NO. 24060

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
HERBERT GAUTIER, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-0347)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

On February 23, 2000, Defendant-Appellant Herbert Gautier (Gautier) was indicted on the following charges:

> Count One: Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(a) (1993);[1] and
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> Count Two: Sexual Assault in the Second Degree, in violation of HRS § 707-731(1)(a) (Supp. 2001).[2]

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[1]HRS § 707-730 (1993) provides in relevant part as follows:

> **§707-730 Sexual assault in the first degree.** (1) A person commits the offense of sexual assault in the first degree if:
>
> (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion;
>
> . . . .
>
> (2) Sexual assault in the first degree is a class A felony.

[2]HRS § 707-731 (Supp. 2001) provides in relevant part as follows:

> **§707-731 Sexual assault in the second degree.** (1) A person commits the offense of sexual assault in the second degree if:
>
> (a) The person knowingly subjects another person to an act of sexual penetration by compulsion;
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> . . . .
>
> (2) Sexual assault in the second degree is a class B felony.

Following a jury trial in the Circuit Court of the First Circuit[3] (circuit court), Gautier was acquitted of Count One and convicted of and sentenced on Count Two. The Judgment was filed on January 3, 2001.

On appeal, Gautier contends the circuit court (1) failed to properly instruct the jury on the ignorance-or-mistake-of-fact defense pursuant to HRS § 702-218 (1993);[4] (2) erred or plainly erred in permitting improper lay opinion evidence; (3) abused its discretion by admitting irrelevant and prejudicial testimony; (4) prevented immediate cross-examination regarding a love letter; and (5) erred in denying Gautier's motions for an in-court examination of jurors and motion for a new trial based on juror misconduct. We conclude that the circuit court erred in refusing to instruct the jury on the ignorance-or-mistake-of-fact defense and that this error was not harmless beyond a reasonable doubt. We, therefore, vacate the

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[3]The Honorable Virginia Lea Crandall presided.

[4]HRS § 702-218 (1993) provides as follows:

> **§702-218 Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
>
> (1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or
>
> (2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense.

circuit court's January 3, 2001 Judgment and remand this case for a new trial.

I. BACKGROUND

The Complaining Witness (Complainant) testified at trial that she met Gautier in 1998 and they began dating. Complainant and Gautier moved in together in 1998. Asked whether she had consensual sex with Gautier at the beginning of their relationship, Complainant testified, "not all the time but yes." Complainant testified that Gautier wanted anal sex the "majority of the time." She stated that "[s]ometimes he would just satisfy with vaginal, but he insisted on anal." Complainant told Gautier that "anal hurted and I didn't want to do anal." Gautier "wouldn't care" that it hurt. Complainant testified that if she said no and asked Gautier to stop, "[h]e would keep forcing it in, tell me to stop fighting or stop struggling and it would be easier if I just stopped fighting him. But the more I fight, the more he would push his penis inside."

When asked how one particular incident of forced anal sex affected the way she responded to future demands of sex from Gautier, Complainant testified that "[e]verytime he asked, I tried to give it, trying to keep the peace between us and so things wouldn't escalate further. I would just opening -- just do what he wanted."

Under cross-examination, Complainant testified that sometime prior to February 14, 2000 she told Gautier she did not want to engage in anal sex and Gautier told her that "if it would hurt, he would not do it again."

Complainant testified that on February 14, 2000, she entered the apartment she shared with Gautier and she

> went downstairs. I noticed [Gautier] was laying on the bed in my room watching a tape. I didn't want to be bothered with him so I went in my son's room. I was going to lay down in there before going to school that evening. He got up off the bed and followed me into my son's room. He came up behind me, and he says we need to make up. At that point, I told him I didn't want to make up with him, to leave me alone. He says yeah, we're going to make up. At that point, he starts going for my jeans and my underwear, trying to pull 'em down. Again, I tell him I don't want to make up with him, to leave me alone. I elbow him. I'm not really sure where 'cause I'm faced this way, and I do that, and I go down the hallway.
>
> When he get to the room where he was sleeping in at the time, he pulled me into that room and started again to pull down my jeans and my underwear. Once again, I stated to him that I didn't want to be bothered with him, I didn't want to make up, to leave me alone. He says, "Fine, but it's going to happen whether you want to or not. I'm hard up for sex," is what he states to me.

Complainant explained that following previous arguments between them, Gautier had used the words "we need to make up" to mean that he wanted to have sex. Complainant believed that she and Gautier would fight again if she were not "submissive and do what he wanted me to do."

Complainant followed Gautier back into her room and told him to get the videotape he was watching in her room and go upstairs to watch it. Complainant explained that at some point

during the second year of their relationship (in 1999), Gautier had moved into "the third bedroom of the house."

When Complainant asked Gautier to get out of her room, he "laughed it off" and said he was not going to get out of her room. Complainant testified as follows:

> I again asked him to get out of my room. He told me he was hard up for sex and that it had been a week, that it was going to happen whether we -- whether I wanted to or not. At that point, I stated to him do what you need to do then leave me alone.
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> . . . .
>
> I just wanted him to get out of my room. I thought he would leave. I thought he would finish watching his tape and then leave. At no point did I say I want to have sex with him. So I don't know what he interpret from me saying do what you need to do, then leave.
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> . . . .
>
> He pulled me on the bed -- I was standing in front of the TV, and he pulled me on the bed and removed my draws [sic] and my jeans. I was laying on my stomach, and I was being real resistive -- or I wasn't fighting him off, but I wasn't making it easy for him. I remember him telling me to arch my back, and I wouldn't arch my back. So he used his left hand and lifted me up. And he took the two pillows that was on the side where he was laying on and put it under me to keep me up in that position.
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> . . . .
>
> Well, when he told me to arch my back or to spread my legs, I wouldn't. I made my body real like stiff, like I wouldn't give in. That's when he lifted me up with his arm and put the pillows under to keep -- 'cause I was trying to go back down, and he held me up and put the pillows under so I wouldn't be able to go back down to the bed. At that point, he took his right hand and his left leg, he's spreading my buttocks apart, and he put his -- with the right hand, he's putting his -- placing his penis into my vagina. I'm crying at this point. He doesn't stop. He just keeps going. And I remember him asking me, "How does this feel? Do you like this?" And I ignored him. I'm still crying. He turns me over on my back at this point, and he put my legs up, proceeded to go with his penis again inside my vagina. I am still crying. I'm not saying anything to him. I'm just crying.

Complainant testified that Gautier placed her legs upon his neck and shoulders and penetrated her vagina with his penis

while asking, "[h]ow does this feel?" Complainant did not answer Gautier because she was crying hysterically.

In response to the question of whether Complainant had initially told Gautier no, Complainant answered "[y]es." Complainant testified she resisted Gautier by making her body stiff, trying to bite Gautier, and trying to push Gautier away "but not really with a lot of force."

When Gautier was done, he got off the bed and went into his bathroom. Complainant got up and went into her bathroom. Looking down, Complainant saw blood coming from her vaginal opening; her period had occurred two weeks prior, and she was not menstruating at this time.

Complainant testified that she called the police on February 15, 2000 to give her statement about the February 14, 2000 incident.

II. JURY INSTRUCTION

Gautier contends the circuit court erred by failing to instruct the jury on his ignorance-or-mistake-of-fact defense where the evidence at trial supported such an instruction. Pertaining to his ignorance-or-mistake-of-fact defense, Gautier submitted his requested jury Instruction No. 2 (Instruction No. 2), which read as follows:

7.13 Ignorance or Mistake of Fact

In any prosecution for an offense, it is a defense that the Defendant engaged in the prohibited conduct under ignorance or mistake of fact if the ignorance or mistake negates the state of mind required to establish an element of the offense.

Thus, for example, a person is provided a defense to a charge based on an intentional of knowing state of mind, if the person is mistaken (either reasonably, negligently, or recklessly) as to a fact that negates the person's state of mind required to establish an element of the offense; however, a reckless mistake would not afford a defense to a charge based on a reckless state of mind.

Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the Defendant would be guilty of another offense had the situation been as the Defendant supposed. In such a case, the Defendant may be convicted of the offense of which the Defendant would be guilty had the situation been as the Defendant supposed.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the offense. If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

During the settling of instructions, Defense Counsel argued that Instruction No. 2 was warranted.

[Deputy Prosecuting Attorney]: Yes, Judge. This instruction relies upon whether defendant testifies. If he doesn't, then there is no way for --

THE COURT: Then we'll reserve this one.

[Defense Counsel]: Your Honor, I think that it's contingent upon whether or not he testifies. I think that a reasonable person can look at the evidence and say look, the woman was, you know, giving sex to him consensual. It's not consensual according to her, but she -- she -- she, you know, meant to keep the peace. When she's meaning to keep the peace, she's not saying anything about it and then all of a sudden, you know, everything's fine for a whole year and things leading up to February 14, you know, they may not believe her that she was crying, but she just didn't say anything again like the year before and then, boom, she cries rape because she didn't want it, but she didn't say

> anything about it. I think there could be a factual basis even without him testifying. That's already on the record, that can be gleaned from the evidence.
>
> THE COURT: Court will pass it at this time.

After Gautier elected not to testify, the circuit court refused to give Instruction No. 2:

> THE COURT: And with regard to the defendant's requested number two, the court will refuse that over objection of the defendant. [Defense Counsel].
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> [Defense Counsel]: Your Honor, there appears to be at least a scintilla of evidence that -- of some form of mistake of fact in this case. The evidence is such that number one, it was consensual sex for at least one year, leading up to February 14th incident.
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> In addition to that, you know, there's evidence that she stated that, "I agree, I didn't think it was a rape," and evidence that even leading up to that, that, you know, she was just trying to keep the peace. If you're trying to keep the peace, arguably, you're not telling the guy "no" and it's consistent with being, you know, consensual one year before.
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> So -- and there's also testimony that she says, "Well, I wasn't resisting" because they may buy parts of her testimony and not all of her testimony. And if that's the case, if she was just thinking it in her mind, but not -- not -- and just continuing on with the pattern over the year before, then - then, you know, it goes to negative Mr. Gautier's state of mind and therefore, 7.13 is applicable and may have more than the scintilla of evidence to warrant the defense.

In State v. Locquiao, 100 Hawaiʻi 195, 58 P.3d 1242 (2002), the Hawaiʻi Supreme Court held:

> This court has consistently held that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be. Moreover, it is the trial judge's duty to insure that the jury instructions cogently explain the law applicable to the facts of the case and that the jury has proper guidance in its consideration of the issues before it. Thus, on review, we must ascertain whether the jury instructions given by the circuit court, when read and considered as a whole, are prejudicially

> insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless the prosecution satisfies its burden of showing that the erroneous instructions were harmless beyond a reasonable doubt.

Id. at 205-06, 58 P.3d at 1252-53 (internal quotation marks, citations, ellipsis, and brackets omitted).

In Locquiao, the Hawaiʻi Supreme Court vacated defendant's convictions for Promoting a Dangerous Drug in the Third Degree and Unlawful Use of Drug Paraphernalia because the circuit court refused to instruct the jury on the ignorance-or-mistake-of-fact defense pursuant to HRS § 702-218 (defendant had testified he was unaware the "glass material" in his pocket was an illegal ice pipe). In vacating the convictions, the supreme court held:

> The Hawaiʻi legislature premised the enactment of HRS § 702-218 on the proposition that, "if a person is ignorant or mistaken as to a matter of fact, the person's ignorance or mistake will, in appropriate circumstances, prevent the person from having the requisite culpability with respect to the fact as it actually exists." See Commentary to HRS § 702-218 (1993). Consequently, the legislature intended that a jury consider, separate and apart from the substantive elements, whether a defendant's mistaken belief should negate the requisite culpability for the charged offense. That being the case, insofar as ignorance or mistake of fact is a statutory defense in Hawaiʻi, we deem the reasoning of the jurisdictions entitling the defendant to a separate instruction to be the more compelling and, thus, now hold that, where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense. We believe that to hold otherwise would render HRS § 702-218(1) nugatory.

Locquiao, 100 Hawaiʻi at 208, 58 P.3d at 1255 (ellipses omitted).

Under Locquiao, the circuit court was required to give the ignorance-or-mistake-of-fact defense jury instruction offered by Gautier if there was any "support in the evidence, . . . no matter how weak, inconclusive or unsatisfactory the evidence." Id. at 205, 58 P.3d at 1252. Clearly, in the instant case, there was evidence in the record supplied by Complainant's testimony to support the giving of the requested instruction. See Commentary to HRS § 701-115 defenses ("[I]t places an initial burden on the defendant to come forward with some credible evidence of facts constituting the defense, unless, of course, those facts are supplied by the prosecution's witnesses." Emphasis added).

Complainant testified that she lived with Gautier and had both consensual and nonconsensual sex with him. Her primary objection was to anal sex, not vaginal sex. When Gautier asked for sex, Complainant said she "tried to give it, trying to keep the peace between us and so things wouldn't escalate further. I would just opening -- just do what he wanted." Before February 14, 2000, Complainant told Gautier she did not want to engage in anal sex; Complainant did not mention vaginal sex, which is what happened on February 14. On February 14, prior to the sex act, Complainant told Gautier to "do what you need to do then leave me alone." Complainant testified that she believed she and Gautier would fight again if she were not "submissive and do what he wanted me to do."

Under Locquiao, even if this testimony by Complainant is regarded as "weak, inconclusive, or unsatisfactory," it does support Gautier's request for an ignorance-or-mistake-of-fact defense jury instruction. To be convicted of Sexual Assault in the Second Degree (Count Two), the State was required to prove Gautier subjected Complainant to an act of sexual penetration by compulsion. The circuit court gave an instruction to the jury defining "compulsion" as the "absence of consent or a threat, expressed or implied, that places a person in fear of public humiliation, property damage, or financial loss."

Certainly, there was some evidence, in the form of Complainant's testimony, however weak, inconclusive, or unsatisfactory it may have been, that supported Gautier's requested ignorance-or-mistake-of-fact defense jury instruction as to Complainant's consent to vaginal sex on February 14, 2000. The circuit court erred in refusing to give the instruction. Inasmuch as the jury was not given the opportunity "expressly and separately to consider [Gautier's] defense of ignorance or mistake of fact at trial, there is a reasonable possibility that the circuit court's error may have contributed to [Gautier's] conviction." Locquiao, 100 Haw. at 108, 58 P.3d at 1255 (internal quotation marks and brackets omitted; emphasis in original). Gautier's conviction and sentence must therefore be

vacated. Because we vacate Gautier's conviction and sentence, we choose not to address Gautier's remaining points.

III. CONCLUSION

Accordingly, Gautier's conviction and sentence are vacated, and this case is remanded for a new trial.

DATED: Honolulu, Hawaiʻi, January 21, 2003.

On the briefs:

Joyce K. Matsumori-Hoshijo,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge