* * * **FOR PUBLICATION** * * *
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

JING HUA XIAO, Petitioner/Defendant-Appellant.

NO. 28370

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(HPD CRIM NO. 06295746)

MAY 25, 2010

MOON, C.J., NAKAYAMA, DUFFY, and RECKTENWALD, JJ.;
ACOBA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY MOON, C.J.

On March 29, 2010, this court accepted petitioner/defendant-appellant Jing Hua Xiao's application for a writ of certiorari to review the Intermediate Court of Appeals' (ICA) December 3, 2009 judgment on appeal, entered pursuant to its November 13, 2009 summary disposition order. Therein, the ICA affirmed the District Court of the First Circuit's[1] December 12, 2006 judgment, convicting Xiao of prostitution in violation of Hawai'i Revised Statutes (HRS) § 712-1200(1) (1993 and Supp. 2008).[2]

[1] The Honorable Edwin C. Nacino presided.

[2] HRS § 712-1200 provides:

Prostitution. (1) A person commits the offense of

(continued...)

Briefly stated, pursuant to a police undercover investigation for possible prostitution activities at Club Sara Lee in Honolulu, Xiao was charged with prostitution based upon "slow dancing" with an undercover police officer, who had bought her several drinks, during which she engaged in sexual conduct, i.e., rubbing her body and breasts up against the officer's body and groin area. Following a bench trial, Xiao was convicted, and she appealed. On direct appeal before the ICA, Xiao argued that there was insufficient evidence to support her conviction. The ICA disagreed and affirmed her conviction.

On application, Xiao argues that the ICA erred in concluding that there was sufficient evidence that she engaged in sexual conduct for a fee. More specifically, she argues, inter alia, that "there [wa]s absolutely no evidence adduced that the drink[s] she received constituted a fee" and any sexual conduct that went on between herself and Officer Wagner was "merely gratuitous."[3]

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[2](...continued)
prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee.

(2) As used in subsection (1), "sexual conduct" means "sexual penetration," "deviate sexual intercourse," or "sexual contact," as those terms are defined in [HRS §] 707-700 [(Supp. 2006)].

(Bold emphasis in original.) (Underscored emphasis added.)

[3] Xiao also contends that "there [wa]s absolutely no evidence that would confirm that . . . Xiao received monetary compensation from anyone for the purchase of the drink" and that the ICA's decision in this case is inconsistent with its decision in State v. Schneider, 120 Hawai'i 418, 209 P.3d 195 (App. June 26, 2009) (SDO). Inasmuch as we vacate the judgment of (continued...)

Based on the discussion below, we hold that there was insufficient evidence to convict Xiao under HRS § 712-1200(1). We, therefore, vacate the ICA's judgment on appeal and reverse Xiao's conviction.

I. BACKGROUND

On October 8, 2006, Xiao was arrested for prostitution based on an encounter between Xiao and Honolulu Police Department (HPD) undercover officer Joel Wagner (Officer Wagner) at Club Sara Lee on July 24, 2006.[4] On December 12, 2006, Xiao was orally charged as follows:

> You are charged that on or about July 24th, 2006, in the City and County of Honolulu, State of Hawai'i, you did engage in or agree to offer to engage in sexual conduct with another person for a fee, thereby committing the offense of [p]rostitution in violation of [HRS §] 712-1200(1)[.]

Xiao pleaded not guilty to the charge.

A. Non-Jury Trial

Xiao's bench trial commenced on December 12, 2006 and lasted one day. The sole evidence presented by respondent/plaintiff-appellee State of Hawai'i (the prosecution) was the testimony of Officer Wagner.

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[3](...continued)
the ICA and reverse Xiao's conviction based on her first point of error, we do not address her remaining contentions.

[4] There is no indication in the record as to why Xiao's arrest occurred two and a half months after the encounter between Xiao and Wagner at Club Sara Lee. As previously indicated, Wagner's presence at the club was part of an undercover investigation into possible prostitution activities in the club. Thus, Xiao's arrest was presumably delayed because of the ongoing undercover investigation.

On direct examination, Officer Wagner testified that, on the evening of July 24, 2006, he was working undercover with the morals detail of the narcotics-vice division of the HPD, investigating possible prostitution activity at Club Sara Lee, a bar in Honolulu. According to Officer Wagner, Xiao entered a karaoke room at the bar that Officer Wagner shared with another HPD officer and another female. He testified that he knew Xiao from other nights that he had visited Club Sara Lee. As to the events that took place in the karaoke room, Officer Wagner testified as follows:

> Q. [By the prosecution] [T]ell us what happened[.]
> A. [By Officer Wagner] [Xiao] came to me[,] and we greeted each other. We sat down, she asked if she could have a drink. I asked if there were any other types of drinks than [the] twenty-dollar type that I had bought her on previous occasions, and she said yes, there are other types.
> Q. Okay. So, you asked her if there are any other types of drinks. Okay, so then what happened.
> A. She said . . . there's a forty-dollar type of drink as well.
> Q. So then what did you say?
> A. I said go . . . and get yourself a forty-dollar drink. I then gave her some of the pre-recorded money that we had, that I had been issued.
> Q. Did you give her a full forty dollars?
> A. Yes.
> Q. Okay. And did she actually go get you the drink herself?
> A. She went and got her ----
> Q. I'm sorry, that drink for herself?
> A. Yeah, the drinks that she bought, yes, she did go and get that drink for herself.

Officer Wagner explained that, when Xiao returned, she put the drink down and asked him to dance. Officer Wagner then testified:

> [W]e began to dance, [and] I placed my hands on her hips, on her waist area[. I]t was a slow dance type of movement. She then pulled herself closer to me and put my hand around her back, and I could, and . . . she then began to rub her

> pelvis against me. I then began to get an erection, she then began to rub her pelvis on my erection. She then said oh, what's this, and then began to grind harder on my [clothed] penis.

Officer Wagner explained that, after dancing, Xiao sat "very close to me, right next to me touching me, and . . . she was rubbing my thigh with her hand" as they made "small talk."

According to Officer Wagner, he later offered to purchase Xiao another forty-dollar drink, and, "[w]hen she returned again,, she put the drink down and asked me to dance again, . . . and we began to dance in the same manner as before." He testified that Xiao "began again to grind her pelvis against my clothe[d] penis and that lasted for a lot of the dance. Toward the end of that dance, she actually squatted and rubbed her breasts against my [clothed] penis as well." When asked specifically "how many times approximately that evening did you offer to buy her forty-dollar drinks?" on direct examination, Officer Wagner responded, "I'm sure probably three. I really don't know."

On cross examination, Officer Wagner provided the following details regarding his encounter with Xiao:

> Q. [By defense counsel] At the time that [Xiao] asked you to purchase a drink, did she offer to engage in any sexual contact with your conduct [sic]?
> A. [By Officer Wagner] No, she didn't.
> Q. Did she offer you a blow job?
> A. No, she didn't.
> Q. Did she offer to rub your penis?
> A. No, she didn't.
> Q. Okay. Did she offer to have intercourse with you?
> A. No, she did not.
> Q. So, there's no discussion at all of any quid pro quo for that forty-dollar drink, is that correct?
> A. Correct.

. . . .

Q. [A]nd during the course of [Xiao rubbing her pelvis against you], did she say anything to you, such as, thank you for the drink, this is in return for what I purchased, what you purchased for me?

A. She did say thank you for the drink. She didn't say that this is in return for what you purchased for me.

Q. Okay. In fact, she just whispered to you thank you, is that correct?

A. Correct.

. . . .

Q. So, at no time during the course of this evening did she ever tell you I will do anything to you for that forty-dollar drink, is that correct?

A. Correct.

. . . .

Q. [A]nd during the course of the time where she rubbed her breasts on you, she never said to you that this is for the drink that you purchased for me, is that correct?

A. That's correct.

Officer Wagner additionally testified that Xiao never: (1) removed any clothing; (2) exposed herself in any way to him; (3) put her hand down his pants; or (4) put her mouth on him. Officer Wagner stated that there were other people in the karaoke room; in other words, it was not "a private place where no one could see [them] dancing."

With respect to Officer Wagner's perception of Xiao's conduct on the night in question, he testified as follows:

Q. [By defense counsel] So . . . your whole mindset initially going into this establishment is you were looking for possible, as you said, prostitution activity, is that correct?

A. [By Officer Wagner] Correct.

. . . .

Q. [So e]verytime she touched you, correct, you put in your report that she rubbed herself against you while you were dancing, you considered that prostitution activity based on your mindset going in, is that correct?

A. Based on my training and experience, I believe that to be prostitution activity, yes.

Q. And you indicated while dancing she again rubbed her pelvis on [your] erect penis, and that to you is considered prostitution activity?

A. That in conjunction with the payment, yes.

Q. Payment for the drink?

A. Yes.

Q. She did get a drink, correct?

A. Yes, she did.
Q. And she drank it during the course of your sitting down with her and talking to you?
A. Yes, she did.
Q. So it's not like . . . you gave her forty bucks and she got up and danced such as the situation we have a lap dance, is that correct?
A. That's correct.

Officer Wagner described their dancing as the type of dancing that he sees at dance clubs, i.e., "dirty dancing." The defense described "dirty dancing" as involving people rubbing their bodies against the bodies of their dance partners.

During a brief redirect examination, Officer Wagner stated that he had, on previous occasions, purchased twenty-dollar drinks for Xiao at Club Sara Lee, and she had never asked him to dance. Following a brief recross and before Officer Wagner was excused, the trial court sought to clarify Officer Wagner's testimony and the following colloquy ensued:

THE COURT: A point of clarification. On direct, you said three times on [sic] this dancing occurred for forty-dollars and you said you don't remember. Then [defense counsel] says in your report it says two times. So, it would be two times, not three times?
THE WITNESS [By Officer Wagner]: The two times is for the prostitution violation. There were more purchases during the evening.
THE COURT: At forty dollars?
THE WITNESS: At forty dollars.
THE COURT: And no dancing takes place?
THE WITNESS: I can't remember, your Honor.
THE COURT: Okay, so you can't remember that, but you remember specifically two times there's dances at forty-dollars and you remember purchasing her forty-dollar drinks later on but no dancing, is that the testimony? I'm trying to clarify that[.]
THE WITNESS: Yes.

(Emphases added.) At that point, both counsel indicated they had no further questions based upon the court's clarifying questions.

Thus, Officer Wagner was excused, and, thereafter, the prosecution rested.

The defense then moved for a judgment of acquittal, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 29(a) (2000),[5] stating:

> [I]f the [trial c]ourt takes the facts in this case in the light most favorable to the [prosecution], it's clear from the testimony of [Officer Wagner] that there is no prostitution case in this matter. [I]f the [trial c]ourt takes the facts in the light most favorable to the [prosecution then] they have to prove that there's an offer and agreement to engage in sexual conduct for a fee.
>
> Sexual conduct is the touching of the intimate parts of an actor who the person is not married to, nor living with. I think the evidence produced at this point in time is that the officer was not married, had never been married to [Xiao[6]] and the actual definition of sexual conduct includes not living with as well. So, that has not been proven.
>
> But additionally, . . . the uncontroverted evidence is that [Xiao] sat with this individual through the night, had a number of drinks. On . . . two occasions, [he] purchased a forty-dollar drink which she, in fact, drank [and] got up and danced with him, and basically, that's the extent of the testimony of [Officer Wagner].
>
> [Officer Wagner] indicated he got excited. [Xiao] said thank you after he [became] erect, and that was it. There was no discussion of any sexual conduct, intercourse, blow job or anything of any significance with reference to any sexual conduct.
>
> So we believe at this juncture, even given the light most favorable to the [prosecution], the[prosecution] ha[s] not prove[n] the onus of the offense beyond a reasonable doubt.

In response, the prosecution asserted that it had made a prima facie case, specifically stating that:

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[5] HRPP Rule 29(a) states in relevant part that:

> The court on motion of a defendant or of its own motion shall order the entry of 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.

[6] During direct examination, Officer Wagner testified that he and Xiao have never been married.

> Sexual conduct under [HRS §]707-700 means any touching whether directly or through the clothing or other material intended to cover the sexual or other intimate parts. There was sexual conduct as defined by [HRS §]707-700 in this case.
>
> [Officer Wagner] specifically testified that [Xiao] was rubbing her pelvis and her breasts against his penis, [a] sexual . . . intimate part[] that w[as] intended to be covered by clothing or other material.

The trial court orally denied Xiao's motion for judgment of aquittal, stating "[the trial c]ourt[,] taking the evidence in the light most favorable to the [prosecution,] believes that a prima facie case had been made by the prosecution." Xiao did not testify, invoking her right to remain silent, and the defense rested without calling any witnesses.

Thereafter, the following occurred:

> THE COURT: So, Madam Prosecutor, you can argue first, or you just wanna argue and save for rebuttal? Whatever way.
>
> [THE PROSECUTOR]: Yeah, I'll just -- I'll incorporate my ---
>
> THE COURT: So, just rebut.
>
> [DEFENSE COUNSEL]: Your Honor, we'd incorporate our previous argument. We'd only note at this juncture, your Honor, the [c]ourt must not take the evidence in the light most favorable to the [prosecution] but must find by proof beyond a reasonable doubt that there was an offer and agreement to engage in sexual conduct for a fee.
>
> Clearly, the testimony of [Officer Wagner] indicates there was no verbal offer and agreement to engage in any sexual conduct for a fee. In fact, he testified as (indiscernible) did [Xiao] say . . . if you buy me a drink that I will do X minus Z, at no time did that happen. In fact, during the course of the evening, apparently, [Officer Wagner] indicated that drinks were purchased other times and no contact was made between [Xiao] and the officer.
>
> In fact, in this case, all that happened was that there was dirty dancing on the floor to the extent of what happened in this matter. If there was some other indicia that she had agreed to engage any [sic] sexual conduct such as when she was sitting down with him rubbing his penis or trying to take down his zipper or things of that nature, even offering and whispering in his ear, anything with regard to any sexual contact, it'd be a different situation.
>
> We believe that the burden here is proof beyond a reasonable doubt, which is a high burden, and the facts in this case is just not, does not warrant what the legislature

> has determined to be prostitution in this case. So, we'd ask the [c]ourt to acquit [Xiao].
>
> THE COURT: Okay.
>
> {THE PROSECUTOR]: . . . [Officer Wagner] testified that he had met with [Xiao] on several occasions previously. He had bought her twenty-dollar drinks several times prior to this. Never at that time did she ever offer to dance with him. It was only upon offering to buy her a forty-dollar drink that she asked him to dance and then subsequently engaged in the sexual contact.
>
> And so, although not explicit in this case, your Honor, the [prosecution] would contend [that the prostitution statute] doesn't [require] an explicit will you touch my penis for forty-dollars. That is not necessary, but the implicit argument here is that [Officer Wagner] buys [Xiao] this forty-dollar drink, she dances with him. She then proceeds to touch his penis through the clothing. She did this twice in exchange for a forty-dollar drink.
>
> So, therefore, your Honor, [the prosecution] would contend that there was an engagement and agreement and offer to engage in sexual conduct with another person not the spouse of the defendant for a fee.

Following closing arguments, the trial court found Xiao guilty as charged, stating:

> [B]ased on the evidence presented, [the c]ourt does find that [the prosecution presented] credible testimony [establishing that Officer Wagner] entered the establishment on previous occasions, did not dance when purchasing twenty-dollar drinks. On the night of the offense, [he] purchased forty-dollar drinks twice and did, in fact, receive dances where sexual contact occurred between the parties.
>
> The concern the [c]ourt had was that forty-dollar drinks were purchased after where no dancing took place, but had this been just a one-time forty-dollar drink and dance and then forty-dollars occurring after that and no dancing, I think the argument would be a strong argument for [Xiao], but based upon it occurring twice the same type of pattern, [the c]ourt does find that the [prosecution] has proven beyond a reasonable doubt that prostitution occurred. So, I'm gonna find [Xiao] guilty at this time.

Xiao was then sentenced, pursuant to the guidelines set forth in HRS § 712-1200(4), to six months probation, a $500 fine, a $75 probation fee, and $35 in court costs. On January 10, 2007, Xiao filed a timely notice of appeal. Her sentence was stayed pending appeal.

B. Appeal Before the ICA

On direct appeal, Xiao argued that the trial court erred in denying her motion for judgment of acquittal and finding her guilty of prostitution, specifically contending that the prosecution failed to present sufficient evidence to support a prima facie case of prostitution, let alone a finding of guilt. Xiao asserted that, pursuant to HRS § 712-1200, the prosecution was required to prove -- as an essential element of the offense -- that Xiao had engaged in, agreed to, or offered to engage in some form of sexual conduct with Officer Wagner for a fee and that the prosecution failed to do so. She argued that she, in fact, never offered any sexual favors and that no specific sexual conduct was ever offered as a "quid pro quo" for a fee, drink, or otherwise.

In its answering brief, the prosecution maintained that there was sufficient evidence to support Xiao's conviction. The prosecution argued that:

> HRS § 712-1200 specifies that a violation occurs "if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee." **While [Xiao] neither explicitly agreed nor offered to engage in sexual conduct, the conjunction "or" also allows for the violation of the statute by engaging in the activity without an explicit offer or acceptance.** A person may violate the statute by engaging in the prohibited activity or by agreeing or offering to do so.

(Bold emphasis added.) (Underscored emphasis in original.) The prosecution pointed to the following evidence in support of the trial court's verdict: (1) the categorization of drinks not as

beer or wine, but instead as twenty- or forty-dollar drinks; and (2) Xiao's initiation of sexual contact -- i.e., rubbing her pelvis and breasts against Officer Wagner's penis -- subsequent to Officer Wagner giving her forty dollars cash ("ostensibly to buy the more expensive drink") on two instances during the night in question. The prosecution further argued that a verbal agreement was not necessary; rather, there was an implicit understanding that Officer Wagner would obtain "something more" for giving Xiao forty dollars to purchase a drink (as opposed to the twenty-dollar drinks he had purchased in the past).

On November 13, 2009, the ICA issued its two-page, five-paragraph summary disposition order, affirming the trial court's December 12, 2006 judgment of conviction. State v. Xiao, No. 28370 (App. Nov. 13, 2009) (SDO). Specifically, the ICA held, without elaboration, that,

> [u]pon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Xiao's point of error as follows:
> There was substantial evidence to convict Xiao of [p]rostitution. State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996).

SDO at 1. On December 3, 2009, the ICA filed its judgment on appeal. Xiao's timely application for a writ of certiorari, filed March 1, 2010, was accepted by this court on March 29, 2010.

II. STANDARD OF REVIEW

This court has long held that

> evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction[.] 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.

Eastman, 81 Hawai'i at 135, 913 P.2d at 61 (emphasis added). Substantial evidence is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Fields, 115 Hawai'i 503, 512, 168 P.3d 955, 964 (2007) (brackets omitted); see also Eastman, 81 Hawai'i at 135, 913 P.2d at 61.

III. DISCUSSION

As previously indicated, Xiao, in advancing her position regarding insufficiency of the evidence, argues that "there [wa]s absolutely no evidence adduced that the drink[s] she received constituted a fee" and that any sexual conduct that went on between herself and Officer Wagner was "merely gratuitous." As previously quoted, see supra note 2, HRS § 712-1200 provides that:

> **Prostitution.** (1) A person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person **for a fee**.
>
> (2) As used in subsection (1), "sexual conduct" means "sexual penetration," "deviate sexual intercourse," or "sexual contact," as those terms are defined in [HRS §] 707-700.

(Bold emphasis in original.) (Underscored emphases added.) In turn, HRS § 707-700 defines "sexual contact" as

> any touching, other than acts of "sexual penetration," 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.[7]

HRS § 707-700 (Supp. 2006). Based on the plain language, the statute provides three alternative means of committing the offense of prostitution, that is, the defendant must: (1) engage in "sexual conduct" with another for a fee; (2) agree to engage in "sexual conduct" with another for a fee; or (3) offer to engage in "sexual conduct" with another for a fee. Based on these alternatives, a defendant need not actually engage in the sexual conduct, but need only agree or offer to engage in such conduct, which is confirmed by our case law.

For example, in State v. Connally, 79 Hawai'i 123, 899 P.2d 406 (App. 1995), HPD Officer Rick Orton was assigned to plainclothes duty to "enforce morals violations" in Waikiki. Id. at 124, 899 P.2d at 407. He observed Connally "walking back and forth on the [m]auka sidewalk of Kalakaua Avenue, approaching Japanese tourists as they passed by and attempting to talk to them or stop them." Id. (brackets omitted). Officer Orton began to follow Connally, who struck up a conversation with three

[7] HRS § 707-700 also provides definitions for "sexual penetration" and "deviate sexual intercourse"; however, inasmuch as there was no allegation or evidence at trial that Xiao engaged in, or agreed or offered to engage in those prohibited acts, our discussion is limited to "sexual contact" as statutorily defined.

Japanese males, saying, "Asobi masho ka?" ("Would you like to play?") and "Hyaku doru Aru?" ("Do you have a hundred dollars?"). Id. Officer Orton arrested Connally shortly afterward. Id. at 125, 899 P.2d 408. Based on Officer Orton's testimony at trial, Connally was found guilty of prostitution, in violation of HRS § 712-1200(1), and she appealed. Id.

On appeal, Connally argued, inter alia, that there was insufficient evidence to support her prostitution conviction. Id. at 127, 899 P.2d at 410. Reviewing the statements made by Connally to the men on Kalakaua Avenue, the ICA stated:

> Whether the men responded to [the d]efendant's offers and the substance of their responses are irrelevant under the prostitution statute. [The d]efendant merely had to offer to engage in sex in exchange for a fee. Thus, based on Officer Orton's testimony and all other evidence adduced at trial, we conclude that there was sufficient evidence for the trial judge to find that [the d]efendant offered to engage in sexual conduct in exchange for money.

Id. (emphasis added). Accordingly, the ICA affirmed Connally's conviction. Id.

Both the ICA and this court have subsequently applied the Connally court's interpretation of the prostitution statute -- i.e., requiring, at minimum, evidence of an offer to engage in sexual conduct for a fee -- in affirming convictions of prostitution where the offer or agreement to engage in sexual conduct for a fee was proven by statements made by the defendant. See State v. Romano, 114 Hawai'i 1, 7, 155 P.3d 1102, 1108 (2007) (concluding that the defendant masseuse's responses to questions by an undercover officer regarding sexual services for an

additional fee, when taken in context, was sufficient to sustain a prostitution conviction); State v. Pegouskie, 107 Hawai'i 360, 365-66, 113 P.3d 811, 816-17 (App. 2005) (concluding that the defendant's statement quoting a price for sexual services was an offer and, when taken in context, was sufficient to sustain a prostitution conviction); State v. Stanford, 79 Hawai'i 150, 151-52, 900 P.2d 157, 158-59 (1995) (concluding that the defendant's one-word statement in Korean street vernacular, when considered with the defendant's subsequent actions, was sufficient to sustain a prostitution conviction); State v. Kun Ok Cho, 120 Hawai'i 256, 203 P.3d 676 (App. Mar. 12, 2009) (SDO). As in Connally, the defendants in these aforementioned cases did not actually engage in any sexual conduct because they were arrested immediately after making the offer or agreeing to engage in sexual conduct for a fee. Nevertheless, whether a defendant "engages in, or agrees or offers to engage in, sexual conduct with another person," each alternative requires that the "sexual conduct" be "for a fee."

In the instant case, Xiao clearly engaged in sexual conduct, i.e., rubbing her body and her breasts up against Officer Wagner's clothed groin area, which clearly qualifies as "sexual contact." See HRS § 707-700 (defining "sexual contact" as "any touching . . . of the sexual or other intimate parts of a person not married to the actor . . . whether directly or through the clothing or other material intended to cover the sexual or

other intimate parts"). Thus, given such conduct, the dispositive question distills to whether Xiao's engagement in the sexual conduct was "for a fee," thereby constituting the offense of prostitution under the first alternative means prescribed in HRS § 712-1200(1).

HRS chapters 712 and 707 do not provide a definition of "fee." Nevertheless, it is well-settled that, when a term is not statutorily defined, this court may resort to legal or other well accepted dictionaries as one way to determine its ordinary meaning. See State v. Chen, 77 Hawai'i 329, 337, 884 P.2d 392, 400 (App. 1994); see also Gillan v. Gov't Employees Ins. Co., 119 Hawai'i 109, 115, 194 P.3d 1071, 1077 (2008).

The word "fee," as it is commonly understood, means "[a] charge for labor or services, [especially] professional services." Black's Law Dictionary 690 (9th ed. 2009); accord Muse v. United States, 522 A.2d 888 (D.C. 1987) (concluding that, in the context of a solicitation for prostitution statute, "the term 'fee' . . . refers to 'payment in return for professional services rendered'").

The Muse court, in deciding whether a gold necklace constituted a fee, stated:

> The term "fee" as used in [District of Columbia Code (DC Code)] § 22-2701.1(1) [(1986 Supp.) (defining "prostitution" as "the engaging, agreeing to engage, or offering to engage in sexual acts or contacts with another person in return for a fee.")] is not defined by statute, nor has it been construed by this court. In light of the underlying commercial nature of solicitation for prostitution, however, we conclude, as have courts in other jurisdictions

> considering the question, that **the term "fee" in this context refers to "payment in return for professional services rendered."**
>
> Given this definition of the term "fee," **we perceive no basis for adopting appellant's suggestion that the term be further limited to require "payment for professional services" in the form of money.** While our solicitation cases have typically concerned proposed exchanges of money for sexual acts, we see no reason why this commercial transaction could not involve payment in a form other than money. Indeed, in Harris v. United States, 293 A.2d 851, 854 (D.C. 1972), rev'd on other grounds, 315 A.2d 569 (1974) (en banc), we recognized that **"[a]n essential element of prostitution is money or material gain in exchange for illicit sexual activity."** (Emphasis added.)

Muse, 522 A.2d at 890-91 (underscored emphasis in original) (bold emphasis added) (some citations and footnote omitted).

Inasmuch as HRS § 712-1200(1) is nearly identical to DC Code § 22-2701.1(1), quoted supra, we are persuaded by the District of Columbia Court of Appeals' interpretation of the word "fee." We agree that a "fee" is not explicitly limited to monetary compensation, but includes payment in the form other than money and, therefore, conclude that a "fee," under the prostitution statute, is money or a "material gain" for sexual conduct. Consequently, as applied to the facts of this case, we also conclude that the forty-dollar drinks would constitute a fee under HRS § 712-1200(1).

The prosecution maintains that "[t]he circumstances surrounding Officer Wagner's investigation included the following uncontroverted facts[:] (1) that [Xiao] engaged in sexual conduct with Officer Wagner, and (2) that [Xiao] received [forty dollars] from Officer Wagner prior to each episode of sexual contact." In

the prosecution's view, connecting these two "uncontroverted facts" equals prostitution. We cannot agree.

In State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985), this court stated that prostitution "is triggered by a sale of sexual services[.]" Id. at 614, 699 P.2d at 987. The dictionary defines "sale" as "the act of selling[.]" Webster's Encyclopedic Unabridged Dictionary of the English Language (1989) at 1262. "Sell" is defined as "to persuade or induce someone to buy (something)[.]" Id. at 1296. Thus, in order to sustain Xiao's conviction for prostitution, there must be evidence of an understanding on the part of Xiao that the forty-dollar drink (i.e., the "fee") paid for by Officer Wagner was to buy sexual favors from her. Without such evidence, there can be no prostitution.

The prosecution argues that, "[c]learly[,] there was an implicit understanding that Officer Wagner would obtain "something more" for giving [Xiao forty dollars] to purchase a drink, than he had when giving her [twenty dollars]." (Emphasis added.) The record, however, does not support the prosecution's inference drawn from Xiao's conduct that she "implicit[ly] underst[ood]" that the purchase of a forty-dollar drink was for sexual conduct.

The only witness to testify at trial was the officer investigating possible prostitution activity at Club Sara Lee, i.e., Officer Wagner. According to Officer Wagner, after

obtaining a drink for herself, which she had asked him to buy for her, Xiao asked him to dance. While they danced, Xiao rubbed his groin area with her pelvis. Subsequently, Officer Wagner offered to buy Xiao another drink. When she returned with her second drink, Xiao again asked him to dance and, while dancing, again rubbed his penis with her pelvis and her breasts. However, Xiao did not ask Officer Wagner to dance on the subsequent occasions when he purchased her additional forty-dollar drinks, and Officer Wagner admitted that he purchased more than two forty-dollar drinks. We, therefore, disagree with the trial court's characterization that the two drink purchases that led to Xiao's sexual conduct constituted a "pattern."

Moreover, at trial, defense counsel specifically asked Officer Wagner: "At the time that [Xiao] asked you to purchase a drink, did she offer to engage in any sexual contact with your conduct [sic]?" Officer Wagner replied "[n]o, she didn't." Defense counsel later inquired: "[D]uring the course of [Xiao rubbing her pelvis against you], did she say anything to you, such as, thank you for the drink, this is in return for what I purchased, what you purchased for me?" Officer Wagner replied that "[s]he did say thank you for the drink[but, s]he didn't say that this is in return for what you purchased for me." Based on such testimony, we cannot conclude -- as the prosecution urges -- that Xiao had "an implicit understanding" that Officer Wagner's purchase of the forty-dollar drinks was for sexual contact.

Given the totality of circumstances, we believe that the prosecution failed to prove beyond a reasonable doubt that Xiao "engage[d] in sexual conduct with [Officer Wagner] for a fee."

IV. CONCLUSION

Based on the foregoing, we hold that there was insufficient evidence to convict Xiao under HRS § 712-1200(1). We, therefore, vacate the ICA's judgment on appeal and reverse Xiao's conviction.

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