NO. 22992

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

EARL ROSSMAN, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 95-245)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

This appeal arises from the October 29, 1999 conviction and sentence of defendant-appellant Earl Rossman of (1) one count of sexual assault in the first degree, (2) two counts of attempted sexual assault in the third degree, and (3) three counts of sexual assault in the third degree.

On appeal, Rossman contends: (1) that the trial court erred when it denied his motions for judgment of acquittal; (2) that there was insufficient evidence to support the jury's verdicts of guilt beyond a reasonable doubt; (3) that the trial court erred when it gave jury instruction 3.12, which states that the prosecution is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence, or to produce all documents mentioned or suggested by the evidence, because, when considered with all other

instructions, instruction 3.12 would lead a reasonable juror to conclude that lack of evidence is not a sufficient reason to find a reasonable doubt; and (4) that the trial court committed a manifest abuse of discretion in sentencing Rossman to consecutive terms of imprisonment.

We hold that the trial court erred when it denied Rossman's motion for judgment of acquittal with respect to the charge of first degree sexual assault. Rossman's remaining contentions are without merit. Accordingly, we reverse Rossman's conviction of first degree sexual assault and remand for resentencing.

I. BACKGROUND

For approximately seven years, Earl Rossman lived in unit 19 of the Noelani Apartments in Waimea, on the island of Hawai'i. Rossman was known as a generous distributor of candy amongst neighborhood children and would occasionally join the children in freeze tag and other games about the apartment grounds. Then quite suddenly, in early March 1994, Rossman left Waimea for Cleveland, Ohio.[1]

Also in early March 1994, reports began to emerge that Rossman had sexually assaulted several children in the apartment complex. After a police investigation and grand jury indictment,

[1] Rossman testified that the mother of one of his accusers and her husband suspected him of being an informant or narcotics agent. In early March 1994, the husband purportedly threatened Rossman's "life and limb" as a result of several recent police arrests he believed Rossman to be responsible for. According to Rossman, after receiving this threat, he immediately left for Cleveland.

Rossman was arrested, extradited to Hawai‘i, and charged with: (1) one count of first degree sexual assault, in violation of Hawai‘i Revised Statutes (HRS) § 707-730(1)(b) (1993);[2] (2) two counts of attempted third degree sexual assault, in violation of HRS § 705-500(1)(b) (1993)[3] and § 707-732(1)(b) (1993);[4] and (3) three counts of third degree sexual assault in violation of HRS § 707-732(1)(b) (1993).

Rossman was tried in Hilo between August 31 and September 2, 1999. Several adults and a number of children testified on behalf of the prosecution. At the close of the prosecution's case, Rossman moved by oral motion for a judgment of acquittal on all charges. The court preserved the motion and

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[2] Sexual assault in the first degree is defined by HRS § 707-730(1)(b) (1993) as follows:

> (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 . . . .

[3] HRS § 705-500(1)(b) (1993) reads as follows:

> (1) A person is guilty of an attempt to commit a crime if the person:
> . . . .
> (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.

[4] Sexual assault in the third degree is defined by HRS § 707-732(1)(b) (1993) as follows:

> (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.

postponed argument.[5] Rossman then presented his defense, in which he was the sole witness.

At the close of evidence, Rossman moved for a judgment of acquittal on the basis of the preserved motion. The court heard arguments and subsequently denied the motion, stating in relevant part:

> [T]he Court recognizes that I have to consider the evidence in the light most favorable to the State. And I believe that the State has established at least a prima facie case, and the amount and quantity and quality of probative evidence of the value of that evidence is going to be left to the jury.

The defense then moved for a judgment of acquittal on the basis of evidence presented by both the prosecution and the defense. The trial court, noting the standard to be applied to motions for judgments of acquittal differs at the close of all evidence, denied the motion.

The jury returned a verdict of guilty on all six counts. Rossman was sentenced to twenty years' imprisonment for the first degree sexual assault conviction and five years for each of the third degree sexual assault and attempted third degree sexual assault convictions. The circuit court ordered that two counts of third degree sexual assault and one count of

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[5] Hawai‘i Rules of Penal Procedure (HRPP) Rule 29(b), instructs that "[i]f a motion for judgment of acquittal is made at the close of the evidence offered by the prosecution, the court shall not reserve decision thereon." This appears, however, to be exactly what the trial court did. Accordingly, we do not apply the rule of State v. Halemanu, 3 Haw.App. 300, 650 P.2d 587 (1982), which would bar Rossman from asserting error by the trial court on appeal where he has, subsequent to the trial court's ruling on his motion, presented his case to the jury.

attempted third degree sexual assault be served concurrently[6] and the remaining sentences be served consecutively, totaling thirty-five years of imprisonment.[7] Rossman was also ordered to pay a five hundred dollar criminal injuries compensation fee.

II. STANDARDS OF REVIEW

A. Motions for judgment of acquittal

> When reviewing a motion for judgment of acquittal, we inquire whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

State v. Jhun, 83 Hawai‘i 472, 481, 927 P.2d 1355, 1364 (1996) (citing State v. Pone, 78 Hawai‘i 262, 265, 892 P.2d 455, 458 (1995); State v. Alston, 75 Haw. 517, 528, 865 P.2d 157, 164 (1994); State v. Rocker, 52 Haw. 336, 346, 475 P.2d 684, 690 (1970)).

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[6] The trial court ordered these three sentences to be served concurrently because they involved convictions with respect to assaults and attempted assaults on one child. The remaining three sentences were ordered to be served consecutively because they involved, respectively, assaults and/or attempted assaults on three separate children.

[7] The trial court sentenced Rossman as follows:

> Commit you to the Director of Public Safety for imprisonment Counts, One, Two and Three for a period of five years. Those involved the same victim. They will be served concurrently. Meaning together.
>
> Count Four, five years.
>
> Count Five, five years.
>
> Count Six, twenty years.
>
> Counts Four, Five, and Six involved separate victims, separate times and circumstances. The court will order that those be served consecutive to Counts One, Two, and Three.
>
> So you have a total of 35 years.
>
> We also order that you pay $500.00 to the Criminal Injuries Compensation Fee.

B. Sufficiency of evidence for verdict

When an appellate court passes on the legal sufficiency of evidence to support a conviction, the test on appeal is whether, considered in the strongest light for the prosecution, there was substantial evidence to support the conclusion of the trier of fact. State v. Wallace, 80 Hawai‘i 382, 391, 910 P.2d 695, 704 (1996) (citing State v. Okumura, 78 Hawai‘i 383, 403, 894 P.2d 80, 100, (1995) (citations omitted)). Substantial evidence is defined as credible evidence that is of sufficient quality and probative value to enable a reasonably cautious person to support a conclusion. State v. Staley, 91 Hawai‘i 275, 281, 982 P.2d 904, 910 (1999) (citation omitted); State v. Ildefonso, 72 Haw. 573, 577, 827 P.2d 648, 651 (1992) (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

C. Jury instructions

"In reviewing jury instructions, 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. Maelega, 80 Hawai‘i 172, 176, 907 P.2d 758, 762 (1995) (citations omitted). Where a trial court has given erroneous instructions, the instructions are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. State v. Gomez, 93 Hawai‘i 13, 17, 995 P.2d 314, 319 (2000) (citing State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (citation omitted)).

D. Sentencing

Due to the broad discretion generally accorded to trial judges in imposing sentences, State v. Vinge, 81 Haw. 309, 316, 916 P.2d 1210, 1217 (1996) (citing Keawe v. State, 79 Hawai‘i 281, 284, 901 P.2d 481, 484 (1995) (citation omitted)), a sentence will not constitute an abuse of discretion unless it appears the sentencing court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. (citing Keawe, 79 Hawai‘i at 284, 901 P.2d at 484 (citing State v. Gaylord, 78 Hawai‘i 127, 144, 890 P.2d 1167, 1184 (1995))).

III. DISCUSSION

A. The trial court erred when it denied Rossman's motion for a judgment of acquittal with respect to the charge of sexual assault in the first degree, but not with respect to all other charges.

Rossman contends that the trial court erred when it denied his motions for a judgment of acquittal. HRPP Rule 29(a) provides in relevant part:

> (a) Motion Before Submission to Jury. . . . The court on motion of defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . .

(emphasis added).

1. Sexual assault in the third degree

A prima facie case of sexual assault in the third degree is established where the prosecution adduces evidence that the defendant knowingly subjected to sexual contact, or caused to

have sexual contact, a person who is less than fourteen years of age. HRS § 707-732(1)(b). The prosecution elicited the testimony of two children. One child, K.U., testified about two separate instances giving rise to two of the three counts of third degree sexual assault. Both incidents allegedly occurred while K.U. was engaged in chores about Rossman's apartment for the purpose of earning money. In the first instance, K.U. testified that she was watering plants when Rossman approached her and touched her right breast. On another occasion, while K.U. was mopping the floor of Rossman's apartment, he approached her and touched her vaginal area over her clothing. Rossman acknowledged that K.U. occasionally cleaned his apartment for money, but denied touching her inappropriately.

The prosecution also elicited the testimony of R.A., who purportedly witnessed Rossman commit the act giving rise to the third count of third degree sexual assault. R.A. testified that he witnessed Rossman touch a child, L.K., during a game of "hide and go seek." He testified that he and L.K. were hiding inside a drainage ditch when Rossman came and sat beside them. He saw Rossman reach out his hand and touch L.K. "someplace in the back" that was "probably from her waist to her knees." The contact occasioned L.K. to proclaim "gross." Rossman acknowledged that he did, in fact, touch L.K., but claimed that the contact was innocent. Both K.U. and L.K. were less than fourteen years of age at the time it was alleged Rossman assaulted them. Viewed in a light most favorable to the

prosecution, the evidence presented by the prosecution reveals a prima facie case from which a jury could have concluded beyond a reasonable doubt that Rossman committed three counts of sexual assault in the third degree.

2. Attempted sexual assault in the third degree

To establish a prima facie case of attempted sexual assault in the third degree, the prosecution must adduce evidence that the defendant intentionally engaged in conduct that, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in sexual assault in the third degree as defined above. HRS § 705-500(1)(b). The prosecution elicited the testimony of K.U. that, while doing housework for Rossman, Rossman grabbed her hand and pulled it towards his genitalia. K.U. testified that when he did this, her hand involuntarily touched the area of his penis over his clothing. Another child, T.F., testified that while she was using a massage machine in Rossman's apartment, Rossman slowly slid his hands down her back until they were touching her buttocks. Both of these children were less than fourteen years of age at the time the alleged incidents occurred. Viewed in a light most favorable to the prosecution, the testimony of these two children, and the inferences to be drawn therefrom, establish a prima facie case from which the jury could have concluded beyond a reasonable doubt that Rossman intentionally engaged in conduct which, under the circumstances as he believed them to be,

constituted a substantial step in a course of conduct intended to culminate in sexual assault in the third degree.

3. Sexual assault in the first degree

A prima facie case of sexual assault in the first degree is established where the prosecution proves that Rossman knowingly subjected to sexual penetration another person who was less than fourteen years of age. HRS § 707-730(1)(b). "Sexual penetration," which includes fellatio, occurs "upon any penetration, however slight." HRS § 707-700.

The prosecution elicited the testimony of three witnesses. The alleged victim's mother testified that her child, M.C., disappeared from the apartment grounds for a period of approximately twenty-five to thirty minutes. She further related that when found by a neighbor, M.C. looked "pale" and "scared." When asked where she had run off to, M.C. allegedly responded that she had been at Rossman's apartment. The neighbor testified to seeing M.C. exit Rossman's apartment. M.C., who was four years old at the time, testified that Rossman approached her while she was playing outside and inquired whether she wanted some jelly beans. M.C. replied in the affirmative and Rossman told her to come to his apartment. When M.C. advised Rossman that her mother would not allow her to enter his apartment, Rossman told her to wait by his door while he obtained the candy. He then opened his door and pulled M.C. inside. She testified that she tried to leave, but that Rossman would not allow her to

exit the apartment. Rossman then allegedly removed both her clothing and his own clothing, except for his shirt.[8]

During direct examination, M.C. twice said that Rossman "put his [] peepee by my mouth." The only suggestion of actual physical contact between Rossman's penis and M.C.'s mouth came in response to a question by the prosecutor, who asked, "[A]nd then you told us that his peepee touched your mouth?" Although M.C. responded "yes" to the question, the record discloses no testimony other than that Rossman placed his penis "by" her mouth. Aside from M.C.'s response to this one question, the prosecution presented no evidence that Rossman's penis penetrated M.C.'s mouth.[9]

A prima facie case for sexual assault in the first degree requires the prosecution show "penetration." HRS § 707-730 (1)(b). In the instant case, the prosecution presented no evidence of penetration. M.C.'s testimony leaves considerable doubt whether there was even "sexual contact" between Rossman's penis and M.C.'s mouth. See State v. Arceo, 84 Hawai'i 1, 20, 928 P.2d 843, 862 (1996). Viewed in a light most favorable to the prosecution, the evidence does not support a prima facie case for sexual assault in the first degree. As such, the trial court

[8] M.C. also testified that Rossman touched her vagina on top of her clothing with his penis and that there was "one part" where his penis touched her vagina where she did not have any clothing on.

[9] Suggestions that Rossman placed his penis against M.C.'s mouth appear to have emanated primarily from the prosecutor. During opening statement, the prosecutor informed the jury that M.C. would testify that "Mr. Rossman took his private and placed it against her mouth." During closing argument, the prosecutor argued "[s]he says that he made contact with her mouth. Her lips."

erred by denying Rossman's motion for judgment of acquittal with respect to the charge of first degree sexual assault.

With respect to all other charges, the prosecution established a prima facie case as to each count, and the trial court was correct to submit the matter to the trier of fact.

B. There was substantial evidence to support the jury's verdict of Rossman's guilt beyond a reasonable doubt.

Rossman asserts that there was not substantial evidence to support the jury verdict finding him guilty on all counts. Rossman's primary contention appears to be that the only evidence presented by the prosecution was the testimony of witnesses, most of whom were quite young at the time the alleged crimes occurred, and some of whose stories appear to have evolved over time.

In analyzing Rossman's argument, we apply the following standard of review to the facts of this case:

> The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.
>
> "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable [a person] of reasonable caution to support a conclusion."

State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996) (citations omitted).

The duty of the appellate court on review is not to evaluate witness credibility, but rather to determine whether there was "substantial evidence" from which the jury could find the defendant guilty. Id.; Staley, 91 Hawai'i at 281, 982 P.2d

at 910 (citing State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931 (1992)). Because we have already held that the trial court erred in failing to dismiss the charge of first degree sexual assault against Rossman, our analysis is limited to the remaining charges.

Witness credibility is for the trier of fact. Staley, 91 Hawaii at 281, 982 P.2d at 910 (citing State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996)). Five witnesses testified on behalf of the prosecution with respect to the charges of third degree sexual assault and attempted third degree sexual assault. The witnesses testified from personal experience about specific events. Rossman's own testimony corroborated portions of their testimony. The jury, as trier of fact, evidently believed the testimony of prosecution witnesses and not the testimony of Rossman. It is not for the appellate court to second-guess its judgment. Id.

Rather, we look for "substantial evidence" from which the jury could reach a verdict of guilty. As noted above, the prosecution established a prima facie case as to all elements of the charges of third degree sexual assault and attempted third degree sexual assault. When viewed "in the strongest light for the prosecution," the evidence presented amounts to "substantial evidence" from which a fact finder of reasonable caution could find Rossman guilty beyond a reasonable doubt of the charges against him.

C. The trial court's jury instruction 3.12, when considered with the other instructions, was not prejudicially insufficient, erroneous, inconsistent or misleading.

Rossman argues the trial court erred in reading to the jury, Instruction 3.12 of the Hawai'i Pattern Jury Instructions - Criminal. The instruction to which Rossman objected read as follows:

> The prosecution is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence, or who may appear to have some knowledge of these events, or to produce all evidence or documents mentioned or suggested by the evidence.

Rossman argues this instruction, when read in concert with instructions to the jury that they could not convict unless they believed the defendant guilty beyond a reasonable doubt, would lead a juror to conclude that lack of evidence was not a sufficient reason to find reasonable doubt. Rossman's argument is without merit.

Jury instruction 3.12 in no way suggested that lack of evidence was not a sufficient reason to harbor a reasonable doubt. The trial court specifically instructed the jury that the prosecution bore the burden of proving "every material element of the offense charged against the defendant beyond a reasonable doubt." The court's explanation included the following elaboration on the term "reasonable doubt":

> [Reasonable doubt] is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence presented and which is based upon reason and common sense.

Instruction 3.12, when read in conjunction with other instructions given to the jury, is a correct statement of the

prosecution's burden. While the defendant's guilt must be proven beyond a reasonable doubt, the prosecution need not call every witness or produce every piece of potentially incriminating evidence to do so. Accordingly, we hold that the jury instructions, as a whole, were not "prejudicially insufficient, erroneous, inconsistent, or misleading."

D. The sentence imposed by the trial court does not amount to an abuse of discretion.

Rossman objects to the trial court's imposition of consecutive sentences. Specifically, he argues that, in light of his advanced age, the lengthy sentence amounts to a life sentence without the possibility of parole and constitutes an abuse of the trial court's discretion.

HRS § 706-668.5 (1993) states, in relevant part, as follows:

> Multiple sentence of imprisonment.
> (1) If multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. . . .
> (2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively shall consider the factors set forth in section 706-606.

HRS § 706-606 (1993) provides as follows:

> Factors to be considered in imposing a sentence.
> The court, in determining the particular sentence to be imposed, shall consider:
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) The need for the sentence to be imposed:
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
> (b) To afford adequate deterrence to criminal conduct;
> (c) To protect the public from further crimes of the defendant; and

> (d) To provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) The kinds of sentences available; and
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been guilty of similar conduct.

In Gaylord, this court traced the history of Hawai‘i's consecutive sentencing statute, concluding:

> [T]he legislative sentencing philosophy permeating HRS ch. 706 in general and HRS § 706-606 in particular dictates that consecutive prison sentences, pursuant to HRS § 706-668.5, may properly be imposed only to achieve retributive, incapacitative, and deterrent objectives. Thus, at the very least, (1) the sentencing court must expressly intend that the defendant's period of incarceration be prolonged by virtue of the consecutive character of the prison terms (the retributive goal), and (2) the sentence must embody the forward-looking aim of future crime reduction or prevention (the deterrent goal).

Id. at 148-50, 154, 890 P.2d at 1188-90, 1194 (citation and footnotes omitted)).

Prior to imposing sentence, the trial court read the following statement from the presentence report to Rossman:

> [W]hile the defendant denies he committed the instant offenses, the circumstances in the instant offenses describe distinct patterns of a pedophile. The victims were at a very vulnerable age. The defendant groomed the victims by using candy, money or games. The offenses occurred over a period of time which showed the offenses were not accidental.

After sentence was imposed, the court further stated:

> We also sat through the trial. We know that the evidence brought forward confirms . . . exactly what [the prosecution] said, separate and distinct times, separate and distinct victims, separate and distinct deliberate action if you will. Therefore, the court finds that you're a threat to the community, particularly young females.
>
> We find that your denial that you have a problem represents or reflects your failure to accept responsibility. Therefore increases the risk, in my opinion, for recidivism. Meaning for you to repeat the offenses. And also I can assure you, will hinder any possibility of rehabilitation.

The trial court's statements reflect a consideration of factors set forth in HRS § 706-606 (1993). Specifically, the court's statements indicate considerations of (1) the nature and circumstances of the offense and the history and characteristics of the defendant; and (2) the need for the sentence to protect the public from further crimes of the defendant. See HRS § 706-606.

In light of these statements, it is apparent the trial court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to Rossman's substantial detriment and, accordingly, that the trial court did not commit a plain and manifest abuse of discretion in sentencing Rossman to consecutive terms of imprisonment pursuant to HRS § 706-668.5.

IV. CONCLUSION

For the foregoing reasons, we (1) reverse Rossman's conviction of one count of sexual assault in the first degree; (2) affirm the circuit court's judgment of conviction against Rossman of two counts of attempted sexual assault in the third degree and three counts of sexual assault in the third degree; and (3) remand for resentencing consistent with this opinion.

Dated: Honolulu, Hawai‘i, March 28, 2001.

On the briefs:

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