

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26569

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
RIGOBERTO QUIROS, Defendant-Appellant

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 03-1-0483(2))

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Nakamura, and Fujise, JJ.)

Defendant-Appellant Rigoberto Quiros (Quiros) appeals from the Judgment entered on May 5, 2004, in the Circuit Court of the Second Circuit (circuit court).<sup>1</sup> Quiros was charged by indictment with third degree sexual assault for knowingly engaging in sexual contact with a minor who was between fourteen and sixteen years old, in violation of Hawaii Revised Statutes (HRS) Section 707-732(1)(c) (Supp. 2006).<sup>2</sup> At the time of the

<sup>1</sup> The Honorable Shackley F. Raffetto presided.

<sup>2</sup> Hawaii Revised Statutes (HRS) Section 707-732(1)(c) (Supp. 2006) provides:

**§707-732 Sexual assault in the third degree.** (1) A person commits the offense of sexual assault in the third degree if:

. . . . .

(c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor[.]

At the time of the charged offense, HRS Section 707-700 (1993) defined "sexual contact" as follows:

"Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor, or of the

charged offense, Quiros was thirty-six years old and the complaining witness (CW), who was best friends with the niece of Quiros's girlfriend, was fourteen years old.

After a jury trial, Quiros was found guilty as charged. The circuit court sentenced Quiros to five years of probation, subject to a special condition that he serve a nine-month term of incarceration.

On appeal, Quiros argues that: 1) the third degree sexual assault statute is unconstitutional on its face and as applied to his conduct; 2) the circuit court's jury instructions on the charged offense constituted a constructive amendment of, or fatal variance from, the indictment; 3) the circuit court erred in precluding him from asking the CW whether she had ever lied to her mother or best friend; 4) the circuit court erred in refusing to give instructions which were relevant to his defense or theory of defense; 5) the circuit court erred in denying his request to communicate with the jurors after their verdict was returned; and 6) the cumulative effect of the alleged errors by the circuit court warrant a new trial.

After a careful review of the record and the briefs submitted by the parties, we affirm the Judgment. We resolve Quiros's arguments on appeal as follows:

1. Quiros was charged with violating HRS Section 707-732(1)(c), which incorporates the definition of "sexual contact" set forth in HRS Section 707-700 (1993). Quiros argues that HRS Section 707-732(1)(c) is unconstitutional on its face and as applied to his conduct because the statute is overbroad, is impermissibly vague, and contains no requirement that the defendant acted with a sexual intent. We conclude that Quiros's arguments are without merit. The Hawai'i Supreme Court has rejected challenges to the constitutionality of the third degree

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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.

sexual assault statute and the definition of "sexual contact" that were based on the same grounds raised by Quiros. State v. Hicks, 113 Hawai'i 60, 73-76 148 P.3d 493, 506-09 (2006); State v. Kalani, 108 Hawai'i 279, 287-88, 118 P.3d 1222, 1230-31 (2005); State v. Richie, 88 Hawai'i 19, 31-32, 960 P.2d 1227, 1239-40 (1998).

2. We reject Quiros's claim that the circuit court's jury instructions on the charged offense constituted a constructive amendment of, or fatal variance from, the indictment. The indictment charged Quiros with engaging in sexual contact with a minor without specifying the particular act or acts by which the third degree sexual assault was committed. Quiros did not move for a bill of particulars. The CW's testimony at trial regarding her being fondled by Quiros was generally consistent with her testimony before the grand jury. The circuit court's jury instructions on the charged offense tracked the indictment. The instructions required proof that Quiros "did knowingly subject [the CW] to an act of sexual contact" and then defined sexual contact, using the statutory definition, to mean "any touching of the sexual or other intimate parts of a person."

The proof required by the circuit court's jury instructions matched the charge alleged in the indictment. In addition, the evidence presented at trial proved the facts alleged in the indictment. We conclude that there was no constructive amendment or fatal variance. See State v. Sword, 68 Haw. 343, 345-56, 713 P.2d 432, 434 (1986); State v. Sanchez, 9 Haw. App. 315, 319-22, 837 P.2d 1313, 1316-17 (1992). We reject Quiros's suggestion that the prosecution's trial evidence is limited to the evidence it presented before the grand jury.

3. Quiros argues that the circuit court erred in limiting his cross-examination of the CW by precluding him from asking the CW whether she had ever lied to her mother or best friend. We disagree. The Deputy Prosecuting Attorney (DPA) objected to Quiros's have-you-ever-lied line of questioning on

the grounds that the defense was not inquiring about the CW's untruthfulness on a specific occasion and was just "fishing" for information. The defense did not proffer that it was aware of specific instances of the CW's untruthfulness that it wanted to explore.

Whether the CW had ever lied to her mother or best friend was of minimal impeachment value. In addition, Quiros was able to impeach the CW with far more probative evidence, including evidence that the CW had made inconsistent statements to her mother and others in reporting what Quiros had done to the CW. Quiros was given ample opportunity to impeach the CW's credibility, and the jury had sufficient evidence from which to fairly evaluate the CW's credibility. We conclude that the circuit court did not abuse its discretion in limiting Quiros's cross-examination by precluding him from asking the CW the have-you-ever-lied questions. See State v. White, 92 Hawai'i 192, 205-06, 990 P.2d 90, 103-04 (1999); State v. Orhan, 726 A.2d 629, 638-40 (Conn. Ct. App. 1999) (holding that the trial court did not err in precluding the defendant from asking the complaining witness in a sexual assault case whether she had ever lied to her mother or sister).

4. The circuit court did not err in refusing to give the instructions proffered by Quiros, which he claims were relevant to his defense or theory of defense. The court's instruction on the material elements of the charged offense and its specific unanimity instruction correctly and adequately advised the jury of the applicable law. See State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-75 (1996). Accordingly, the court did not err in refusing to give Quiros's proffered instruction requiring the jury to unanimously find that Quiros had contact with the CW's vagina. The court also did not err in refusing to give Quiros's proffered instruction advising the jury that it could consider evidence that the CW gave inconsistent statements in assessing her credibility. The jury was adequately advised on the subject of witness credibility by other

instructions given by the court. See State v. Bush, 58 Haw. 340, 342, 569 P.2d 349, 350 (1977) ("[W]here a given proposition of law is requested to be given in an instruction, the instruction may properly be refused where the same proposition is adequately covered in another instruction that is given."). When read and considered as a whole, the instructions given by the circuit court were not "prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

5. We conclude that the circuit court did not abuse its discretion in denying Quiros's request to engage in post-verdict communication with the jury. We note that in denying Quiros's motion to reconsider its ruling, the circuit court specifically noted that the jury had expressed its desire not to be contacted by counsel.

6. Based on the above analysis, there is no merit to Quiros's claim that the cumulative effect of the alleged errors committed by the circuit court warrant a new trial.

IT IS HEREBY ORDERED that the May 5, 2004, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, June 29, 2007.

On the briefs:

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Mimi Desjardins, Esq.  
for Defendant-Appellant

Peter A. Hanano  
Deputy Prosecuting Attorney  
County of Maui  
for Plaintiff-Appellee

  
Presiding Judge

  
Associate Judge

  
Associate Judge