IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

PAOLA IBARRA,
Petitioner/Defendant-Appellant,

and

GUSTAVO FERREIRA,
Respondent/Defendant-Appellee.

SCWC-19-0000697

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000697; CASE NO. 1CPC-17-0001646)

MARCH 15, 2023

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

This case requires us to determine what conduct constitutes "profit[ing] from prostitution" in a prosecution for promoting prostitution under Hawai'i Revised Statutes (HRS) §

712-1203 (Supp. 2017). "Profit[ing] from prostitution," HRS § 712-1203, is defined as "accept[ing] or receiv[ing] money or other property pursuant to an agreement or understanding with any person whereby the person participates or is to participate in the proceeds of prostitution activity," HRS § 712-1201(2) (2014).[1]

In the instant case, two women came to Hawaiʻi, and once here, engaged in prostitution. Defendant Paola Ibarra planned the trip: she bought flight tickets for herself and the complaining witness ("CW") and paid for the room they shared. As CW earned money from "dates," she reimbursed Ibarra for her half of the hotel expenses and for the flight ticket to Hawaiʻi. Though Ibarra was engaging in prostitution herself, a jury found that she "profit[ed] from prostitution" under HRS §§ 712-1201(2) and 712-1203. Ibarra testified that she had an understanding with CW that CW would engage in prostitution to pay her back for the costs of the trip, and she accepted money from CW knowing it was earned through prostitution services that CW had personally rendered.

The majority holds that Ibarra's actions did not fall under HRS §§ 712-1201(2) and 712-1203 because she did not

[1] HRS § 712-1201 was amended in 2016 to change only its title. See HRS § 712-1201 (Supp. 2017). Both HRS §§ 712-1201 and 712-1203 were subsequently amended in 2021. All quotations and citations in this opinion are to the versions of the statutes prior to the 2021 amendments, unless otherwise specified.

"profit." In order to profit from prostitution, Ibarra had to benefit financially from the arrangement with CW, i.e., she needed to end up with more money or property than she started with. Respectfully, I disagree.

The plain language and legislative history of HRS §§ 712-1201(2) and 712-1203 show that the statutes penalize any agreement or understanding to receive the proceeds of another person's prostitution activities, including when the payment is received as reimbursement for a debt. Considering the dynamic of economic coercion in trafficking relationships, I am concerned that the majority's interpretation unintentionally creates a safe harbor for traffickers who have extended a loan or a service to their victims but have not yet "profited" from the arrangement.

Accordingly, I respectfully dissent.

II. BACKGROUND

The following facts appear in the record. CW and Ibarra arranged over Instagram to travel together to Hawaiʻi. Once in Hawaiʻi, CW and Ibarra went on prostitution dates together. While CW was having sex with a customer, Ibarra would sit on the balcony of her hotel room, or elsewhere nearby, for "[s]afety." CW did the same for Ibarra.

Ibarra and CW gave conflicting testimony regarding the financial arrangements they had made before their trip. Ibarra

testified that the two women agreed in advance that Ibarra would pay for CW's flight and hotel, and that CW would pay Ibarra back for the flight and half the hotel costs once CW made money from prostitution.

CW denied that she made any agreement to pay Ibarra back before she came to Hawai'i. According to CW, they never had a conversation about payment in advance, but when Ibarra paid the hotel expenses she asked for CW's share, and CW paid. CW attested that though there was no agreement, she paid Ibarra because she felt obligated.

Ibarra was convicted of promoting prostitution. Ibarra moved for judgment of acquittal, or in the alternative, for new trial, arguing that accepting reimbursement for CW's flight and hotel costs was not "profit[ing] from prostitution." The circuit court found that a reasonable juror could find Ibarra guilty of profiting from prostitution pursuant to HRS § 712-1201(2). The circuit court acknowledged that the equities favored Ibarra, but that the plain language of HRS § 712-1201(2) did not support a new trial. The ICA affirmed, holding that the definition of "profits from prostitution" in HRS § 712-1201(2) does not comport with the definition of profit in the "financial accounting sense" but merely requires that a defendant "'accept[] or receive[] money.'" (Alterations in original.)

III. DISCUSSION

A. HRS §§ 712-1203 and 712-1201(2) Proscribe Any Acceptance or Receipt of Funds Pursuant to an Understanding that the Funds Would be Earned Through Prostitution

HRS § 712-1203 criminalizes profiting from prostitution. It reads:

> **Promoting prostitution.** (1) A person commits the offense of promoting prostitution if the person knowingly advances or profits from prostitution.
> (2) Promoting prostitution is a class B felony.

HRS § 712-1201 defines "profits from prostitution." It reads:

> **Advancing prostitution; profiting from prostitution; definition of terms.** In sections 712-1202 and 712-1203:
>
> [. . .]
>
> (2) A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally-rendered prostitution services, the person accepts or receives money or other property pursuant to an agreement or understanding with any person whereby the person participates or is to participate in the proceeds of prostitution activity.

The majority reasons that because HRS §§ 712-1203 and 712-1201(2) use the term "profits," they incorporate the dictionary definition of the term "profit." In order to fall under the statutes, therefore, one must necessarily obtain "a valuable return," a "gain," or an "excess of returns over expenditure." According to the majority, profiting requires "benefitting or obtaining something of value," and "mere reimbursement" does not qualify.

But the legislature specifically defined "profits from prostitution" in HRS § 712-1201(2). Even if the legislature's definition diverges from the dictionary definition of "profit," we cannot override it with a preferred definition. State v. Kantner, 53 Haw. 327, 329, 493 P.2d 306, 308 (1972) ("[T]he courts, as a general rule of construction, are bound to follow legislative definitions of terms rather than commonly accepted dictionary, judicial or scientific definitions.").

The legislature defined the term "profits from prostitution" as accepting or receiving money or property pursuant to an agreement or understanding to share in the proceeds of another person's prostitution activities. HRS § 712-1701(2). This definition is broader than how profit is defined in a business venture or financial accounting context. All that is required is an "agreement or understanding" and the "accept[ance] or recei[pt]" of money. HRS § 712-1201(2).[2]

[2] The legislature created an exception for "personally-rendered prostitution services." HRS § 712-1701(2) (emphasis added) reads:

> A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally-rendered prostitution services, the person accepts or receives money or other property pursuant to an agreement or understanding with any person whereby the person participates or is to participate in the proceeds of prostitution activity.

If Ibarra and CW were both engaging in prostitution during the same date and sharing the earnings, the statute would not apply. However, because Ibarra accepted money from CW that CW earned from CW's own prostitution activities, and Ibarra was not herself engaging in prostitution on those occasions, the exception is not applicable.

Ibarra argues that HRS § 712-1201(2) leads to absurd results because receiving "any money from prostitution activities for any purpose" would fall under the statute. For example, if CW paid Ibarra for a pack of gum, it would constitute "profiting from prostitution." This ignores the language specifying that the receipt of money must be "pursuant to an agreement or understanding." HRS § 712-1201(2). For the acceptance of money to be "pursuant to" an agreement or understanding, there must be a preexisting agreement or understanding wherein both parties agree that one party will engage in prostitution and that some or all of the proceeds will go to the other party. Knowledge that one party is engaging in prostitution, and receipt of funds therefrom, is not enough.

In State v. Yancy, the Washington Supreme Court came to this conclusion when it interpreted the Washington equivalent of HRS § 712-1201(2).[3] 594 P.2d 1342, 1344 (Wash. 1979). In Yancy, the defendant invited minors under the age of 18 to live in a hotel room with him. Id. at 1343. The minors "turned over

[3] When the Yancy court interpreted the Washington statute defining profiting from prostitution in 1979, it was functionally identical to HRS § 712-1201(2). It provided:

> A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

Wash. Rev. Code § 9A.88.060 (West) (codified in 1975) (emphasis added).

to him their earnings from prostitution," which he spent on their combined living expenses. Id. The defendant was convicted of promoting prostitution. Id. He appealed, arguing that the statute was overbroad, because it would penalize those who live with a prostitute and unwittingly receive the benefit of his or her earnings, or those who lawfully render services to a prostitute and are paid for those services out of the prostitute's earnings. Id. at 1344. The court decided that the statute did not apply in either scenario, because there was no "agreement or understanding [w]hereby the person is to participate in the proceeds of prostitution activity." Id.

The defendant also argued that he "was only a roommate sharing expenses" with the two minors and contributed more to the shared living expenses than the minors did. Id. at 1345. The court rejected these arguments, and affirmed the defendant's conviction, holding that the statute did not require "great profits." Id. The statute only required defendant's understanding that he would participate in the proceeds of the prostitution. Id.

Here, Ibarra testified that there was a pre-existing agreement that CW would repay her from the proceeds of her dates. CW denied that there was any such agreement. It was within the province of the jury to credit Ibarra's testimony and

find there was such an understanding.[4] The ICA therefore did not err in finding that there was substantial evidence for the verdict.

B. The Legislative History of HRS §§ 712-1203 and 712-1201(2) Supports a Broad Definition of "Profits from Prostitution"

The legislative history of HRS §§ 712-1203 and 712-1201(2) supports the conclusion that Ibarra's receipt of funds from CW constitutes profiting from prostitution.

As a threshold matter, the text of HRS § 712-1201(2), which defines "profits from prostitution," was not substantively altered between 1972, when the Hawai'i Penal Code was first

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[4] The majority contends that there was no mutual understanding that CW would reimburse Ibarra from the proceeds of prostitution. This directly contradicts Ibarra's own testimony. Ibarra testified that she and CW had agreed "[i]n advance" that CW would pay her back "once she made the money" from prostitution. It is clear from Ibarra's testimony that she knew the source of CW's funds in advance:

> [Counsel:] And as far as financial arrangements, that was all worked out beforehand?
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> [Ibarra:] Yes, it was.
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> [Counsel:] Did [CW] ever give any money from the prostitution, give it all to you?
>
> [Ibarra:] No.
>
> [Counsel:] Give any to you?
>
> [Ibarra:] Only what we agreed upon.

The majority further contends that, because CW testified that there was no understanding between her and Ibarra, the statute does not apply, since the understanding was not "mutual." But the jury was not required to find CW's testimony credible. It was entitled to credit Ibarra's testimony that a mutual understanding existed.

passed, and 2021, when it was last amended.[5] The statute has never contained an exception for repayment of a previously-incurred debt or language indicating that "profit" should be defined as a net gain.

When HRS § 712-1204 (1976),[6] which criminalized "profit[ing] from prostitution" according to the definition in HRS § 712-1201(2), was passed in 1972, the Judicial Council of Hawaiʻi explained:

> This section strikes at the small scale promoter. The taxicab driver who pimps for a prostitute, the bartender who sets up customers for a prostitute, and the hotel clerk who regularly furnishes the prostitute and his or her customer with accommodations would all come within the ambit of this provision.

HRS § 712-1204 cmt. (1976).

Ibarra's acts - arranging travel and accommodation for CW in exchange for part of CW's proceeds - are precisely the "small scale" acts of trafficking that the provision was intended to target.

The 2011 amendments to Chapter 712, which targeted HRS §§ 712-1203 (1) and (2), further suggest that the statute was

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[5] The only edits made in 2011 and 2016 were non-substantive. Compare HRS § 712-1201 (1976), with HRS § 712-1201 (2011) (changing "he" in the statutory text to "a person"), and HRS § 712-1201 (2016) (changing title of statute from "Promoting prostitution; definition of terms" to "Advancing prostitution; profiting from prostitution; definition of terms"). The 2021 amendments to the statute are discussed infra.

[6] HRS § 712-1204 (1976) is functionally identical to the present HRS § 712-1203 (Supp. 2017). HRS § 712-1203 was amended to match HRS § 712-1204's original text, and HRS § 712-1204 was repealed, as part of amendments to Chapter 712 made in 2011. See infra note 7.

specifically intended to criminalize "small scale" acts of trafficking. Rather than narrowing the offense of promoting prostitution, these amendments broadened the range of behavior criminalized by the statute, and significantly increased the severity of the penalty.[7] The legislature's purpose was to "increase[] penalties for the offenses of promoting prostitution in order to deter traffickers and pimps." S. Stand. Comm. Rep. No. 1137, in 2011 Senate Journal, at 1285.

The majority points to the same committee report in support of its interpretation of HRS § 712-1201(2). There, the

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[7] Prior to the 2011 amendments, HRS § 712-1203 criminalized promoting prostitution in the second degree and HRS § 712-1204 criminalized promoting prostitution in the third degree. HRS § 712-1203 (1993 & Supp. 2010) (emphasis added) read as follows:

> **Promoting prostitution in the second degree.** (1) A person commits the offense of promoting prostitution in the second degree if the person knowingly advances or profits from prostitution by managing, supervising, controlling, or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostituted persons.
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> (2) Promoting prostitution is a class C felony.

HRS § 712-1204 (1993), before being repealed in 2011, read as follows:

> **Promoting prostitution in the third degree.** (1) A person commits the offense of promoting prostitution in the third degree if the person knowingly advances or profits from prostitution.
>
> (2) Promoting prostitution in the third degree is a misdemeanor.

In 2011, the legislature repealed HRS § 712-1204, and removed the underlined text above from HRS § 712-1203 such that HRS § 712-1203(1)'s text matched the former HRS § 712-1204(1). 2011 Haw. Sess. Laws Act 145, § 2-4 at 363. The legislature also increased the penalty for promoting prostitution in HRS § 712-1203(2) from a Class C to Class B felony. Id. In sum, "knowingly advanc[ing] or profit[ing] from prostitution" changed from a misdemeanor to a Class B felony. Compare HRS § 1204(2) (1993) ("a misdemeanor") with HRS § 1203(2) (2014) ("a class B felony").

legislature stated that "it is incumbent on the State to craft legislation that combats those who benefit most from the prostitution, the traffickers and pimps . . . ." Id. at 1284. This statement, in context, is not related to HRS §§ 712-1201(2) or 712-1203 – it describes amendments intended to better protect witnesses in cases involving promoting prostitution. Id. at 1284—85. It provides no support for the majority's contention that reimbursement is not "profit[ing] from prostitution." On the contrary, the legislative history shows that Ibarra's acts were intended to fall within the statutory definition.

The subsequent amendments to HRS § 712-1201(2) in 2021 also conflict with the majority's interpretation. Keliipuleole v. Wilson, 85 Hawaiʻi 217, 225, 941 P.2d 300, 308 (1997) ("A court may look to 'subsequent legislative history or amendments to confirm its interpretation of an earlier statutory provision.'") (quoting Franks v. City & Cnty. of Honolulu, 74 Haw. 328, 340 n.6, 843 P.2d 668, 674 n.6 (1993)). A 2021 amendment defined "profits from prostitution" as accepting or receiving "money, anything of value, or other property pursuant to an agreement or understanding with any person whereby the person participates or is to participate in the proceeds of prostitution activity." HRS § 712-1201(2) (2021) (emphasis added); 2021 Haw. Sess. Laws Act 68, §5 at 208-09. If profiting requires "an excess of returns over expenditure," as the

majority suggests, and the statute encompasses "anything of value," the courts would presumably need to offset the proceeds of prostitution against any money, property, goods, or services that the complaining witness received from the defendant to determine whether the defendant "profit[ed]." HRS § 712-1201(2). This might require us to calculate whether the monthly earnings of a complaining witness exceed the market value of a room provided to her.[8] Respectfully, I do not believe the legislature intended to require such an accounting.

C. The Majority's Reading of HRS § 712-1201(2) Risks Creating a Safe Harbor for Traffickers

While the majority's interpretation of HRS § 712-1701(2) would result in Ibarra's acquittal, that approach risks making it more difficult to prosecute traffickers who coerce their victims using loans.[9] Traffickers employ a variety of

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[8] This also requires weighing the value of intangibles, such as the "safety" that Ibarra's presence gave CW.

[9] I acknowledge that a trafficker's exploitation of their victim prior to making a profit might nonetheless fall under the definition of "advancing prostitution." HRS § 712-1201(1) (Supp. 2021) reads:

> A person "advances prostitution" if the person knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons for prostitution purposes, permits premises to be regularly used for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution . . . .

But the fact that trafficking conduct may be captured under "advances prostitution" is not a good argument for reading the definition of "profits from prostitution" narrowly. The legislature crafted two

business models to keeping their victims tethered to them financially.[10] Often, the targets of traffickers have a pressing need for money, lodging, for illicit substances, or to cross a border.[11] The trafficker provides funds or assistance, and the trafficked victim agrees to repay the trafficker from the proceeds of the victim's prostitution.[12] However, the loan proves prohibitively difficult to repay, and the victim is trapped in a coercive dynamic.[13]

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definitions that require proof of different facts, in order to give multiple evidentiary avenues to prosecute trafficking. See HRS § 712-1701 (Supp. 2021). We should not assume that the two do not overlap.

In this case, the circuit court found that the defendant's conduct did not constitute "advance[ing] prostitution" and the State did not appeal, so the issue of what constitutes "advance[ing] prostitution" is not before us.

[10] See John C. Richmond, Human Trafficking: Understanding the Law and Deconstructing Myths, 60 St. Louis U.L.J. 1, 33 (2015).

[11] Vanessa Bouché & Madeleine Bailey, Drug-Based Coercion and Sex Trafficking: Bridging the Legal Disconnect, 109 Ky. L.J. 671, 680 (2021) (traffickers commonly use drugs to lure in persons with an established addiction or to entice people without a prior addiction); Michael J. Frank & G. Zachary Terwilliger, Gang-Controlled Sex Trafficking, 3 Va. J. Crim. L. 342, 385-92 (2015) (pimps may coerce victims through victims' dependence on illicit substances, or may demand repayment for smuggling a victim across a border); Amanda Walker-Rodriguez, The Crime Next Door: An Examination of the Sex Trafficking Epidemic in the United States and How Maryland Is Addressing the Problem, 41 U. Balt. L.F. 43, 60-61 (2010) (traffickers commonly control their victims by creating a debt based on the cost of travel, room, and board).

[12] Richmond, supra note 10, at 33; Walker-Rodriguez, supra note 11, at 60.

[13] Walker-Rodriguez, supra note 11, at 61-62 ("The trafficker creates an unrealistic debt, which he claims the victim owes him. The victim rarely receives any money; instead, the trafficker handles the money and deducts the victim's earnings from her debt.").

Respectfully, I believe that HRS § 712-1201(2) was intended to target all those who have an "agreement or understanding" to participate in the proceeds of another person's prostitution, including when those proceeds were paid in reimbursement of a loan. Ibarra fronted CW money that Ibarra understood would be repaid through prostitution. Though she was acting as a prostitute during her own dates, she was also acting as a trafficker with respect to CW's activities. Because Ibarra acted as a trafficker, HRS §§ 712-1201(2) and 712-1203 criminalize her conduct.

I do not believe that HRS §§ 712-1201(2) and 712-1203 require weighing whether the accused has successfully recouped an initial investment and has experienced a net gain. The legislature crafted its definition of "profits from prostitution" to avoid the need for this type of accounting. I would hold that a person is "profit[ing] from prostitution" under the legislature's definition if, "pursuant to an agreement or understanding," they accept or receive money from another's prostitution, even in reimbursement. Ibarra's conduct falls within this definition, and there is substantial evidence supporting her conviction.

IV. CONCLUSION

For these reasons, I respectfully dissent, and would affirm the judgment of the ICA.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama