was not improper.

4. The circuit court's instruction to disregard improper argument by the prosecutor regarding Villani's identification of Hunkin was sufficient.

Spencer argues that the manner in which the prosecutor argued that Villani's identification testimony was incredible was impermissible and rose to the level of an accusation that defense counsel engaged in "criminal conduct to suborn perjury." At trial, the prosecutor argued that in May 1999 Villani told the police she would not recognize Hunkin again if she saw her, but in court when Spencer's counsel showed Villani pictures of Hunkin, Villani identified Hunkin as the woman who was on the bus. The prosecutor argued:

[Ms. Villani] comes to court and the first thing defendant's lawyer runs right out, shows 'em this big picture and says hey, this is the girl, isn't it? You see this girl? Oh, yeah. Yeah, that's her. That's her. Shows her even another picture. Right. Yeah, that's the girl.

. . . .

She's been talked to, ladies and gentlemen. She's gone over this and she's got problems --

Spencer's counsel objected to the prosecutor's argument, stating the argument implied that Spencer's counsel had tampered with the

witness. At a bench conference, the circuit court stated it would admonish the jury to disregard the argument and ordered the prosecutor to apologize to Spencer's counsel before the jury.

The circuit court then addressed the jury:

THE COURT: Members of the jury, I just have a cautionary instruction to give you at this time. I have to remind you, as I've said before, and that's the reason you do not have your notebooks in front of you, that what the attorneys say is argument. It is not evidence.

And, the Court would ask you to disregard [the prosecutor's] argument with regard to [defense counsel] taking the photograph and approaching Miss Villani about it. [The prosecutor] will further explain it to you.

But what counsel say for argument is argument alone. You are to rely on the evidence which you've heard or inferences that can be drawn.

But, [prosecutor], you may proceed with argument.

[Prosecutor]: Your Honor, I, as an officer of the [court], I would apologize to the Court for the time -- for the recess and to defense counsel.

In my argument I stated that [defense counsel] said some things to Miss Villani in the witness room.

I was not there. I did not see or hear what was actually spoken in the room.

All that was presented as evidence at the trial was that [defense counsel] presented her with the photographs that were admitted into evidence and that will be taken into the jury room and that any inference by my part that he may have said something should be disregarded.

"Generally, a prosecutor's improper remarks are considered cured by the court's instructions to the jury, because it is presumed that the jury abided by the court's admonition to disregard the statement." McGriff, 76 Hawai'i at 160, 871 P.2d

at 794 (internal quotation marks omitted); State v. Holbron, 80 Hawai'i 27, 46, 904 P.2d 912, 931 (1995).

We conclude that the circuit court's curative instruction and the prosecutor's apology were sufficient to cure the prosecutor's improper argument.

5. The prosecutor's rebuttal argument did not inflame prejudice against Spencer that he was a racist.

Spencer argues the prosecutor improperly played part of his videotaped statement out of context and that the prosecutor's intent "could have no other purpose than to inflame the jury against [Spencer] as being a racist." Spencer's videotaped statement was, "I no like screw with her 'cause she was a Samoan looking girl, 'eh?" The prosecutor contrasted this statement with Spencer's later statement that he had consensual sexual contact with Hunkin. The prosecutor stated you "[c]an't have it both ways." Spencer argues the videotaped statement was taken out of context and actually meant that he was aware that Hunkin was irate and he wanted to "prevent her from getting angrier." We note it is Spencer who made the videotaped statement, not the prosecutor. The prosecutor's arguing the inconsistency between Spencer's two statements was not an appeal to racism. Highlighting the inconsistencies in Spencer's statement was proper. Clark, 83 Hawai'i at 305, 926 P.2d at 210.

Assuming arguendo that any of the prosecutor's remarks were improper, Spencer's convictions would not be reversed based on prosecutorial misconduct because the prosecutor's remarks were harmless beyond a reasonable doubt and did not prejudice Spencer's right to a fair trial. The evidence of Spencer's guilt was substantial.

B. Double Jeopardy and Jury Instructions

Spencer contends that a charge of Sexual Assault in the Fourth Degree should have been dismissed following the jury verdict because the jury instructions did not identify any act constituting the actus reus of the offense as to Count II. The jury, Spencer argues, was allowed to convict him in Count II for the same act charged in Count I (the touching of Hunkin's breasts), violating the protection against double jeopardy.

The constitutional protection against double jeopardy contained in the fifth amendment to the United States Constitution and made applicable to the states by the fourteenth amendment and as guaranteed by article I, section 5 of the Hawai'i Constitution prohibits multiple convictions for the commission of a single offense. State v. Lessary, 75 Haw. 446, 457, 865 P.2d 150, 155 (1994).

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.

Lessary, 75 Haw. at 462, 865 P.2d at 157. The indictment stated that the touching of Hunkin's breasts was the basis of Count I, but no act was specified as the basis of Count II. Spencer was convicted of two counts of Sexual Assault in the Fourth Degree. We consider jury instructions on appeal as a whole and determine if "the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Arceo, 84 Hawai'i at 11, 928 P.2d at 853 (internal quotation marks omitted); see also Kupau, 76 Hawai'i at 393, 879 P.2d at 498.

The jury instructions as to Count I stated three material elements the State had to prove beyond a reasonable doubt for the jury to convict Spencer of Sexual Assault in the Third Degree: (1) that on or about March 23, 1997, in the City and County of Honolulu, State of Hawai'i, Spencer did have sexual contact with Hunkin by placing his hand on her breast; and (2) that he did so by strong compulsion; and (3) that he did so knowingly. The circuit court also instructed the jury as to the definition of "sexual contact."⁵

⁵ Sexual contact was defined as "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." HRS § 707-700 (Supp. 1992).

The jury instructions as to Count II stated three material elements the State was required to prove for the jury to convict Spencer of Attempted Sexual Assault in the First Degree: (1) that on or about March 23, 1997, in the City and County of Honolulu, State of Hawai'i, Spencer intentionally engaged in conduct; and (2) that the conduct was a substantial step in a course of conduct, intended by Spencer, to subject Hunkin to an act of sexual penetration; and (3) that Spencer was aware his conduct constituted strong compulsion. The circuit court instructed the jury as to the definition of "sexual penetration."⁶

The circuit court also gave the following instruction:

If you find the [D]efendant not guilty of Attempted Sexual Assault in the First Degree or Sexual Assault in the Third Degree, or you are unable to reach unanimous verdicts as to these offenses, then you must consider whether the Defendant is guilty or not guilty of the included offense of Sexual Assault in the Fourth Degree.

A person commits the offense of Sexual Assault in the Fourth Degree if he knowingly subjects another person to sexual contact by compulsion.

There are three elements to the offense of Sexual Assault in the Fourth Degree, each of which the prosecution must prove beyond a reasonable doubt.

⁶ Sexual penetration was defined as "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. Each act of sexual penetration shall constitute a separate offense." HRS § 707-700.

These three elements are:

1. That on or about March 23, 1997, in the City and [C]ounty of Honolulu, State of [Hawai'i], Defendant Abraham Spencer did subject Valerie Hunkin to sexual contact;
2. That he did so by compulsion; and
3. That he did so knowingly.

HRS § 707-733(1)(a).

It is clear from the circuit court's instructions that Sexual Assault in the Fourth Degree is an included offense to both Counts I and II, and that the elements of the crime are that sexual contact was knowingly made by compulsion. The State argued and presented substantial evidence that Spencer made physical contact with not only Hunkin's breasts, but her vagina. In Spencer's April 25, 1997, interview with Orian, Spencer admitted that he made contact with Hunkin's vagina.

In light of the evidence submitted and the focus at trial on the testimony of both parties, it appears quite clear that the prohibited act in Count II's included offense was sexual contact with Hunkin's vaginal area. This prohibited act was clearly different from the prohibited act in Count I (the touching of the breasts). Spencer was not subjected to multiple prosecutions for the same conduct, and the jury instructions when read and considered as a whole were not prejudicially insufficient, erroneous, inconsistent, or misleading.

IV. CONCLUSION

We affirm the September 23, 1999, judgment and conviction of the circuit court.

DATED: Honolulu, Hawai'i, October 15, 2001.

On the briefs:

Michael G.M. Ostendorp
for defendant-appellant.

Chief Judge

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

Associate Judge

Acting Associate Judge