

NO. 24080

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
HWA YOUNG PARK, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD NO. 00-278787)

MEMORANDUM OPINION

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

\_\_\_\_\_ Defendant-Appellant Hwa Young Park ("Park") appeals from the January 9, 2001 Judgment, entered by District Court Judge Russel S. Nagata after a bench trial, convicting Park of Harassment, Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2000),<sup>1</sup> and sentencing him to probation for six months upon the following conditions: payment of a \$100.00 fine, a \$75.00 probation fee, and \$25.00 to the Criminal Injury Compensation Fund; conformity to the usual terms and conditions of probation; not to be arrested or convicted; and completion of an anger management course.<sup>2</sup> We vacate and remand for a new trial.

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<sup>1</sup> Hawaii Revised Statutes § 711-1106(1)(a) (Supp. 2000) states, in pertinent part, as follows: "A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person: . . . [s]trikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]"

<sup>2</sup> After the court sentenced Defendant-Appellant Hwa Young Park (Park), Plaintiff-Appellee State of Hawai'i informed the court that it would be serving Park with an order requiring him to report to the Honolulu Police Department (HPD) for identification processing. The court responded, "I will sign the order. And, Mr. Park, you have to go for processing, fingerprint processing, either HPD or the Sheriff's Office."

FACTS

At the beginning of the trial on January 9, 2001, Park was charged with one count of harassment as follows:

[DEPUTY PROSECUTING ATTORNEY]: Sir, on July 21st (twenty first), 2000, in the City and County of Honolulu, State of Hawaii, with intent to harass, annoy, or alarm another person, to wit, Ok Hee Sung Lee, you did strike, shove, kick, or otherwise touch Miss Lee in an offensive manner or subject Miss Lee to offensive physical contact, thereby committing the offense of Harassment in violation of Section 711-1106(1)(a) of the Hawaii Revised Statutes.

The relevant calendar dates are as follows:

July 19, 2000	Wednesday
July 20, 2000	Thursday
July 21, 2000	Friday
July 22, 2000	Saturday
July 23, 2000	Sunday

The complaining witness, Ok Hee Sung Lee ("Lee"), testified, through a Korean interpreter, that she met Park in Korea, moved to Hawai'i, and lived with him.

Lee testified that on July 21, 2000, she and Park got into an argument. One reason for the argument was that Park did not want Lee to leave to go to church. Lee is a Christian and Park is a Buddhist. Another reason was that Lee came from Korea to marry Park but Park has a family and, in the words of Lee, "he's been coming back and forth from his family and myself." When Lee was leaving to go to church, Park grabbed her hand and arm without her consent, stopped her, and caused her some pain. Lee testified that she was not sure if this incident (Incident A) happened on the 21st or the 23rd but she was sure that it happened on a Sunday.

On cross-examination, defense counsel did no more than have Lee reconfirm that Incident A occurred on a Sunday.

After a recess, Plaintiff-Appellee State of Hawai'i (the State) asked the court for permission to recall Lee to clarify the day of the offense. Defense counsel objected. The court permitted the recall.

Lee testified that she went to church on Wednesday and when she returned, she and Park got into a big argument. She testified that Park grabbed her on Wednesday and caused bruises on her arms and she noticed the bruises on Thursday morning. However, she also testified that the bruises that she reported to the police officer on Sunday "was [the] result from the argument from Wednesday on[.]" When asked, "Did the defendant only cause bruises to your arm one time in July of 2000," she responded, "Throughout that week."

Police Officer Stephen Roe (Officer Roe) testified that on July 23, 2000, Lee made a statement in Korean, a Korean interpreter translated her statement into English, Officer Roe took pictures of the bruises and wrote Lee's translated statement onto a piece of paper, and Lee initialed every line of the written statement and signed it (Lee's Transcribed Statement). Over the objection of defense counsel, the court admitted Lee's Transcribed Statement into evidence. It stated as follows:

On 07-21-00 at about 2130 hours I tried to leave my boyfriend's apartment at 1550 Wilder Avenue unit B303, and my boyfriend Hwa Young Park tried to stop me. Hwa Young Park grabbed me with both arms as I tried to get away. I struggled and fought to escape, but he kept holding on to my arms. I have bruises on both of my arms due to the struggle. I told him several times to "let go", "let go" but he didn't release me. We struggled until about 2220 hours on 07-21-00, when I was able to leave the apartment. I didn't give him permission to hurt me and I did feel pain when he restrained me. I am willing to prosecute.

While testifying, Lee read the first part of Lee's Transcribed Statement as follows: "On 7/21/00, at about 2130 (two-one-three-zero) hours[.]" Lee testified that she went to church late Friday, July 21st. After the service, she returned home. Later, she was informed that Park had come to church looking for her and that the church had called the police. Lee saw Park past midnight but "nothing really took place" at that time.

On recross examination, Lee testified that she went to church on Wednesday, Thursday, Friday, Saturday, and Sunday. Lee called the police on Sunday after Park did not want Lee to go to church and Lee and Park argued and Park followed Lee all the way to church.

The State then moved to amend the alleged date of the offense to July 19, 2000. Defense counsel objected and moved "for judgment of acquittal based on the charge as stated." The court permitted the amendment. The State rested its case.

Defense counsel then called Lee back to testify. Lee testified that on the 19th, the one-hour church service began at seven o'clock and on the 21st, the service began at ten o'clock.

Defense counsel asked Lee about what happened on the 21st, showed Lee a broken plastic pan, and asked her how it became broken. Lee described a second incident (Incident B) as follows: "I tried to go to church, and he stopped me. He locked the door, and he put me in the bathroom and he locked the door. I asked him to open the door, and then we got in [sic] physical, and I threw that." When asked when this happened, Lee testified, "I believe that took place on Wednesday. I'm not sure if it was Wednesday or the weekend. But -- and everytime I try to go to church there's always some incident. And, it was took -- taking place either Wednesday, Friday and Sunday." Although there is evidence that there were more than two incidents, there is no evidence of a specific third incident. There is no evidence that Incident A and Incident B are the same incident.

Testifying for the defense, Officer Roe confirmed that Lee told him that Incident A occurred on July 21, 2000.

In his defense, Park testified that he and Lee lived together. He had been a Buddhist but "change[d] to Christian because . . . I love her." On the 19th, he went to church with her. On the 21st, when Lee wanted to go to church, Park was upset because she promised him that she would go only on Sunday. Park was unhappy because Lee worked six days a week and went to church three or four times a week, including all day Sunday, and Park did not have much time with her. Park blocked Lee's exit.

Lee pushed him, hit him with the plastic pan, and pounded the door and the window. Lee also stepped on Park's foot, injuring him. In self-defense, Park tried to stop Lee by grabbing her arms and hands. When the neighbor called the police, Park departed.

Ultimately, the court decided as follows:

THE COURT: . . . Mr. Park[,] Court finds that on or about the 19th (nineteenth) of July, City and County of Honolulu, that there was - you and the complaining witness got into an argument, at which time the complainant wanted - witness wanted to leave the apartment to go to church, at which time you were - were unhappy that she wanted to leave to go to church. Based on your concerns about the amount of time that you two - lack of time you two had together and - and her - her desire to go to church, not spend time with you, that you prevented her from leaving the premises by - by grabbing her arms without her permission causing pain and causing subsequent bruising.

Based on those facts, Court finds that you intentionally, with intent to harass at the minimum, annoy complaining witness, did touch . . . the complaining witness in an offensive manner. Therefore, Court finds you guilty.

## DISCUSSION

### A.

Park contends that the trial court reversibly erred when it did not grant Park's motion for judgment of acquittal. We disagree. Park's motion for judgment of acquittal was based on the charge pre-amendment. It became moot when the court permitted the amendment. Moreover, Park waived any right he may have had to challenge the denial of his motion for judgment of acquittal when he thereafter presented evidence in his defense. State v. Rodrigues, 6 Haw. App. 580, 581, 733 P.2d 1222, 1223 (1987). However, we are authorized to examine the sufficiency of

the evidence under the Hawai'i Rules of Penal Procedure Rule 52(b) plain error rule. Id.

B.

"[A]s a general rule, the precise time and date of the commission of any given offense is not a material element of the offense within the framework of the HPC [Hawai'i Penal Code]."

State v. Arceo, 84 Hawai'i 1, 14, 928 P.2d 843, 856 (1996).

"[T]he information need only be specific enough to enable the defendant to prepare his defense and to protect him from being subsequently prosecuted for the same offense." State v. Roberts, 101 Idaho 199, 200, 610 P.2d 558, 559 (1980).

1.

In State v. Matautia, 81 Hawai'i 76, 83, 912 P.2d 573, 580 (1996) (internal brackets omitted), this court noted that "[t]he Sixth Amendment to the United States Constitution explicitly provides that 'in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.' Article I, section 14 of the Hawai'i Constitution recognizes a similar right." Noting that the elements of the amended charged offense were different from the elements of the charged offense, this court concluded that "Defendant clearly did not have time to prepare an adequate defense to the new charge and was substantially prejudiced by the last-minute amendment." Id., at 84, 912 P.2d at 581.

Park argues that the amendment of the date of the incident in the charge substantially prejudiced his rights because he prepared only for the events on July 21, 2000, not July 19, 2000. In light of his testimony, this argument lacks a basis in the record.

2.

In cases involving child victims of repeated instances of sexual abuse, "the prosecution may, at its option, seek a single conviction by charging multiple acts, each of which constitutes a separate and distinct sexual assault, within a single count of an indictment or complaint." Arceo, 84 Hawai'i at 27, 928 P.2d at 869 (1996) (footnote omitted). However,

(1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Id. at 33, 928 P.2d at 875 (footnote omitted).

The Arceo rules noted above do not apply in cases alleging that an adult perpetrator harassed an adult victim. "Where a statute specifies several ways in which its violation may occur, the charge may be laid in the conjunctive but not in the disjunctive." State v. Jendrusch, 58 Haw. 279, 283 n.4, 567 P.2d 1242, 1245 n.4 (1977).

Here, Park initially was charged with having committed the offense of harassment on July 21, 2000. Pursuant to an



amendment, he was charged with having committed the offense of harassment on July 19, 2000. He was convicted of having committed the offense of harassment "on or about the 19th (nineteenth) of July."

There is evidence of two specific incidents of harassment, one occurring on the 19th and one occurring on the 21st. The trial court implicitly included both incidents when it found that the offense of which Park was being convicted occurred "on or about the 19th (nineteenth) of July." In doing so, it erred.

#### CONCLUSION

Accordingly, we vacate the district court's January 9, 2001 Judgment convicting Park of Harassment, HRS § 711-1106(1)(a) (Supp. 2000), and remand for a new trial.

DATED: Honolulu, Hawai'i, March 13, 2002.

On the briefs:

Dwight C. H. Lum  
for Defendant-Appellant.

Chief Judge

Mangmang Qiu Brown  
for Plaintiff-Appellee.

Associate Judge

Associate Judge