

NO. 27146

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
FALESA AFUVAI, Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 03-1-0288)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Lim and Foley, JJ.)

Defendant-Appellant Falesa Afuvai (Afuvai) appeals from the Judgment filed on February 16, 2005 in the Circuit Court of the First Circuit (circuit court).^{1/} A jury found Afuvai guilty of the following offenses:

Count 1: Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (Supp. 2005); and

Counts 2, 3, 4, and 5: Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(b) (Supp. 2005).

The circuit court sentenced Afuvai to the following concurrent terms of incarceration: Count 1: Twenty (20) years; and Counts 2, 3, 4, and 5: Five (5) years each.

On appeal, Afuvai argues:

(1) The indictment was constitutionally defective because each count contained several undated criminal acts.

^{1/} The Honorable Dexter D. Del Rosario presided.

(2) Counts 1 through 5 in his indictment were constitutionally defective because the 15-month time span in which the offenses were alleged to have occurred was so great that he was deprived of adequate notice of the facts and circumstances surrounding the offenses.

(3) The circuit court erred in denying Afuvai's Motion for Bill of Particulars or in the Alternative, Motion to Dismiss (Motion for Bill of Particulars). Because the State did not respond to his Notice of Alibi with more specificity as to the dates on which he allegedly committed the acts included in Counts 1 through 5, Afuvai was denied his constitutional and statutory right to be notified of the dates before trial so that he could investigate and present evidence to counter the State's allegations.

(4) The circuit court erred by not ruling that the State had elected October 31, 2002 as the date on which the offenses occurred.

(5) The circuit court erred in denying his Motion to Set Aside Verdict and Enter Judgment of Acquittal or For New Trial (Motion to Set Aside Verdict) because the State did not rebut his alibi beyond a reasonable doubt.

(6) The jury's verdicts were inconsistent.

Based on the foregoing, Afuvai asserts that his convictions should be reversed.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) The indictment was not constitutionally defective because:

In general, the precise time and date of the commission of an offense is not regarded as a material element. Accordingly, [the Hawai'i Supreme Court] has long recognized that, in cases involving sexual abuse of minors, it is sufficient, in the indictment, to allege that the offense occurred over a particular time span.

State v. Arceo, 84 Hawai'i 1, 13, 928 P.2d 843, 855 (1996)

(internal quotation marks, citations, and brackets in original omitted).

(2) The indictment was not constitutionally defective because the 15-month time period within which the State alleged in its indictment that Afuvai committed the acts included in Counts 1 through 5 was sufficiently specific to put Afuvai on notice of the charges against him. State v. Sprattling, 99 Hawai'i 312, 318, 55 P.3d 276, 282 (2002); Arceo, 84 Hawai'i at 13, 928 P.2d at 855; HRS § 806-34 (1993); Hawaii Rules of Penal Procedure Rule 7(d); Valentine v. Huffman, 285 F. Supp. 2d 1011, 1023 (N.D. Ohio 2003); Hillenburg v. State, 777 N.E.2d 99, 103 (Ind. Ct. App. 2002); Commonwealth v. Fanelli, 377 Pa. Super. 555, 556, 560-61, & 563-64, 547 A.2d 1201, 1202 & 1204-1206 (1988) (overturned on other grounds); State v. D.B.S., 216 Mont. 234, 238-39, 700 P.2d 630, 633 (1985); Commonwealth v. Niemetz, 282 Pa. Super. 431, 436-441, 422 A.2d 1369, 1371-74 (1980).

(3) The circuit court did not err by denying Afuvai's Motion for Bill of Particulars because the time frame included within the indictment was sufficiently specific and there is no evidence in the record on appeal that the State knew of any particular dates on which Afuvai's alleged offenses occurred besides October 31, 2002. State v. Delgado, 50 Conn. App. 159, 169 n.11, 718 A.2d 437, 443 n.11 (1998).

(4) The circuit court did not err by failing to rule that the State elected October 31, 2002 as the date on which the offenses occurred because the State (a) was not required to elect a date, since the circuit court gave the jury a specific unanimity instruction and (b) clearly intended to include non-October 31, 2002 acts in each of Counts 1 through 5. Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-75.

(5) The circuit court did not err by denying Afuvai's Motion to Set Aside Verdict because there was sufficient evidence in support of the jury's verdicts and some basis on which the jury could have reasonably disbelieved Afuvai's alibi. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998); State v. Gabrillo, 10 Haw. App. 448, 456-58, 877 P.2d 891, 894-95 (1994); State v. Tamura, 63 Haw. 636, 637-38, 633 P.2d 1115, 1117 (1981).

(6) The jury's verdicts on Counts 1 through 5 and Counts 6 and 10 were not necessarily inconsistent. Pursuant to Arceo, the jury was given the discretion to unanimously choose

which underlying criminal act had been proved beyond a reasonable doubt by the State for each of Counts 1 through 5. Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-75. Although the jury determined that neither Count 6 nor Count 10 occurred between January 11, 1999 and July 9, 2001, the jury could have found that each act constituting each offense in Counts 1 through 5 occurred between July 10, 2001 and October 31, 2002 or on October 31, 2002. Arceo 84 Hawai'i at 33, 928 P.2d at 875; State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996).

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on February 16, 2005 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 14, 2006.

On the briefs:

Daphne E. Barbee
for Defendant-Appellant.

Don Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge