

NO. 23369

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RUBEN GARCIA, Defendant-Appellant

APPEAL FROM THE FIFTH CIRCUIT COURT
(CR. NO. 99-0071)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Foley, JJ.)

Upon a review of the record, we summarily affirm the April 4, 2000 Judgment,¹ entered in the Fifth Circuit Court, Judge George M. Masuoka presiding, upon a jury verdict, convicting Defendant-Appellant Ruben Garcia (Garcia) of twelve counts of Sexual Assault in the First Degree, Hawaii Revised Statutes (HRS) § 707-730(1)(a) (1993),² and two counts of Assault in the Third Degree, HRS § 707-712(1)(a) (1993).³ For each of the first seven counts of Sexual Assault in the First

¹ Defendant-Appellant Ruben Garcia (Garcia) had been charged with fifteen counts of Sexual Assault in the First Degree, one count of Kidnapping, two counts of Sexual Assault in the Third Degree, and two counts of Assault in the Third Degree. The jury convicted Garcia of the Kidnapping count but, at sentencing, the court *sua sponte* dismissed the charge "on the basis that . . . it merges with the sexual assault in the first degree."

² Hawaii Revised Statutes (HRS) § 707-730(1)(a) (1993) states, in relevant part, as follows: "A person commits the offense of sexual assault in the first degree if: . . . [t]he person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]"

³ HRS § 707-712(1)(a) (1993) states, in relevant part, as follows: "A person commits the offense of assault in the third degree if the person: . . . [i]ntentionally, knowingly, or recklessly causes bodily injury to another person[.]"

Degree, Garcia was sentenced to concurrent twenty-year terms of imprisonment. For each of the last five counts of Sexual Assault in the First Degree, Garcia was sentenced to concurrent twenty-year terms of imprisonment, with these terms running consecutively to the terms imposed for the first seven counts. For each of the two counts of Assault in the Third Degree, Garcia was sentenced to concurrent one-year terms of imprisonment.

Plaintiff-Appellee State of Hawai'i (the State) presented evidence that the complainant weighed 98 pounds and Garcia weighed between 185 and 190 pounds and the offenses occurred in Garcia's apartment on February 29, 1999. In relevant part, the complainant testified that Garcia

grabbed me by my arm and jerked me and my bag fell out of my hand. . . . And I asked him to let me go, and he told me: Come on, we're both adults here, I know you want it just as much as I do. And I told him: I want to go home.

. . . .

. . . He looked at me and he told me: What are you some kind of fucking lezzie? And I told him no. And he told me: Well, what's wrong with you, we're both adults. And I told him I just wanted to go home.

. . . .

. . . He then pulled me into his room and threw me on the bed. And I wanted to go home and I told him to let me go home, and he wouldn't let me go.

At one point during the physical contact, Garcia noticed that the complainant was bleeding and asked if she was on her period. She told him that she "had gotten through with [her] period several days ago." Garcia testified that when he asked the complainant about the blood, she responded that it was

nothing and that she was at the end of her menstrual cycle. The complainant, in her testimony, denied making this statement. The police recovered the blood-stained comforter.

Police Officer Marvin Rivera testified, in relevant part, as follows:

And [Garcia] proceeded to tell me that he did, in fact, go out with [the complainant] and that they went out for a few drinks and had ended up at his residence. One thing led to another and they ended up having sex but that it was consensual.

He also pointed out that -- he admitted getting carried away and making hickeys all over her body but that none of it was done by force.

Garcia testified that he had consensual sex with the complainant and the complainant never told him to stop.

Commencing April 2000, the complainant was treated by Dr. Harold Goldberg, a psychiatrist at the Kaua'i Community Mental Health Center. The complainant testified that she suffered from nerve rash, hives, swelling, nightmares, flashbacks, difficulty in sleeping, and weight loss. On January 12, 2000, the State filed its Motion In Limine seeking to qualify Dr. Goldberg as an expert. Garcia's counsel filed a motion to exclude Dr. Goldberg as a witness. On January 18, 2000, in an in-chambers hearing on the Motions In Limine, the court decided to permit Dr. Goldberg's testimony, but only to the following extent:

[Dr. Goldberg] can say that [the complainant] indicated she was sexually assaulted and that her actions from this time on was [sic] consistent with posttraumatic stress syndrome [sic]. He cannot go into the specific facts [and he] will not [be permitted] to go into the specific facts relating what she allegedly related to him about the assault.

At this time, Garcia's counsel requested that the court note his objection to Dr. Goldberg's testifying and the court responded by saying, "Your objection is, of course, noted herein."

At trial on January 20, 2000, the State and Garcia stipulated as follows:

That on Exhibit P-13, the black and white bedspread was tested at three sites, and on one of the three sites tested positive for human blood. The pink and blue sheet or bedspread, which is P-15 in evidence, was tested and there were no traces of human blood on said Exhibit P-15. On Exhibit P-19, the floral print bedspread, two of the two sites tested, tested positive for human blood.

In this appeal, Garcia advances the following three (3) points of error:

A. The trial court committed reversible error when it allowed the expert testimony of the complainant's psychiatrist where such testimony did not serve to assist the trier of fact but rather was offered merely to bolster the complainant's credibility and as such was far more prejudicial than probative under Rule 403 of the Hawaii Rules of Evidence.

B. [Garcia's] convictions should be reversed and the case remanded for a new trial where the jury instructions with respect to the defense of consent were prejudicially insufficient and misleading in that they did not clearly state that [Garcia's] state of mind concerning the attendant circumstances with respect to the complainant's consent or lack thereof was an element of each and every count of sexual assault, which[,] if not proven beyond a reasonable doubt[,] required a verdict of not guilty on those charges.

C. [Garcia's] convictions should be reversed and the case remanded for a new trial where he was provided ineffective assistance of counsel such that he was denied potentially meritorious defenses due to a lack of due diligence by trial counsel.

(Record citations omitted.)

We disagree with the first two points. As to the first point, the record indicates that the trial court limited the complainant's psychiatrist to testifying that the complainant's symptoms after the alleged sexual assaults and kidnapping were consistent with post-traumatic stress disorder syndrome, a factor probative in determining whether the complainant consented to have sex with Garcia. As to the second point, we conclude, in light of State v. Horswill, 75 Haw. 152, 160, 857 P.2d 579, 583 (1993), that the consent instruction and the intentional state of mind instruction were sufficient and it was unnecessary to include the lack of the complainant's consent as an element to each sexual assault count charged.

The third point has subpoints. The first subpoint complains that his defense counsel "did not object to the testimony of Dr. Goldberg as being more prejudicial than probative." This subpoint is contradicted by the record.

The second subpoint is that defense counsel did not cross-examine Dr. Goldberg and the complainant about the complainant's particular post-traumatic stress disorder symptoms. The third subpoint complains that defense counsel "stipulated to allowing the blood evidence in and then never had any forensic testing done to discover the nature and source of the blood." These subpoints have no merit because the record does not show (a) they were errors or (b) that they resulted in the withdrawal

or substantial impairment of a potentially meritorious defense. Moreover, it appears that it was Garcia's strategy not to discover the nature and source of the blood.

The third subpoint has no merit because it complains of facts that (a) are not part of the record on appeal in this case, and (b) are a part of Garcia v. State, S.P.P. No. 00-01-0002, filed in the Fifth Circuit Court, State of Hawai'i, commenced by Garcia.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken, filed on April 4, 2000, is affirmed.

DATED: Honolulu, Hawai'i, September 11, 2002.

On the briefs:

Caren Dennemeyer
for Defendant-Appellant.

Chief Judge

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for Plaintiff-Appellee.

Associate Judge

Associate Judge