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NO. CAAP-25-0000091

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
RAY G. DICION, also known as Ray Dicion,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CPC-24-0000813)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, Hiraoka and Guidry, JJ.)

Defendant-Appellant Ray G. Dicion (**Dicion**) was convicted of Sexual Assault in the Fourth Degree, in violation of Hawaii Revised Statutes (**HRS**) § 707-733(1)(a) (Supp. 2016)[1] (**Count 1**), and Attempted Sexual Assault in the Fourth Degree, in

[1] HRS § 707-733(1)(a) provides,

> (1) A person commits the offense of sexual assault in the fourth degree if:
> (a) The person knowingly subjects another person, not married to the actor, to sexual contact by compulsion or causes another person, not married to the actor, to have sexual contact with the actor by compulsion[.]

violation of HRS §§ 705-500 (2014)[2] and 707-733(1)(a) (**Count 2**). Dicion appeals from the "Judgment of Conviction and Sentence" (**Judgment and Sentence**) entered by the Circuit Court of the First Circuit (**circuit court**)[3] on January 22, 2025. For the reasons set forth herein, we affirm.

Dicion raises three points of error on appeal, contending that: (1) "[t]he definition of 'sexual contact' in [HRS] § 707-700[(Supp. 2024], as applied to Dicion, is unconstitutionally vague," and this definition "fails to provide sufficient notice that the touching of another's sexual or other intimate parts through a blanket is prohibited"; (2) "[t]he evidence is insufficient to support Dicion's conviction in Count

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[2] HRS § 705-500, which sets forth the offense of criminal attempt, provides,

> (1) A person is guilty of an attempt to commit a crime if the person:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[3] The Honorable Clarissa Y. Malinao presided.

2 as there was insufficient evidence that Dicion had the specific intent to place his hand on the complaining witness's [(**CW**)] genitals"; and (3) "[t]he [circuit] court erred when it selected replacement jurors when Dicion was not in the courtroom and denied his request to re-draw the replacement jurors and his subsequent motion for a new trial."

Upon careful review of the record, briefs, and relevant legal authorities, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Dicion's contentions of error as follows:

(1) Dicion contends that "[s]exual contact," as defined by HRS § 707-700, is unconstitutionally vague because it does not provide sufficient notice of the prohibited contact. HRS § 707-700 defines sexual contact as,

> **any touching**, other than the acts of "sexual penetration", **of the sexual or other intimate parts of another**, or of the sexual or other intimate parts of the actor by another, whether directly or **through the clothing or other material intended to cover the sexual or other intimate parts**.

(Emphasis added.) Dicion contends that a person of ordinary intelligence would not reasonably interpret the plain meaning of "clothing" to include a "blanket," and that HRS § 707-700 is ambiguous as to whether "other material intended to cover the sexual or other intimate parts" includes bedding or a blanket.

Dicion contends that, given the alleged ambiguity, the phrase "clothing or other material intended to cover the sexual

or other intimate parts" should be interpreted under the rule of lenity. See State v. Kalani, 108 Hawaiʻi 279, 288, 118 P.3d 1222, 1231 (2005) ("Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity. Under the rule of lenity, the statute must be strictly construed against the government and in favor of the accused." (cleaned up)).[4]

We apply the following principles "[w]hen confronted with a constitutional challenge of a penal statute on the grounds of vagueness":

> **The constitutionality of a statute is a question of law which is reviewable under the right/wrong standard.** Additionally, where it is alleged that the legislature has acted unconstitutionally, this court has consistently held that **every enactment of the legislature is presumptively constitutional**, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable

[4] Dicion relatedly challenges the circuit court's conclusions of law (**COLs**) 5, 6, and 7, which are set forth in its February 24, 2025 "Findings of Fact[(**FOFs**)], [COLs,] and Order Denying Motion for Judgment of Acquittal and Denying Motion for New Trial" (**February 24, 2025 FOFs/COLs/Order**), as follows:

> 5. Pursuant to [State v.]Wheeler,[121 Hawaiʻi 383, 219 P.3d 1170 (2009),] the Court first looks to the plain language of the statutory definition and finds the statutory language is plain and unambiguous. To give effect to its plain and obvious meaning of [HRS] §[]707-700 is to include a blanket as "other material intended to cover the sexual or other intimate parts." To grant a Motion of Judgment of Acquittal on the basis that the blanket covering a fully clothed person whose sexual or other intimate parts are being touched over the blanket or an attempt to touch sexual or other intimate parts over the blanket would lead to absurd results.
>
> 6. Pursuant to HRS §[]1-15, "every construction which leads to an absurdity shall be rejected."
>
> 7. An ordinary reading of HRS § 707-700 gives sufficient notice to a reasonable person that blanket is "other material intended to cover the sexual or other intimate parts." Thus, the statute cannot be said to be unconstitutionally vague.

> doubt. The infraction should be plain, clear, manifest, and unmistakable.

State v. Alangcas, 134 Hawaiʻi 515, 524, 345 P.3d 181, 190 (2015) (emphasis added) (citation omitted). "Where possible, a penal statute will be read in such a manner as to preserve its constitutionality," and "[a] statute will not be held unconstitutional by reason of uncertainty if any sensible construction embracing the legislative purpose may be given it." Id. at 524-25, 345 P.3d at 190-91 (citation omitted).

> [A] criminal statute is void for vagueness unless it: 1) gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly, and 2) provides explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.

Kalani, 108 Hawaiʻi at 287, 118 P.3d at 1230 (citation omitted).

As defined by HRS § 707-700, "[s]exual contact" includes the touching of another's intimate parts through "clothing or other material." Although "clothing" is not expressly defined, we "may confirm the ordinary meaning of statutory terms by resort to extrinsic aids, such as dictionaries and our case law." Id. at 284, 118 P.3d at 1227 (citation omitted).

We conclude that a "person of ordinary intelligence" would have "a reasonable opportunity to know" that touching CW's sexual or other intimate parts through a blanket constituted touching through "other material." See id. at 287, 118 P.3d at

1230 ("[N]o more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." (cleaned up)). The term "[s]exual contact," as applied to include touching through "other material intended to cover the sexual or other intimate parts," is therefore not unconstitutionally vague. Dicion's contention lacks merit.

(2) Dicion contends that, with regard to Count 2, there was insufficient evidence to demonstrate that he had "specific intent to place his hand on [CW's] genitals" to support his conviction for Attempted Sexual Assault in the Fourth Degree. We apply the following standard to our review of Dicion's contention:

> [E]vidence 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 same standard applies whether the case was before a judge or jury. 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. Brown, 157 Hawaiʻi 354, 366, 577 P.3d 1045, 1057 (2025) (citation omitted). "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. (cleaned up). Deference is given to triers of fact "to determine credibility,

weigh the evidence, and draw justifiable inferences of fact from the evidence adduced." Id. (citation omitted).

CW testified at trial that she went to sleep on the night of May 28, 2024 in underwear, sweatpants, and a "regular T-shirt." While lying flat on her back, and covered by a blanket, she could feel breathing in her right ear. She felt a hand[5] "[g]liding across [her] chest" or her "breast area," going over her nipples, and "gliding down towards [her] vagina area, stopping right . . . between [her] bellybutton and [her] vagina area." The touching went on for "like ten, twenty minute[s]" and "[i]t felt really long to [CW]." Dicion's "whole hand" was on top of CW's blanket, and the touching was through the blanket. CW felt "[Dicion's] legs across [her] legs," and "dry humping up on [her] right side."

CW's father testified that while going outside to smoke cigarettes, he "had a weird feeling." He turned on the hallway light, which lit up the sleeping area his daughters shared, and saw Dicion lying next to CW. He saw Dicion with his arms around CW, with Dicion's hand slowly "going in a downward direction." CW's father was not certain how far down Dicion's

[5] CW testified that the lights were off and she could not tell who was touching her until "[her] dad first turned on the light," and "came to pull [Dicion] off" the bed. At that time, CW saw who was lying next to her. CW testified that she "was asleep" when Dicion got into her bed, that she woke up "just a little bit" when the touching occurred, and "fully woke up" when her father pulled Dicion off the bed.

hand went because he "just reacted . . . as quick as [he] could," but he believed Dicion's hands went over CW's nipples, and Dicion was "cuddled up to [CW]" with Dicion's legs bent and groin area against "[CW's] butt area." CW's father "rushed towards [Dicion]" and began "hitting" and "wrestling with [Dicion]."

Dicion testified that he got into CW's bed to "get closer to her," and to "congratulate" her on her high school graduation. He further testified that his body was "leaned up" and a "little bit on" CW's bed, his feet were not on the bed, and that he did not touch CW anywhere other than on her right shoulder. Before he could congratulate CW, "the light came on" and CW's father "came attacking [him]." Dicion testified that CW had a blanket covering her body, and that he did not touch CW on the "nipples," "stomach area," "crotch area," or "genital area."

On this record, we conclude that the jury could have reasonably inferred, from CW and her father's testimony, that Dicion took a "substantial step in a course of conduct intended to culminate in" the placement of his hand on CW's genitals. CW testified that Dicion's hand moved down her chest towards her "vagina area," stopping above her vagina. CW's father testified that Dicion's hand was on CW, and moving over her nipples in a "downward" direction. Although Dicion's testimony conflicted

with that of CW and CW's father, "it is for the finder of fact to assess the credibility of witnesses . . . and it may accept or reject such testimony in whole or in part." State v. Bailey, 126 Hawaiʻi 383, 405, 271 P.3d 1142, 1164 (2012) (cleaned up). We conclude that, viewed in the light most favorable to the prosecution, there is sufficient evidence in the record to support Dicion's conviction on Count 2, Attempted Sexual Assault in the Fourth Degree.

(3) Dicion contends that the circuit court erred by choosing "replacement jurors" outside his presence, in violation of Hawaiʻi Rules of Penal Procedure (**HRPP**) Rule 43, and by denying his subsequent motion for a new trial.[6] Dicion contends that this infringed upon his constitutional right to be present in court "at all stages of trial." On this basis, Dicion contends that the circuit court erred in denying his request to

[6] Dicion relatedly challenges COLs 10 and 11, set forth in the February 24, 2025 FOFs/COLs/Order, as follows:

> 10. The random drawing of five prospective jurors by the clerk of the court, to replace the preselected jurors who did not appear for jury duty service, satisfied HRS §[]635-26.
>
> 11. During voir dire, both Counsels had a full opportunity to question the prospective jurors for any bias or prejudice in the presence of [Dicion]. The Court does not find that the selection of five jurors, at random, outside the presence of [Dicion] caused prejudice or substantial detriment to [Dicion] that would warrant a new trial in the interests of justice.

(Footnotes omitted.)

redraw the new prospective jurors in his presence, and his subsequent October 18, 2024 motion for a new trial. We review questions of constitutional law de novo under the right/wrong standard. State v. Vaimili, 135 Hawaiʻi 492, 499, 353 P.3d 1034, 1041 (2015).

"[HRPP] Rule 43 . . . codifies a defendant's constitutional right to be present at trial, as well as exceptions to the defendant's continued presence." Id. at 501, 353 P.3d at 1043 (citation omitted). HRPP Rule 43 provides, in relevant part,

> **(a) Presence required. The defendant shall be present** at the arraignment, at the time of the plea, at evidentiary pretrial hearings, **at every stage of the trial including the impaneling of the jury**[7] and the return of the verdict, and at the imposition of sentence, **except as otherwise provided by this Rule.**
>
> **(b) Continued presence not required.** The further progress of a pretrial evidentiary hearing or of the trial

[7] HRS § 635-26 (2016) defines the "[i]mpaneling" of a jury, as follows:

> (a) At the trial of any cause requiring a jury in any circuit or district court, **the clerk of the court shall draw a jury by lot, to the number of twelve, from the box containing the names of persons who have been duly summoned** to attend as trial jurors who are not excused from attendance. **If any of the twelve are challenged and set aside, the clerk shall continue to draw by lot from the box until twelve impartial jurors are obtained,** who then shall be sworn as the jurors for the trial of the cause. If so directed by the court, additional jurors shall be drawn and impaneled to sit as alternate jurors.
>
> (b) Upon the stipulation of the parties, the jury may consist of a number less than twelve.

(Emphasis added.)

> to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the hearing or trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial); or
>
> (2) engages in conduct which is such as to justify exclusion from the courtroom.

(Emphasis added.)

Here, the circuit court conducted jury preselection on October 4, 2024 with Dicion present. The circuit court preselected jurors 65, 69, 47, 36, 15, 70, 44, 21, 41, 42, 32, and 57. Jurors 69, 15, 38, 21, and 32 did not appear on October 7, 2024 for jury selection and the first day of trial. The circuit court proceeded as follows:

> THE COURT: Counsels, we are here for the start of jury trial. The court would like to report on record that division staff indicated of the 70 prospective juror[s] summoned to appear for Mr. Dicion's trial this morning, there were 21 are [sic] not present. One of the twenty are excused. And of the twenty, five were not present of the preselected [jurors].
>
> And, Mr. Dicion, your attorney can lay his objections. But **before you were brought into court the division staff replaced those five no-shows with a random pulling to fill them in with projected [sic] jury.**
>
> So, for example, in the following chair number 2, juror 69 was a no-show this morning. He was replaced with juror -- prospective juror 43.
>
> Chair number 5, juror 15, was a no-show this morning. Replaced by prospective juror number 3.
>
> Chair number 7, juror 38 was a no-show this morning, replaced by prospective juror 62.
>
> In chair number 8, prospective juror 21 was a no-show. Replaced by prospective juror number 52.
>
> And lastly, for the jury pre-selection, juror 32 in chair 11 was also a no-show this morning. And replaced by juror number 19.
>
> [Defense counsel], do you need a moment to speak with Mr. Dicion for you folks to lay out any particular objection at this point?

[DEFENSE COUNSEL]: No, Your Honor. I'm actually ready to lay that out.

THE COURT: Go ahead.

[DEFENSE COUNSEL]: Thank you. So, Your Honor, **these five names that were drawn to replace jurors who did not appear this morning, that was done before my client came into the courtroom this morning.** So he was still at cell block at the time. And **so he did not witness these additional names being drawn. And so I would object to that.** He was present for the other seven names being drawn last -- it was on Friday. But not for these five jurors.

So along with objecting then, I would ask that these five no-show jurors from today, that we just re-select the five replacements, since Mr. Dicion is now in the courtroom, so that he can witness that portion of the jury selection process.

THE COURT: Just to clarify. And I'll get [the State's] position as to that. [**Defense counsel**], **you were present in the courtroom when the division staff selected the replacements, correct?**

[DEFENSE COUNSEL]: **I was, but not Mr. Dicion.**

THE COURT: Understood. **And Mr. Dicion [sic] you're indicating to the court [Mr. Dicion] has an objection that the division staff randomly replaced these jurors, because he was not present?**

[DEFENSE COUNSEL]: Yes.

THE COURT: **But he's present now.**

[DEFENSE COUNSEL]: **He's present now, right.**

THE COURT: And has been informed of this. And he continues to object?

[DEFENSE COUNSEL]: Well, **it's just that the drawing of these five names to replace the no-shows this morning I would argue is part of the jury selection process that the defendant has the right to be present for. So while he's informed of these replacements right now, he was not present at the time their names were drawn.** So --

THE COURT: [State]?

[STATE]: Your Honor, at the most it would be a harmless error. The [S]tate would leave it to the court though to decide whether or not to re-draw.

THE COURT: Thank you. At this time, [Defense counsel], your objection is noted on behalf of your client. The court will respectfully deny that. And we will proceed to jury pre-selection -- excuse me -- individual voir dire

> to the jurors who yet -- who answered yes to any one of the three questions on the survey.

(Emphasis added.)

Dicion moved for a new trial on October 18, 2024, on the ground that he was not present in the courtroom during the preselection of new prospective jurors. The circuit court orally denied the motion on January 22, 2025, and subsequently entered the February 24, 2025 "Findings of Fact, Conclusions of Law[,] and Order Denying Motion for Judgment of Acquittal and Denying Motion for New Trial."

Dicion's sole contention is that, although his counsel was present, his own absence from the courtroom during the random selection of the new prospective jurors violated his right to a fair trial. Pursuant to HRPP Rule 43, Dicion has the right to be present at "every stage of the trial." In Vaimili, the Hawaiʻi Supreme Court held that "for the purposes of HRPP Rule 43, trial 'commences' when prospective jurors are administered an oath prior to voir dire, at any authorized location for court proceedings." 135 Hawaiʻi at 503, 353 P.3d at 1045. Here, the new prospective jurors were preselected prior to the circuit court clerk's administering of an oath, and prior to any voir dire examination. Thus, Dicion's rights were not violated by the preselection of the new prospective jurors.

Moreover, even assuming error, we conclude that such error would be harmless at most. See HRPP Rule 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Dicion contends only that his absence during the preselection of the new prospective jurors violated his right to a fair trial. He did not argue below -- and he does not argue on appeal -- that the method utilized by the circuit court in selecting the new prospective jurors was non-compliant with HRS § 635-26 (2016), or that it otherwise violated his right to a fair trial. The record reflects that Dicion was present in court during every other part of the jury selection process -- including during the circuit court clerk's administering of the oath to jurors, voir dire, peremptory challenges, and the swearing in of the empaneled jurors. As the circuit court found, counsel for both sides "were able to exercise voir dire and question the prospective jurors as to whether they were able to remain impartial, open minded and fair to both parties, including [Dicion] . . . if they were to be selected for trial."

Dicion's contention that he was denied a fair trial lacks merit.

For the foregoing reasons, we affirm the Judgment and Sentence.

DATED: Honolulu, Hawaiʻi, November 23, 2026.

On the briefs:

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/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Kimberly T. Guidry
Associate Judge