NOT FOR PUBLICATION

NO. 25262

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST OF JOHN DOE, BORN ON AUGUST 13, 1986

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-J No. 0049197)

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

John Doe (Doe) appeals (1) the May 21, 2002 amended decree of the family court of the third circuit[1] that adjudicated him a law violator for having committed the offenses of sexual assault in the first degree (count I),[2] sexual assault in the second degree (count II)[3] and sexual assault in the third degree

[1] The Honorable Aley K. Auna, Jr., judge presiding.

[2] In count I, John Doe (Doe) was charged with violating Hawaii Revised Statutes (HRS) § 707-730(1)(b) (Supp. 2003), which provides in pertinent part that, "A person commits the offense of sexual assault in the first degree if: . . . . The person knowingly engages in sexual penetration with another person who is less than fourteen years old[.]" (Enumeration omitted; format modified.) HRS § 707-700 (1993) defines "sexual penetration" as "vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense."

[3] In count II, Doe was charged with violating HRS § 707-731(1)(a) (1993 & Supp. 2003), which provides in relevant part that, "A person commits the offense of sexual assault in the second degree if: The person knowingly subjects another person to an act of sexual penetration by compulsion[.]" (Enumeration omitted; format modified.) HRS § 707-700 (1993) defines "compulsion," in pertinent part, as "absence of consent[.]"

(count III),[4] arising out of an August 27, 2001 incident; and (2) the family court's August 2, 2002 order that denied his June 12, 2002 motion to reconsider sentence or for a new trial.[5]

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Doe's points of error as follows:

1. Doe first argues that his adjudication for sexual assault in the second degree in count II must be reversed, because (a) the evidence disclosed "only a single continuous act of sexual penetration" and thus could not support his adjudication for both sexual assault in the first degree in count I and sexual assault in the second degree in count II; and (b) the family court in its August 2, 2002 findings of fact,

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[4] In count III, Doe was charged with violating HRS § 707-732(1)(b) (1993 & Supp. 2003), which provides in relevant part that, "A person commits the offense of sexual assault in the third degree if: . . . . 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[.]" (Enumeration omitted; format modified.) HRS § 707-700 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." In count III, the State charged that Doe subjected the complaining witness to sexual contact "by touching her genitals and breasts[.]" Cf. State v. Jendrusch, 58 Haw. 279, 283 n.4, 567 P.2d 1242, 1245 n.4 (1977) ("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." (Citation omitted.)).

[5] Doe does not specify or argue error with particular respect to the family court of the third circuit's August 2, 2002 order that denied his June 12, 2002 motion to reconsider sentence or for a new trial. Hence, we will not review and thus affirm the family court's August 2, 2002 order. See Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2002); Wright v. Chatman, 2 Haw. App. 74, 76-77, 625 P.2d 1060, 1062 (1981); HRAP Rule 28(b)(7) (2002); Weinberg v. Mauch, 78 Hawai‘i 40, 49, 890 P.2d 277, 286 (1995); In re Wai‘ola O Moloka‘i, Inc., 103 Hawai‘i 401, 438 n.33, 83 P.3d 664, 701 n.33 (2004).

conclusions of law and adjudication of guilt (FsOF/CsOL) "never found that two separate and distinct acts of sexual penetration had occurred." Opening Brief at 19. Doe suggests that (c) the purported error "would implicate state and federal double jeopardy concerns." Opening Brief at 18 (citation omitted). We disagree.

a. The eleven-year-old complaining witness (the CW) testified that Doe, who was fifteen years old at the time,[6] first "went on top of me and then he stuck his dick in my private part." This initial penetration was consensual but unlawful because the CW was less than fourteen years old and unable to give consent. Hawaii Revised Statutes (HRS) § 707-730(1)(b) (Supp. 2003). The CW also remembered that Doe then withdrew, removed a condom, and penetrated her again. This time, she felt pain and told Doe, "No," but he would not stop. HRS § 707-731(1)(a) (1993 & Supp. 2003). The evidence thus disclosed two separate and distinct acts of sexual penetration, HRS § 707-700 (1993) ("each act of sexual penetration shall constitute a separate offense"); State v. Arceo, 84 Hawai‘i 1, 21, 928 P.2d 843, 863 (1996) ("each distinct act in violation of these [sexual assault] statutes constitutes a separate offense under the [Hawaii Penal Code]" (footnote omitted)), which constituted substantial evidence to support Doe's adjudication in both count I and count II. State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d

[6] Doe was born on or about August 13, 1986.

648, 651 (1992); State v. Eastman, 81 Hawai‘i 131, 139, 913 P.2d 57, 65 (1996).

b. The family court did not, in fact, specifically find in its FsOF/CsOL that there were two separate and distinct sexual penetrations predicate to counts I and II -- and no wonder, for the issue was not raised below and Doe raises it here for the first time as plain error. Regardless, it is clear the family court satisfied itself that was the case, in part through its own specific and focused questioning of the CW on that very subject. Indeed, Doe's trial counsel acknowledged to the family court that there was "a second time as [the CW] had indicated[.]" The formal omission notwithstanding, the court in its FsOF/CsOL specifically found the material elements of both offenses and, as detailed above, substantial evidence supported separate adjudications therefor. This argument lacks merit.

c. Given the substantial evidence adduced at trial of two separate and distinct criminal acts of sexual penetration, which was not expressly disputed below given Doe's alibi defense, Doe's suggestion of "state and federal double jeopardy concerns" is not well taken. Arceo, 84 Hawai‘i at 21, 928 P.2d at 863; State v. Caprio, 85 Hawai‘i 92, 100, 937 P.2d 933, 941 (App. 1997) (the multiple punishments prong of the double jeopardy clause protects against "multiple punishments for the same offense, even in a single prosecution" (citation omitted; emphasis in the original)).

2. For his other point of error on appeal, Doe contends the family court erred in taking judicial notice, during the State's case, of his prior adjudication as a person in need of supervision (the PINS adjudication), arising out of a February 7, 2000 incident in which he engaged in sexual intercourse with another girl under the age of fourteen. Doe argues that (a) the evidence was inadmissible and prejudicial because it was pure propensity evidence, Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2003);[7] (b) the evidence was not relevant to identity because identity was theretofore not disputed; (c) the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, HRE Rule 403 (1993);[8] and (d) judicial notice was improper under the circumstances, because "it is unclear from the record what specific documents from '[Doe's] prior record' the State was asking the court to take judicial

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[7] Hawaii Rules of Evidence (HRE) Rule 404(b) (Supp. 2003) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

[8] HRE Rule 403 (1993) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

notice of to establish the prior PINS adjudication." Opening Brief at 13-14 (brackets in the original). We disagree.

a. The evidence was not pure propensity evidence, as it was relevant to the issue of identity. HRE Rule 404(b). Doe's defense at trial was alibi, so the issue of identity was front and center for the family court. The CW testified that after the incident, "He told me don't tell anyone 'cause like he already got caught or something by somebody else too." The CW confirmed that Doe was talking about, "Doing the same thing[.]"

b. While it is true the issue of identity had not yet been expressly disputed when the family court took judicial notice of Doe's PINS adjudication, it is also true that Doe filed a notice of alibi defense well before trial and later, in his defense, asserted through several witnesses, including himself, that he was home deathly sick with the flu at the time the offenses were committed. The timing of the judicial notice was thus ultimately immaterial. Cf. HRE Rule 104(b) (1993).[9]

c. Even assuming, *arguendo*, that the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice," HRE Rule 403, that danger is presumed nugatory because here a judge, and not a jury, was the fact-

[9] HRE Rule 104(b) (1993) provides:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

finder. In a bench trial,

> the normal rule is that if there is sufficient competent evidence to support the judgment or finding below, there is a presumption that any incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only.
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> State v. Gutierrez, 1 Haw.App. 268, 270, 618 P.2d 315, 317 (1980) (citations omitted). See also State v. Vliet, 91 Hawai'i 288, 298, 983 P.2d 189, 199 (1999). More to the point, we presume the court considered the evidence for [identity] purposes and for [identity] purposes only. Cf. People v. Deenadayalu, 331 Ill. App.3d 442, 265 Ill.Dec. 285, 772 N.E.2d 323, 329 (2002) ("when other-crimes evidence is introduced for a limited purpose, it is presumed that the trial judge considered it only for that purpose" (citation omitted)); Corley v. State, 987 S.W.2d 615, 621 (Tex.Ct.App.1999) (in a bench trial, "the danger that the trier of fact will consider extraneous offense evidence for anything other than the limited purpose for which it is admitted is reduced, and the likelihood that the extraneous evidence will unfairly prejudice the defendant is diminished").

State v. Montgomery, 103 Hawai'i 373, 383, 82 P.3d 818, 828 (App. 2003). Nothing in our independent review of the record appears to rebut this presumption.

d. Contrary to Doe's assertion, it is clear that only two documents could have been the subject of the family court's judicial notice -- the family court's November 9, 2000 "Decree Re: PINS Petition(s)" and the underlying May 24, 2000 "Petition HRS Chapter 571." The decree was entered by the same judge and both documents are contained in the file of this case. Under these circumstances, the family court was required, when asked, to take judicial notice of the documents. State v. Akana, 68 Haw. 164, 166, 706 P.2d 1300, 1302 (1985) (the trial court was required to take judicial notice of "the trial court's own file . . . in the court's immediate possession").

3. Doe argues that the family court erred in finding

(FOF 5) that he: (a) "told [the CW] to take her clothes off," whereas the CW testified that she removed her clothes without prompting from him; (b) told the CW "Ssh" when she said "ow," whereas the CW testified that he told her "Shhh" when she hit something which made a noise, and not when she said "Ouch"; and (c) touched the CW's "genitals and breasts," whereas the CW testified that he touched her "breasts" and "butt." We agree that these findings are clearly erroneous because they lack substantial evidence to support them. Accordingly, we agree the family court was wrong in concluding that Doe had sexual contact with the CW "by touching her breasts and genitals." Troyer v. Adams, 102 Hawai‘i 399, 409-10, 77 P.3d 83, 93-94 (2003).

Therefore,

IT IS HEREBY ORDERED that the family court's May 21, 2002 amended decree and its August 2, 2002 order denying Doe's motion to reconsider sentence or for a new trial, are affirmed. We vacate the aforementioned findings and conclusion and remand to the family court for amendment thereto, consistent with this order.

DATED: Honolulu, Hawai‘i, June 8, 2004.

On the briefs:

Jon N. Ikenaga, Deputy Public Defender, State of Hawai‘i, for defendant-appellant.

Linda L. Walton, Deputy Prosecuting Attorney, County of Hawai‘i, for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge