

NO. 22895

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

THOMAS MAIELUA, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 96-0764(2))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Thomas Maelua (Defendant) appeals from an August 13, 1999 judgment of conviction and sentence of the second circuit court (the court)¹ on four counts of sexual assault in the first degree, Hawai'i Revised Statutes (HRS) § 707-730(1)(b) (1993)² and six counts of sexual assault in the

¹ The Honorable Shackley F. Raffetto was the presiding judge herein.

² HRS § 707-730(1)(b) provides 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[.]

third degree, HRS § 707-732(1)(b) (1993).³ We affirm the judgment.

On appeal, Defendant alleges that (1) the court committed plain error by failing to properly instruct the jury regarding the state of mind as to each offense, and (2) his rights to due process and a fair trial were prejudiced by the alleged misconduct of Plaintiff-Appellee State of Hawai'i (the prosecution).

The standard of review on appeal for jury instructions is whether "when read and considered as a whole, the instructions given [must have been] prejudicially insufficient, erroneous, inconsistent, or misleading [to warrant reversible error.]" State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998) (quoting State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1998)).

Instruction No. 21, representative of other elements instructions given in this case, read as follows:

A person commits the offense of Sexual Assault in the First Degree if he knowingly subjects to sexual penetration another person who is less than fourteen (14) years of old [sic].

³ HRS § 707-732(1)(b) provides in part 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[.]

There are five material elements of the offense of Sexual Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That on or about October 28, 1996;
2. In the County of Maui, State of Hawaii;
3. [Defendant]
4. Did knowingly subject [Complainant]; a person less than fourteen (14) years old;
5. To an act of sexual penetration, to wit, by placing his finger in her vagina.

(Emphasis added.) The underscored language in instruction No. 21 was identical to the state of mind requirement contained in the sexual assault instructions on the other counts. Defendant complains that the "placement of the word 'knowingly' in a sentence grammatically and spatially apart from the sentence setting forth the 'result of conduct' element may imply that the state of mind need not be established as to that material element."

As was decided in State v. West, 95 Hawai'i 452, 464, 24 P.3d 648, 660 (2001), in which the identical underscored words were in issue, this court held that the adverb "knowingly" in the instruction modifies the verb "subject," and the jury is presumed to understand that knowingly modifies "sexual penetration" and not "fourteen years old." Furthermore, because sexual assault in the first degree with a minor less than fourteen years old is a strict liability offense with respect to the attendant circumstance of the minor's age, an erroneous application of the term "knowingly" would constitute harmless error. See id. Accordingly, the subject instruction did not amount to reversible error.

Accepting that a letter written by Complainant concerning the incident was excluded by the court, error, if any, resulting from witnesses' testimony with respect to their reactions or feelings toward the letter was harmless error and, thus, not prejudicial to Defendant's substantial rights. See State v. Mitchell, 94 Hawai'i 388, 400, 15 P.3d 314, 326 (App. 2000). When asked whether Complainant "had written everything that had happened to [her]" "when [she] wrote that four-page letter to [her] mom, Complainant's answer of "yes" verified that what was contained in the letter was consistent with the testimony she had given at trial as to what had taken place. Thus, the testimony of the witnesses would not have led to prejudicial speculation by the jury, which had already heard Complainant's account of the incident.

Second, the prosecution's reference in final argument to Complainant attending a grand jury proceeding with her mother was not prosecutorial misconduct. See State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992) (holding that in determining error for prosecutorial misconduct, the court considers the nature of the misconduct, the promptness of a curative instruction or lack of it, and the strength or weakness of the evidence against the defendant). Complainant's mother had no reason to fabricate her testimony about taking Complainant to the grand jury, and Defendant does not indicate how the prosecution's

comment infringed upon his constitutional rights. Hence, there was no prejudice to Defendant as a result of the comment.

Third, the prosecution's comments in final argument about Complainant's medical examination was not prosecutorial misconduct. The examining physician gave a detailed and descriptive account of the medical procedures he performed on Complainant. Consequently, the prosecution was not prohibited from referring to such detailed procedures in closing arguments. "A prosecutor is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence." State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999) (internal citation and quotation marks omitted).

As to all points raised by Defendant, there was no reversible error. Therefore,

IT IS HEREBY ORDERED that the August 13, 1999 judgment of the court is affirmed.

DATED: Honolulu, Hawai'i, August 22, 2001.

On the briefs:

Jock M. Yamaguchi for
defendant-appellant.

Richard K. Minatoya, Deputy
Prosecuting Attorney,
County of Maui, for
plaintiff-appellee.