NO. 24349

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
HAPPY WILLIAMS, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 00-01-1282)

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

On August 15, 2000, the family court of the first circuit, the Honorable James R. Aiona, Jr., judge presiding, entered a judgment against Defendant-Appellant Happy Williams (Defendant) that convicted him of the misdemeanor offense of sexual assault in the fourth degree, in violation of Hawaii Revised Statutes (HRS) § 707-733(1)(a) (1993).[1/] Defendant appeals that judgment and the family court's September 29, 2000 order denying his motion for new trial. On appeal, Defendant argues (1) that there was insufficient evidence adduced at trial

[1/] Hawaii Revised Statutes (HRS) § 707-733(1)(a) (1993) provides that "[a] person commits the offense of sexual assault in the fourth degree if: . . . The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion[.]" (Enumeration omitted.) HRS § 707-700 (1993) defines "sexual contact" as "any touching 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." HRS § 707-700 defines "compulsion" as "absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss."

of the material element of compulsion, and (2) that the family court's written findings of fact and conclusions of law erroneously omitted a specific finding of compulsion. Disagreeing, we affirm.

I. Background.

Defendant waived his right to a jury trial. His one-day bench trial was held on August 15, 2000.

At the trial, the complaining witness (CW) testified that she was born on October 16, 1983. She was a student at Waipahu High School and had never been married. Defendant was her mother's boyfriend. In February 1999, CW's mother moved CW and her younger brother[2/] into Defendant's Waipahu apartment. After dwelling in Defendant's home for just one day, CW's mother had to return to Samoa because of what Defendant referred to as "trouble with the [immigration] paperwork[,]" leaving CW and her brother with Defendant. CW's mother gave Defendant a power of attorney for the care of her two children. CW remembered that Defendant was "like [a] stepdad" to her.

CW claimed that Defendant touched her on Sunday, September 5, 1999, at about noon. CW was sitting on a small couch in the living room watching television with Defendant. CW maintained that her brother was sleeping in her bedroom at the time. CW was wearing shorts, and a T-shirt with a bra

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[2/] The complaining witness's brother was one year younger than she.

underneath. Without saying a word, Defendant came over and touched the upper part of her thigh with his right hand, for not more than a second. Then, with the same hand, Defendant touched her breast through her clothing. This was a softer, more lingering touch. CW told Defendant to stop, then stood up, went into her bedroom and locked the door. CW woke her brother up and sent him out to the living room. A couple of minutes later, CW saw Defendant outside of her bedroom window, looking in at her. A short while after that, Defendant knocked on CW's bedroom door and asked if she wanted to accompany him to the park. CW refused his invitation. At the close of direct examination, CW testified that she did not consent to Defendant's touching of her.

CW told her aunt and uncle about the incident the next day. Her aunt remembered that CW was crying and looked upset. CW's aunt and uncle thereupon went to Defendant's apartment and confronted him. Defendant insisted that nothing untoward had happened. CW's aunt and uncle fetched the children's belongings and moved CW and her brother into their nearby apartment. Under cross-examination, CW admitted that she had wanted to live with her aunt and uncle prior to the incident. Under cross-examination, CW's aunt acknowledged that CW told her Defendant "used two hands [to] touch her legs then two hands [to] touch her breasts."

According to Defendant, CW's uncle assured him that "we are gonna keep this a secret." About two or three weeks later,

however, CW told her teacher about the incident. The teacher recalled that CW was "upset or crying." The teacher told CW to report the incident to the authorities, but when a week had gone by and CW had not made a report, the teacher informed the school counselor. The counselor thereupon alerted her vice principal, and the police were called. A police officer arrived at the school and talked to CW. CW made a statement and the police officer filed a report.

Defendant called the police officer who took CW's written statement as his first witness. The police officer confirmed that CW mentioned in her statement that her brother was sleeping in his bedroom during the incident. The apartment contained only one bedroom, hers, other than Defendant's.

Defendant, testifying in his own defense, insisted that he had not been making advances towards CW. He had been ordering her to cover herself up. Among the various rules of Defendant's Samoan household was one prohibiting the display of bare legs, even in the home.

Defendant claimed that the incident actually occurred a week before on August 29th, and not on September 5th. His counsel had pointed out that September 6th was Labor Day and hence, CW could not have gone to school the day after the incident, as she had testified. Defendant recalled that while CW was watching television, she was wearing tight shorts and rocking her chair, "flopping her legs back and forth[.]" Defendant

maintained that CW's brother was lying on a futon in the living room watching television with them at the time. Defendant walked over to CW, tapped her on the left knee, and motioned for her to cover herself up. CW ignored him, so Defendant slapped her leg and signaled again, whereupon CW stood up and went into her room. Later, Defendant invited CW and her brother to go the park. There, the children played basketball and volleyball. When they returned to Defendant's apartment, Defendant allowed the children to practice driving a car around the parking lot. The next day, as was his wont, Defendant took the children to school in the morning and in the afternoon picked CW up at school after her volleyball practice.

During closing arguments, Defendant's counsel highlighted various inconsistencies among the testimonies of CW and the other State witnesses in order to derogate CW's credibility, and argued that the incident in question was in fact a last-straw instance of child discipline, not sexual abuse, and that CW had fabricated her story of the crime in order to escape from Defendant's rule-bound apartment to the residence of her aunt and uncle, which she preferred. The State essentially argued that CW's testimony and the circumstances revealed by the evidence demonstrated her credibility.

The family court found Defendant guilty. In the course of its oral ruling, the family court deemed CW a credible witness. The family court immediately sentenced Defendant to one

year of probation upon terms and conditions, including a sex offender assessment and sex offender treatment, if indicated, and registration as a sex offender, "if required." Upon Defendant's request, execution of sentence was stayed pending appeal. Judgment was entered on the same day the bench trial was held, August 15, 2000.

On August 25, 2000, Defendant filed a motion for new trial. In the motion, Defendant's counsel declared that "the [family court] did not colloquy the Defendant as to his right to testify or not testify and the consequences that Defendant would face if he chose to testify." The motion was based on Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995), in which the supreme court held that a trial court must advise a criminal defendant of the right to testify and the right not to testify and obtain an on-the-record waiver of the defendant's right to testify in every case in which the defendant does not testify. Id. at 236 & 236 n.7, 900 P.2d at 1303 & 1303 n.7. Defendant argued that the supreme court thus implied a similar colloquy requirement in every case, such as this one, in which the defendant chooses to testify. At a September 29, 2000 hearing, the family court denied Defendant's motion for new trial.

On December 12, 2000, Defendant filed a motion requesting written findings of fact and conclusions of law supporting the family court's denial of his motion for new trial, "in order to prepare an appeal in [this] matter[.]" At the

December 28, 2000 hearing on this motion, the family court granted Defendant's request for findings of fact and conclusions of law on its denial of his motion for new trial. In the course of doing so, the family court noted that the intervening State v. Lewis, 94 Hawai'i 292, 296, 12 P.3d 1233, 1237 (2000) ("we hold that Tachibana does not require that the court engage in the colloquy if the defendant chooses to testify"), filed November 28, 2000, had "pretty much put that [(Defendant's appeal of the denial of his motion for new trial)] to rest." In the course of the hearing, it was also noted that the State had, apparently *sua sponte*, prepared findings of fact and conclusions of law on the family court's general finding of guilt at the bench trial.

Findings of fact and conclusions of law on the family court's denial of Defendant's motion for new trial were filed on May 18, 2001. On the same day, findings of fact and conclusions of law on the family court's general finding of guilt at the bench trial were filed. The latter read as follows:

FINDINGS OF FACT

1. [CW] was born on October 16, 1983.
2. [CW] resided with [Defendant in Waipahu, Hawai'i], from February to September 1999. Said address is located within the City and County of Honolulu, State of Hawaii.
3. Defendant was acting as guardian to [CW], since he had been given power of attorney for [CW] by [CW's] mother, who was residing in Samoa.
4. When [CW] and Defendant were alone together in the living room of the above-mentioned address, Defendant touched [CW] on her thigh with his hand.
5. [CW] told Defendant to stop.
6. Defendant touched [CW] on her breast with his hand.
7. [CW] then got up and left the room.

8. [CW] has never been married.
9. [CW] is a credible witness.

CONCLUSIONS OF LAW

1. Defendant is charged with knowingly subjecting [CW] to sexual contact by compulsion[.]
2. "Sexual contact" is defined in Section 707-700 [HRS], as "any touching 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."
3. This Court concludes that the Defendant's act of touching [CW's] breast with his hand constitutes an act of "sexual contact".
4. "Knowingly" is defined in Section 702-206(2), [HRS], as follows:

A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

5. This Court concludes that Defendant "knowingly["] engaged in the above sexual act with [CW].
6. This Court concludes that the prosecution has proved beyond a reasonable doubt all of the material elements for the offense of Sexual Assault in the Fourth Degree.

II. Discussion.

On appeal, Defendant first argues that the evidence adduced at trial was insufficient to establish the material element of compulsion, or "absence of consent[.]" HRS § 707-700. See also § 707-733(1)(a).

Where the sufficiency of the evidence at trial is challenged on appeal, the standard of review is well-established:

> We have 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 same standard applies whether the case

> was before a judge or a jury. 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.
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> "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. And as trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (brackets, citations and internal block quote format omitted). "Furthermore, it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306 (brackets, citation and internal quotation marks omitted).

Here, it goes without detailing the relevant circumstances revealed by the evidence reviewed above, that there was substantial evidence to support a finding of compulsion. Defendant's arguments in this connection, that "no evidence was adducted [(sic)] that any threat was attempted by [Defendant,]" and that "the only testimony elicited by the Prosecution with regards to consent was that [CW] told [Defendant] to stop after he touched her breast[,]" Opening Brief at 10, are immaterial and just plain wrong, respectively.

Defendant also contends on appeal that

> Defendant requested the Trial [Court] to make special findings of fact and conclusions of law, pursuant to [Hawai'i Rules of Penal Procedure (HRPP) Rule] 23(c). Although the request was made in a timely [(sic)] fashion, the Court ordered the Prosecutor to prepare said findings and conclusions. Thereafter, the State submitted the findings of fact and conclusion[s] of law to the Court and the Court signed them. The Court[']s findings of fact and Conclusions of law failed to establish the required element of the lack of compulsion.

Opening Brief at 9-10. HRPP Rule 23(c) (2000) provides that "[i]n a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence."

Contrary to Defendant's assertions, the record reveals that he made no request for findings of fact and conclusions of law on the family court's general finding of guilt "at the time of the general finding[.]" HRPP Rule 23(c). There is no indication in the record that he made such a request at any time or at all. We have held that where "no request for such a finding, pursuant to Rule 23(c), HRPP, appears in the record[,] . . . the general finding of guilt in the decision was sufficient. Compare State v. Alsip, 2 Haw. App. 259, 630 P.2d 126 (1981)." State v. Bigelow, 2 Haw. App. 654, 654, 638 P.2d 873, 874 (1982).

Defendant did file a successful written request for findings of fact and conclusions of law on the family court's denial of his motion for new trial, and such findings and conclusions were filed, but Lewis, supra, squelched any appeal based upon that denial. Assuming, *arguendo*, that this written request somehow constituted a request for findings of fact and conclusions of law on the family court's general finding of guilt at the bench trial, the request was untimely, and such findings and conclusions that the State did prepare -- apparently *sua sponte* in anticipation of Defendant's appeal of the judgment -- were untimely filed. HRPP Rule 23(c).

Under similarly ambiguous circumstances, we held:

> No request for specific findings of fact was made pursuant to Rule 23(c), [HRPP]. It is well-settled that in reviewing a decision rendered in a case tried by the court without a jury, an appellate court will indulge every reasonable presumption in favor of findings made by the court below as the basis of its decision and in the absence of specific findings, every finding of fact necessary to support the decision appealed from will be presumed to have been made. 5 AM.JUR.2d Appeal and Error § 840 (1962).

State v. Alsip, 2 Haw. App. 259, 262, 630 P.2d 126, 128 (1981). The family court's findings of fact and conclusions of law on its general finding of guilt included substantial factual findings supporting a finding of the material element of compulsion. They also included the following conclusions:

> 1. Defendant is charged with knowingly subjecting [CW] to sexual contact by compulsion[.]
> . . . .
> 6. This Court concludes that the prosecution has proved beyond a reasonable doubt all of the

> material elements for the offense of Sexual Assault in the Fourth Degree.

Given the foregoing, and the substantial evidence of compulsion adduced at trial, we not only presume, but believe it is clear, that the family court made a sufficient finding of the material element of compulsion. This is not a case in which the trial court refused a timely request for findings, see State v. Wells, 7 Haw. App. 510, 512-15, 780 P.2d 585, 586-88 (1989) (vacating and remanding for the requested special findings), or a case in which "the factual basis of the lower court's ruling cannot be determined from the record." State v. Anderson, 67 Haw. 513, 514, 693 P.2d 1029, 1030 (1985) (vacating and remanding for factual findings on the trial court's grant of a motion to suppress).

III. Conclusion.

Accordingly, we affirm the August 15, 2000 judgment and the September 29, 2000 order denying Defendant's motion for new trial.

DATED: Honolulu, Hawaii, August 19, 2002.

On the briefs:

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for defendant-appellant.

Acting Chief Judge

Mark Yuen,
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Associate Judge

Associate Judge