

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28349

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

STATE OF HAWAI'I, Plaintiff-Appellee,
KUN OK CHO, Defendant-Appellant

KHAMAKADO
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STATE OF HAWAI'I

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(HPD Cr. No. 06084084)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Kun Ok Cho (Cho) appeals from the judgment entered by the District Court of the First Circuit, Honolulu Division¹ (district court) on December 5, 2006 that convicted and sentenced her for prostitution in violation of Hawaii Revised Statutes (HRS) § 712-1200 (1993 & Supp. 2008).²

Cho argues that: (1) the district court erred when it denied her motion to continue trial to allow her witness to testify and lay a foundation for admission of her polygraph examination results, and (2) there was insufficient evidence to convict her of prostitution.

Upon a careful review of the record and the briefs submitted by the parties, and having given due consideration to the case law and statutes relevant to the arguments advanced and the issues raised by Cho, we affirm and conclude as follows:

(1) The district court did not abuse its discretion in denying Cho's motion for a continuance because the sole basis for the motion was the unavailability of a witness who would have purportedly testified to Cho's polygraph examination results, which are inadmissible under Hawai'i case law. See State v. Okumura, 78 Hawai'i 383, 397, 894 P.2d 80, 94 (1995) (holding

¹ The Honorable Christopher P. McKenzie presided.

² The current language of HRS § 712-1200 has not changed since Cho allegedly violated the section.

that "[a]ccording to well-established precedent in this jurisdiction, polygraph results are not admissible at trial whether offered by the prosecution or the defense, and we see no way in which the polygraph examination results could have been material to the preparation of the defense") (citations omitted). See also State v. Batangan, 71 Haw. 552, 556-57, 799 P.2d 48, 51 (1990) ("The common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' [sic] credibility. Thus, expert testimony on a witness' [sic] credibility is inappropriate."); and State v. Klafta, 73 Haw. 109, 117, 831 P.2d 512, 517 (1992) (concluding that expert testimony on a defendant's credibility "is not admissible, and is of no help to the jury"). The denial of the continuance was thus inconsequential to Cho's defense.

(2) There is substantial evidence in the record, specifically, the testimony of Officer Ayres K. Taylor (Officer Taylor), to support Cho's conviction for prostitution.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution.

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.

"Substantial evidence" 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.

It is the province of the trial judge, not the appellate courts, to determine the credibility of witnesses and the weight of the evidence.

State v. Pegouskie, 107 Hawai'i 360, 365, 113 P.3d 811, 816 (App. 2005) (citations, brackets, and ellipsis omitted).

HRS § 712-1200(1) provides currently, as it did at the time of the alleged offense, that "[a] person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee."

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(Emphasis added.) A conviction for prostitution does not require an actual exchange of money; the defendant merely has to agree or offer "to engage in sex in exchange for a fee." State v. Connally, 79 Hawai'i 123, 127, 899 P.2d 406, 410 (App. 1995).

In this case, Officer Taylor testified that Cho "whispered" and asked him if he wanted "everything"--"street vernacular for sexual intercourse and fellatio"--while "she had her hand kine'a closed in slight fist moving back and forth by her mouth simulating fellatio." With respect to a fee, he further testified as follows:

Q What happened after she was, showed you an action that implied fellatio?

A I believe I asked her, you know, everything or how much.

. . . .

Q What happened after you asked her this?

A She put her hand to her mouth and kine'a said shh.

Q And then what happened?

A I asked her, I told her I just wanna make sure I had enough money, which she once again told me to shh.

Q And was this in (indiscernible) she made the showing motion?

A Yeah. They usually don't discuss prices.

. . . .

Q And what happened after she made that shh?

A I believe I had put up my finger symbolizing one and kine'a whispered one hundred.

Q And what if anything did she say?

A She said no. She did ask if I gave mama fifty dollars, which I replied yes, and she said that was the house fee.

Q And then what happened?

A I believe I offered two hundred. I put up two fingers and told her, you know, two hundred, which she agreed.

Q I'm sorry, I didn't hear. Did you say two hundred?

A I whispered two hundred with my fingers showing.

Q What happened after you whispered two hundred?

A She agreed to it.

Q What do you mean by agreed?

A She shook her head and agreed.

THE COURT: I'm sorry, I didn't hear. I heard you say she shook her head and?

THE WITNESS: In agreeance [sic].

THE COURT: She shook her head.

[DEPUTY PROSECUTOR]: Q What happened after -- well, could you describe in what direction did she shake her head?

A Up and down, a yes motion.

Q What happened after she shook her head up and down?

A She just agreed, and a few minutes later, the arrest team came in.

Although Officer Taylor's testimony conflicted with Cho's version of events, there was nonetheless substantial evidence that Cho agreed to engage in sexual conduct (i.e., "everything") for a fee of \$200. Any factual discrepancies were thus resolved by the district court in the prosecution's favor. See id. at 127, 899 P.2d at 410 (stating that it "for the trial judge as the factfinder in this case to assess the credibility of the witnesses . . . and to resolve all questions of fact").

Therefore, the December 5, 2006 judgment is hereby affirmed.

DATED: Honolulu, Hawai'i, March 12, 2009.

On the briefs:

Dwight C. H. Lum and
Reginald P. Minn
for Defendant-Appellant.

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Deputy Prosecuting Attorney,
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for Plaintiff-Appellee.

Mum Reclined

Corinne K.A. Watanabe

Craig H. Nakamura