

NO. 25896

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

EDISON LAMEG, Defendant-Appellant.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 01-1-2241)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Edison Lameg appeals from: (1) the September 24, 2002 findings of fact, conclusions of law, and order of the first circuit court, the Honorable Sandra A. Simms presiding, denying Lameg's motion to suppress, filed July 3, 2002; and (2) the judgment of the first circuit court, the Honorable Karen S.S. Ahn presiding, filed May 19, 2003, convicting him of and sentencing him for two counts of sexual assault in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(c) (Supp. 2001), one by way of fellatio (Count I) and the other by way of vaginal intercourse (Count II). On appeal, Lameg contends that: (1) the circuit court erred in denying his motion to suppress statements, filed July 3, 2002, by concluding that he voluntarily, intelligently, and knowingly waived his right to counsel prior to the commencement of custodial interrogation by Honolulu Police

Department Detective Richard Kellett (Detective Kellett); (2) for purposes of the element of "sexual penetration" set forth in HRS § 707-730(1)(c), the circuit court erred in instructing the jury, over Lameg's objection, that "[f]ellatio" means a sexual act in which the mouth or lips come into contact with the penis" (emphasis added), on the ground that, with respect to Count I, "this instruction did not require the prosecution to prove the act of 'sexual penetration' beyond a reasonable doubt, as mandated under HRS § 707-700 (1993) and HRS § 707-730(1)(c)"; and (3) that the circuit court erred in failing to issue a sua sponte limiting instruction to the jury that the prosecution having failed to satisfy the requirements of Hawai'i Rules of Evidence (HRE) Rules 802.1(1) (1993) and 613(b) (1993), the complainant's prior inconsistent statement to Detective Kellett could not be considered substantively in its deliberations. In response, the plaintiff-appellee State of Hawai'i [hereinafter, "the prosecution"] argues that: (1) the circuit court correctly denied Lameg's motion to suppress because Detective Kellett answered and clarified all of Lameg's questions regarding the assistance of counsel in the course of reading Lameg his Miranda rights prior to his interrogation and Lameg knowingly, voluntarily, and intelligently waived his right to an attorney; (2) that, with respect to Count I, the jury instruction regarding the element of "sexual penetration," including the definition of "fellatio," was

not prejudicially insufficient, erroneous, inconsistent, or misleading because the jury was sufficiently apprised that it was required to find beyond a reasonable doubt that Lameg had engaged in an act of "sexual penetration" involving the complainant; and (3) that the lack of a sua sponte limiting jury instruction regarding the substance of the complainant's prior inconsistent statement was not plainly erroneous, inasmuch as the jury had been multiply apprised of the complainant's statement to Detective Kellett, not only through the complainant's trial testimony, but also through Detective Kellett's trial testimony and his questioning during his taped interrogation of Lameg, which had been admitted into evidence and played for the jury.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we affirm the circuit court's findings of fact, conclusions of law, and judgment of conviction and sentence.

First, we hold that, prior to the commencement of Detective Kellett's custodial interrogation, Lameg knowingly, voluntarily, and intelligently waived his right to an attorney. Lameg responded ambiguously to Detective Kellett's question, "[D]o you want an attorney now?" Thus, inasmuch as it is undisputed that Lameg did not unequivocally request the assistance of an attorney, the protections afforded to the

defendants in State v. Edwards, 96 Hawai'i 224, 226, 30 P.3d 238, 240 (2001) (holding that "the police failed to make a reasonable effort to contact an attorney pursuant to [HRS] § 803-9(2) (1993), as requested by [the defendant], when they did nothing more than call the attorney's listed telephone number twice on two different occasions, although informed that the number was not in service") and State v. Ababa, 101 Hawai'i 209, 216, 65 P.3d 156, 163 (2003) (holding that defendant's "reply that he wanted an attorney in response to the alternatives presented by the detectives [(i.e., to speak to an attorney or to the detectives)] was sufficiently precise to put the detectives on notice of their obligations under HRS § 803-9(2) . . . to make reasonable efforts to contact one"), both of whom unambiguously invoked their rights to counsel, were unavailable to Lameg. In the aggregate, Lameg's statement and correlative questions constituted an equivocal request for counsel, such that Detective Kellett was confronted with the choice articulated in State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (1994): "either cease all questioning or seek non-substantive clarification of the suspect's request." Inasmuch as Detective Kellett chose to "seek non-substantive clarification" of Lameg's request, we hold that Detective Kellett adequately cultivated Lameg's understanding of his Miranda rights. Id.; see also State v. Carvalho, 101 Hawai'i 97, 63 P.3d 405 (App. 2002), cert. granted, 100 Hawai'i 295, 59

P.3d 930 (2002), cert. dismissed, 101 Hawai'i 233, 65 P.3d 180 (2003).

Second, we hold that the jury instructions were not erroneous and did not violate Lameg's rights to due process and equal protection. The circuit court gave three relevant instructions: (1) "[s]exual penetration means vaginal intercourse, fellatio, or any intrusion of any part of a person's body into the genital opening of another person's body. It occurs upon any penetration, however slight, but emission is not required" [hereinafter, instruction #1]; (2) "[f]ellatio means a sexual act in which the mouth or lips come into contact with the penis" [hereinafter, instruction #2]; and (3) "[y]ou must consider all of the instructions as a whole and consider each instruction in the light of all of the others. Do not single out any word, phrase, sentence, or instruction and ignore the others. Do not give greater emphasis to any word, phrase, sentence, or instruction simply because it is repeated in these instructions" [hereinafter, instruction #3]. Reading instruction #1 and instruction #2 together, as required by instruction #3, the jury was required to find as follows: "Sexual penetration means vaginal intercourse, [a sexual act in which the mouth or lips come into contact with the penis], or any intrusion of any part of a person's body into the genital opening of another person's body. It occurs upon any penetration, however slight, but

emission is not required." The defendant essentially argues that the jury read the definition of "sexual penetration" to mean only "vaginal intercourse, fellatio, or any intrusion of any part of a person's body into the genital opening of another person's body," with "fellatio" requiring only "sexual contact" rather than "sexual penetration." According to the defendant's logic, the jury ignored the second half of instruction #1 (that sexual penetration "occurs upon any penetration, however slight") and also ignored instruction #3 (requiring the jury to "consider all of the instructions as a whole and consider each instruction in the light of all of the others").<sup>1</sup> Both the United States Supreme Court and the Hawai'i Supreme Court have held "that jurors are reasonable and generally follow the instructions they are given." Yates v. Evatt, 500 U.S. 391, 403 (1991), overruled on other grounds, Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991); State v. Holbron, 80 Hawai'i 27, 46, 904 P.2d 912, 931 (1995) (quoting Yates). The presumption that the jury followed the circuit court's instructions means that the jury followed instruction #3. This presumption, therefore, also means that the jury considered the definition of "fellatio" in the context of

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<sup>1</sup> With regard to instruction #3, this court has stated that "[m]erely informing the jury that it should consider the court's instructions as a whole cannot obviate an error of omission where the remaining instructions fail to provide the crucial information." State v. Tabigne, 88 Hawai'i 296, 305, 966 P.2d 608, 617 (1998). The jury instructions in the instant case did not omit any information; rather, the defendant contends that the combination of instructions misled the jury.

the definition of "sexual penetration." Thus, the instructions, on their face, were not misleading. In addition, there was sufficient evidence to uphold the jury's finding that penetration occurred, as Officer Kagawa testified that the head of Lameg's penis was in the complainant's mouth. In summary, the circuit court's instructions were not erroneous: the instructions required the jury to find sexual penetration before convicting Lameg of first degree sexual assault and did not violate Lameg's rights to due process and equal protection.

Third, we hold that the circuit court did not plainly err in failing to sua sponte give a limiting instruction prohibiting the jury from substantive consideration of the complainant's prior inconsistent statement or in allowing the complainant's prior inconsistent statement in evidence for the truth of the matters asserted therein. The prosecution did not satisfy the second prong of HRE Rule 613(b) because the prosecution did not ask the complainant whether she had made each prior inconsistent statement. However, if the prosecution had fulfilled this requirement, the statements would have been admissible for the truth of the matters asserted therein. See HRE Rule 802.1(1)(C). Lameg's technical objection does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," State v. Sawyer, 88 Hawai'i 325, 330,

966 P.2d 637, 642 (1998), so as to justify a reversal for plain error. Therefore,

IT IS HEREBY ORDERED that the circuit court's September 24, 2002 findings of fact, conclusions of law, and order denying Lameg's motion to suppress and the circuit court's May 19, 2003 judgment of conviction and sentence are affirmed.

DATED: Honolulu, Hawai'i, June 8, 2004.

On the briefs:

Karen T. Nakasone and  
Edward K. Harada,  
Deputy Public Defenders,  
for defendant-appellant  
Edison Lameg

Mark Yuen,  
Deputy Prosecuting  
Attorney, for  
plaintiff-appellee  
State of Hawai'i