

*** NOT FOR PUBLICATION ***

NO. 25836

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ROY RITA, Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(Cr. No. 02-1-0139)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

The defendant-appellant Roy Rita appeals from the judgment of the fifth circuit court, the Honorable Clifford Nakea presiding, entered on May 1, 2003, convicting him of continuous sexual assault of a minor under the age of fourteen years, in violation of Hawai'i Revised Statutes (HRS) § 707-733.5 (Supp. 1997).¹ On appeal, Rita contends, inter alia: (1) that there was insufficient evidence to convict him of continuous sexual assault of a minor in violation of HRS § 707-733.5 because

¹ On June 17, 2002, a Kauai grand jury returned an indictment against Rita, charging him with one count of continuous sexual assault of a minor under the age of fourteen, in violation of HRS § 707-733.5 (Count I), and, in the alternative, nine counts of attempted sexual assault in the first degree, in violation of HRS §§ 705-500 (1993) and 707-730(1)(b) (1993) (Counts II through X). On February 18, 2003, prior to trial, the plaintiff-appellee State of Hawai'i orally moved to dismiss Counts V, VI, VII, VIII, IX, and X, all charges of attempted sexual assault in the first degree, and the circuit court granted the motion.

On February 19, 2003, the jury found Rita "guilty as charged" of Count I, charging continuous sexual assault of a minor under the age of fourteen years. As to Counts II, III, and IV, charging in the alternative attempted sexual assault in the first degree, the jury found him "guilty" of the included offense of sexual assault in the third degree. The circuit court, sua sponte, stated that, pursuant to HRS § 707-733.5(3), it could not find Rita guilty of the charge of continuous sexual assault of a minor and any other felony sex offense involving the same victim. The circuit court then found Rita guilty of continuous sexual assault and dismissed the jury's guilty verdicts as to the included charges in Counts II, III, and IV.

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evidence of a third incident of "sexual contact" was not adduced at trial; (2) that (a) the term "sexual contact" as defined by HRS § 707-700 (1993) is unconstitutionally vague, insofar as (b) "buttocks" are not "intimate parts," and that (c) the circuit court erred in instructing the jury that "sexual contact" is defined only as "any touching of the sexual or other intimate parts of a person not married to the actor"; (3) that the circuit court erred in failing to instruct the jury as to the elements of sexual assault in the fourth degree, HRS § 707-733(1)(a) (1993), inasmuch as it is a lesser included offense of sexual assault in the third degree, HRS § 707-732(1)(b) (1993); (4) that Rita's trial counsel rendered constitutionally ineffective assistance; and (5) that Rita's conviction runs afoul of this court's decision in State v. Rabago, 103 Hawai'i 236, 81 P.3d 1151 (2003), on the bases (a) that Rabago allegedly struck down HRS § 707-733.5 as unconstitutional in its entirety and (b) that the circuit court erred in failing to give the jury a mandatory "specific unanimity instruction," the prosecution, according to Rita, having adduced evidence of more than three acts of sexual assault at trial.

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 resolve Rita's appeal as follows: (1) viewing the evidence -- and, in particular, the complainant's testimony -- in the light most favorable to the prosecution, see State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992), reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992), there was sufficient evidence to convict Rita of continuous sexual assault of a minor under the

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age of fourteen years, in violation of HRS § 707-733.5, inasmuch as the jury could reasonably infer from the complainant's testimony that Rita sexually assaulted her on "three separate occasions"; (2) inasmuch as (a) Rita has not met his burden of plainly, clearly, manifestly, and unmistakably showing unconstitutionality beyond a reasonable doubt, see State v. Kane, 87 Hawai'i 71, 74, 951 P.2d 934, 937 (1998), the term "sexual contact" as defined by HRS § 707-700 is not unconstitutionally vague; see also State v. Richie, 88 Hawai'i 19, 31-32, 960 P.2d 1227, 1239-1240 (1998) ("[T]he definition of 'sexual contact' in HRS § 707-700 is crystal clear."), and inasmuch as (b) the appellate courts of this state have consistently recognized buttocks as "intimate parts," see State v. Rogan, 91 Hawai'i 405, 409, 984 P.2d 1231, 1235 (1999); State v. Crisostomo, 94 Hawai'i 282, 285, 12 P.3d 873, 876 (2000); State v. Bani, 97 Hawai'i 285, 287, 36 P.3d 1255, 1257 (2001); State v. Baron, 80 Hawai'i 107, 112, 905 P.2d 613, 618 (1995); State v. Caprio, 85 Hawai'i 92, 96, 98, 937 P.2d 933, 937, 939 (App. 1997), Rita's touching of the complainant's buttocks constituted "sexual contact," and (c) notwithstanding that the circuit court erred in failing to instruct the jury as to the entire statutory definition of "sexual contact" pursuant to HRS § 707-700, the instruction was not "prejudicially insufficient, erroneous, inconsistent, or misleading," and there was "no reasonable possibility that the error contributed to conviction," see State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996); (3) sexual assault in the fourth degree, in violation of HRS § 707-733(1)(a), is not a lesser included offense of sexual assault in the third degree, in violation of HRS § 707-732(1)(b), see State v. Buch, 83 Hawai'i

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308, 313, 926 P.2d 599, 604 (1996) ("Because sexual assault in the fourth degree requires proof of an additional fact -- compulsion -- it may not be established by proof of the same or less than all the facts required to establish sexual assault in the third degree in violation of HRS § 707-732(1)(b)."); (4) inasmuch as Rita failed to satisfy his burden of demonstrating that "specific errors or omissions resulted in the withdrawal or substantial impairment of a meritorious defense," State v. Poaipuni, 98 Hawai'i 387, 392, 49 P.3d 353, 358 (2002), he has not shown that his trial counsel provided ineffective assistance; and (5) Rita's conviction does not run afoul of Rabago, inasmuch as (a) only a portion of HRS § 707-733.5, namely, HRS § 707-733.5(2), and not the entire statute, was stricken down as unconstitutional, and (b) a "specific unanimity instruction" was not required because the prosecution adduced evidence of only three acts of sexual assault at trial, see State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-875 (1996).

Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, April 29, 2004.

On the briefs:

John H. Murphy, for
the defendant-appellant,
Roy Rita

Tracy Murakami, Deputy
Prosecuting Attorney, for
the plaintiff-appellee
State of Hawai'i