NO. CAAP-14-0001376

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF MN

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-J No. 97012)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Minor-Appellant M.N. (**MN**) appeals from a "Decree Re: Modification and Change of Law Violations Decree," filed on December 4, 2014, and an "Order Denying Minor's Motion for New Trial and/or Reconsideration," filed on December 16, 2014, both in the Family Court of the Second Circuit (**family court**).[1] The family court adjudicated MN a law violator with respect to three separate counts of Sexual Assault in the Third Degree in violation of Hawaii Revised Statutes (**HRS**) § 707-732 (2014).[2]

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[1] The Honorable Lloyd A. Poelman, presided.

[2] HRS § 707-732 provides in part:

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

On appeal, MN contends that (1) the charging document failed to name a complainant; and (2) there was insufficient evidence to support his adjudication on the three counts of Sexual Assault in the Third Degree.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant legal authorities, we resolve MN's points of error as follows and we affirm.

I. Brief Background

On March 28, 2013, Petitioner-Appellee State of Hawai'i (**the State**) filed a petition for the family court to adjudicate MN as a law violator for committing four separate counts of Sexual Assault in the Third Degree in violation of HRS § 707-732.[3] The charges stemmed from allegations that MN had subjected minor Complaining Witness (**CW**) to sexual contact while both were attending school. Following trial, on June 9, 2014, the family court entered a decree adjudicating MN as a law violator under HRS § 571-11(1) (Supp. 2016)[4] with respect to the three counts of Sexual Assault in the Third Degree. MN filed a motion for reconsideration, which the family court denied. On December 4, 2014, the family court entered an amended decree sentencing MN,

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[3] On June 19, 2014, the family court entered an order dismissing Count IV with prejudice.

[4] HRS § 571-11 provides in part:

> **§571-11 Jurisdiction; children.** Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:
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> (1) Concerning any person who is alleged to have committed an act prior to achieving eighteen years of age that would constitute a violation or attempted violation of any federal, state, or local law or county ordinance. Regardless of where the violation occurred, jurisdiction may be taken by the court of the circuit where the person resides, is living, or is found, or in which the offense is alleged to have occurred[.]

inter alia, to probation for a period of twenty-four (24) months under several restrictions. On June 1, 2015, the family court adopted the "State's Proposed Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial."

The facts of this case are disputed. The incident occurred on or around November 21, 2012, at school. MN and CW were classmates. The school's principal Gary Davidson (**Davidson**) testified that towards the end of the lunch period, a classmate of CW reported that CW was in a bathroom crying. CW was brought to an office and Davidson asked the school clerk, Mandy Takata (**Takata**) to speak to CW. Takata testified that CW was hysterical and crying. Takata handed CW a paper to write down what she wanted to say. After about five minutes alone with CW, Takata handed Davidson a note. The note was short but, according to Davidson, there were a "sequence of words" to the effect that MN touched CW on her breasts, buttocks, and vagina. The note prompted Davidson to contact a school resource officer, Officer Michael McCutcheon **(Officer McCutcheon)**, and Davidson gave him the note. Officer McCutcheon paraphrased the information on the note into his police report and also testified that he placed the note in one of the pockets of his uniform and inadvertently washed it.[5] According to Officer McCutcheon, Davidson relayed to him that CW allowed MN to hug her in a certain teacher's [Ms. U's] classroom, and during the hug, MN touched CW's breasts, buttocks, and vagina on the surface of CW's clothing.

CW testified to the following during trial. She was outside Ms. U's classroom during the lunch hour, near a tree, and MN asked for a hug and she hugged him. MN asked for another hug at which point he also touched CW on her "breasts, [her] butt, and [her] vagina." CW also testified that MN "started humping" and "pushing against [her]." Thereafter, CW pushed MN away and walked away.

MN also testified. According to MN, while he was walking outside, he heard a loud noise, he turned around, and

[5] There was a stipulation that the note had been inadvertently lost.

"while [he] was walking [his] left arm was swinging" and CW came "on the side of [MN]" and his "hand accidently hit [his] leg and it bounced off and it accidently bumped [CW]." He further testified that he apologized, gave her a "side hug" and continued walking to class. MN denied that he was by the side of Ms. U's classroom with CW and denied hugging CW there. He also denied CW's allegations that he hugged her twice and denied that he touched her buttocks, breasts, and vagina.

II. Sufficiency of the Charge

On appeal, MN contends for the first time that the charges against him were defective because they failed to name the CW. In each of the three relevant charges, it states in pertinent part that "[MN] did knowingly subject a person less than fourteen (14) years old and not married to him, to sexual contact, or cause said person to have sexual contact with him[.]"

A charging document must sufficiently allege all of the essential elements of the offense charged. State v. Hitchcock, 123 Hawai'i 369, 376-79, 235 P.3d 365, 372-75 (2010). As such, "the sufficiency of the charging instrument is measured, *inter alia*, by whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he or she must be prepared to meet." Id. at 376, 235 P.3d at 372 (citations omitted). As is the case here, when the sufficiency of a charge is challenged for the first time on appeal, the Motta-Wells post-conviction liberal construction approach applies. State v. Tominiko, 126 Hawai'i 68, 76, 266 P.3d 1122, 1130 (2011). This standard "means we will not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." Id. (citation omitted). In determining whether an offense has been sufficiently plead, "we now interpret a charge as a whole, employing practical considerations and common sense." State v. Sprattling, 99 Hawai'i 312, 319, 55 P.3d 276, 283 (2002) (citation omitted). "Moreover, in construing the validity of [a charge], we are not restricted to an examination solely of the charge, but will interpret it in

light of all of the information provided to the accused." Id. at 319, 55 P.3d at 283 (citations omitted).

MN contends that the charging document failed to put MN on notice because it did not name CW, and that even if MN actually knew who the CW was it did not satisfy the requirement that he be put on notice and informed of the nature of the charge.

HRS § 707-732(1)(b) provides that a person commits Sexual Assault in the Third Degree if "[t]he 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[.]" Further, at the time of this case, sexual contact was defined 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." HRS § 707-700 (Supp. 2013). The actual charges against MN were similarly worded and track the statutory language of HRS § 707-732 and HRS § 707-700. See State v. Cordeiro, 99 Hawai'i 390, 406, 56 P.3d 692, 708 (2002) (noting that generally, "a charge drawn from the language of the statute proscribing the offense is not fatally defective") (citation omitted).

Moreover, as MN apparently acknowledges, he knew the identity of the CW. Importantly, he does not provide any specific argument about how he was prejudiced by the omission of CW's name in the charging document. The record confirms that MN was aware of the identity of CW. As the State notes, police reports with the CW's name and related information were provided to MN. Moreover, MN filed pretrial discovery motions related to CW, and also filed subpoenas seeking production of school records and police investigations regarding CW. Thus, the record reflects that MN had actual knowledge of the CW and the allegations made against him. He thus was not prejudiced by the lack of CW's name appearing in the charge.

Given that MN raises his challenge to the charge for the first time on appeal, and in applying the Motta-Wells post-conviction liberal construction standard, MN's adjudication will not be reversed absent MN showing that he was prejudiced or the charges cannot within reason be construed to charge an offense. MN fails to make such a showing.

III. Sufficiency of the Evidence

A. Findings of Fact (FOF) Nos. 3 and 4

MN contends that the family court clearly erred in its FOFs Nos. 3 and 4 because the note written by CW was helpful and material to MN's case and would have shown that CW is not credible and her testimony was inconsistent. The circuit court's FOFs Nos. 3 and 4 state:

> 3. None of the note, or the destroyed evidence, was exculpatory or helpful to [MN's] case, and there was no showing of bad faith by Officer McCutcheon and the police department in destroying the evidence.
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> 4. The note would not have created a reasonable doubt about [MN's] guilt that would not otherwise have existed, and the note was not material to guilt or punishment of [MN].

FOFs are reviewed under the clearly erroneous standard. Schiller v. Schiller, 120 Hawai'i 283, 288, 205 P.3d 548, 553 (App. 2009). MN appears to argue that the note would have clarified where the incident took place, arguing that the "note would have shown that [CW] wrote the alleged incident occurred in Ms. [U's] classroom which was inconsistent with where [CW] testified it happened[.]"

However, the note purportedly stated that the incident occurred in Ms. U's classroom. Officer McCutcheon testified that he read the note, incorporated it into his report, and that it said the incident took place inside Ms. U's classroom. CW testified at trial that the incident took place outside of Ms. U's classroom. At an evidentiary hearing, MN requested that he be allowed to impeach CW through Officer McCutcheon's testimony as it relates to the destroyed note. MN's request was granted and during the trial MN challenged CW's credibility, by way of impeaching her with Officer McCutcheon's testimony. Thus,

despite the unavailability of the note, MN was not prejudiced or harmed because he was still able to challenge CW's credibility based on Officer McCutcheon's testimony that the note said the incident happened in Ms. U's classroom. Given the testimony of Officer McCutcheon, MN was able to adequately challenge CW's inconsistent statements about where the incident occurred.

B. Findings of Fact Nos. 23 and 27 and Credibility

MN contends that the family court erred in finding CW credible and that the evidence presented at trial was not substantial to support the circuit court's adjudication that he committed the three offenses. MN challenges the family court's FOFs Nos. 23 and 27, which state:

> 23. The court finds the testimony of [CW] credible in relation to the important elements in the case.
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> . . . .
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> 27. The State met its burden of proof, beyond a reasonable doubt, with respect to each and every element in Counts One through Three of the Petition in FC-J No. 97012, each charging the MN with Sexual Assault in the Third Degree. There was sufficient **evidence presented by the State to support the MN's convictions for Sexual Assault in the Third Degree in all three counts of the Petition.**

In considering evidence adduced at trial and its review on appeal, the Hawai'i Supreme Court has

> long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction . . . 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.

State v. Matavale, 115 Hawai'i 149, 157-58, 166 P.3d 322, 330-31 (2007). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable [a person] of reasonable caution to support a conclusion." Id. (citation and brackets omitted). "[V]erdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the

[trier of fact's] findings." State v. Jenkins, 93 Hawai'i 87, 100-101, 997 P.2d 13, 26-27 (2000) (citation omitted).

MN argues that CW's testimony was not credible and thus, the evidence cannot constitute "substantial evidence" to support the circuit court's adjudication. The supreme court has recognized that "[w]itnesses may be inaccurate, contradictory, and even untruthful in some portions of their testimony, and yet be entirely credible in other portions of their testimony." State v. Jhun, 83 Hawai'i 472, 482, 927 P.2d 1355, 1366 (1996). Further, an "appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the [trier of fact]." Jenkins, 93 Hawai'i at 101, 997 P.2d at 27.

Here, the family court noted that there are various inconsistencies in the testimony, such as what day of the week it was, in which order CW's body parts were touched by MN, and how long the hugs lasted. The family court considered CW's behavior surrounding the incident, noting that she was "hysterical" and determined that CW was credible despite her inconsistent testimony. Even if CW presented inconsistent testimony, other portions of her testimony may still be credible. Given her demeanor following the incident and the corroborating testimony provided by Davidson and Takata, there was sufficient evidence for the family court to determine that CW was credible, especially as it relates to the elements of the crime charged. The family court expressly noted that inconsistent testimony "doesn't defeat a case in establishing the burden of proof beyond a reasonable doubt[.]" Because it is in the province of the family court to weigh the evidence and determine credibility, we do not disturb the family court's conclusion.

Having determined that CW's testimony was credible, the family court found that the State proved beyond a reasonable doubt three counts of Sexual Assault in the Third Degree. Based on our review of the record, and given the credibility

determination made by the trial court, we conclude there is sufficient evidence in the record to support the circuit court's conclusions as to the three offenses adjudicated in this case.

Therefore, IT IS HEREBY ORDERED that the "Decree Re: Modification and Change of Law Violations Decree," filed on December 4, 2014, and "Order Denying Minor's Motion for New Trial and/or Reconsideration," entered on December 16, 2014, in the Family Court of the Second Circuit, are affirmed.

DATED: Honolulu, Hawaiʻi, June 29, 2017.

On the briefs:

Setsuko Regina Gormley,
for Minor-Appellant.

Peter A. Hanano,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge