

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27064

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
CHARLES B. MILLER, Defendant-Appellant

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

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-0350)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Charles B. Miller (Miller) appeals from the Judgment filed on December 17, 2004, in the Circuit Court of the First Circuit (the circuit court)¹ in Criminal No. 01-1-0350.² Miller was charged by indictment with sexually assaulting two young girls. One of the girls was between six and seven years old (hereinafter referred to as "Minor 1") and the second girl was between four and five years old (hereinafter referred to as "Minor 2") during the time of the charged offenses. Miller was charged with:

Count 1 -- third degree sexual assault, in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993),³

¹ The Honorable Virginia Lee Crandall presided.

² In a separate appeal docketed as No. 27065, Defendant-Appellant Charles B. Miller (Miller) appeals from a December 17, 2004, Judgment entered by the Circuit Court of the First Circuit in Criminal No. 99-2253.

³ At the time of the charged offenses, Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993) provided:

(1) A person commits the offense of sexual assault in the third degree if:

for subjecting Minor 1 to sexual contact or causing Minor 1 to have sexual contact with Miller, by placing his hand on her vagina.

Count 2 -- continuous sexual assault of a minor under the age of fourteen, in violation of HRS § 707-733.5 (Supp. 1997), for engaging in three or more acts of sexual penetration or sexual contact with Minor 1 over a period of time.

Count 3 -- third degree sexual assault, in violation of HRS § 707-732(1)(b), for subjecting Minor 2 to sexual contact or causing Minor 2 to have sexual contact with Miller, by placing his hand on her vagina.

Count 5⁴ -- continuous sexual assault of a minor under the age of fourteen, in violation of HRS § 707-733.5, for engaging in three or more acts of sexual penetration or sexual contact with Minor 2 over a period of time.

After the State of Hawai'i (the State) rested its case-in-chief, the circuit court granted Miller's motion for judgment of acquittal on Count 5. Prior to closing argument, the State also conceded that there was insufficient evidence to proceed on Count 2. Thus only Counts 1 and 3 were submitted to the jury. The jury found Miller guilty on Count 1 but could not reach a verdict on Count 3. The circuit court granted a mistrial as to Count 3. Miller was sentenced to five years of incarceration to be served consecutively to the incarceration imposed for his other sexual assault convictions in Criminal No. 99-2253.

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(b) 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[.]

⁴ Count 4, which charged Miller with first degree sexual assault, was withdrawn by the State of Hawai'i.

On appeal, Miller argues that the circuit court erred in giving the following jury instructions over his objection:

1. Jury Instruction 3.03 -- Consider Only the Evidence;
2. Jury Instruction 3.09 -- Credibility And Weight of Testimony;
3. Jury Instruction 3.12 -- Prosecution Not Required to Call All Witnesses;
4. Jury Instruction 9.01 -- Unanimity Instruction -- Generic;
5. State's Proposed Instruction No. 1 -- regarding the elements of the offense for Count 1; and
6. State's Proposed Instruction No. 4 -- regarding knowledge of the age of the complainants.

Miller contends that the circuit court's errors in giving these instructions, whether viewed separately or cumulatively, deprived him of a fair trial.

After a careful review of the record and the briefs submitted by the parties, we conclude that Miller's arguments are without merit. The circuit court did not err in giving the instructions challenged by Miller, which all correctly stated the law, or in failing to modify certain of the instructions as requested by Miller. 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).

In connection with his claim that the circuit court erred in giving its unanimity instruction (Jury Instruction 9.01), Miller contends that the court also erred in failing to

require the jury to answer a special interrogatory. We disagree. The unanimity instruction was sufficient and no special interrogatory was required. See State v. Sanford, 97 Hawai'i 247, 257, 35 P.3d 764, 774 (App. 2001).

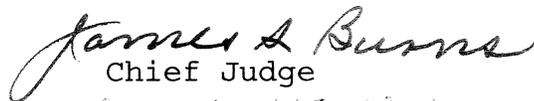
IT IS HEREBY ORDERED that the Judgment filed on December 17, 2004, in the Circuit Court of the First Circuit in Criminal No. 01-1-0350 is affirmed.

DATED: Honolulu, Hawai'i, January 30, 2007.

On the briefs:

Chester M. Kanai,
for Defendant-Appellant

Sonja P. McCullen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge