

DISSENTING OPINION OF ACOBA, J.,  
WITH WHOM RAMIL, J., JOINS

I would vacate the judgment, remand the case, and instruct the first circuit court (the court) to enter a judgment of acquittal by reason of physical or mental disease, disorder, or defect excluding penal responsibility and to render an appropriate post acquittal order. See Hawai i Revised Statutes (HRS) § 704-400 (1993). The (1) uncontroverted testimony of the wife and children of Defendant-Appellant Orlando Mendoza (Defendant), (2) Defendant s mental health history, (3) reports of the Hawai i State Hospital (HSH) staff that observed Defendant, and (4) two of the three-member court-appointed panel opinions constituted, in my view, more than the preponderance of the evidence necessary to prove Defendant s affirmative defense that he lacked substantial capacity to [1] appreciate the wrongfulness of [his] conduct or [2] . . . conform [his] conduct to the requirements of law. HRS §704-400 (1993).

Dr. Douglas Cooper opined that [a]t the time of his alleged conduct [Defendant] was substantially cognitively and volitionally impaired as a result of mental illness. Dr. John Wingert determined that [Defendant] was substantially impaired at the time of the alleged conduct by [Schizophrenia, Paranoid

Type, and] that he lacked the capacity to appreciate the wrongfulness of his conduct and the capacity to conform his conduct to the requirements of law. While Defendant was required to prove his defense by a preponderance of the evidence, Plaintiff-Appellee State of Hawaii (the prosecution) bore the ultimate burden of proving Defendant guilty beyond a reasonable doubt and, thus, of disproving that Defendant lacked such substantial capacity. On this record, I do not believe the evidence was substantial, that is that reasonable minds would accept [the evidence] as adequate to support the conclusion, that Defendant was guilty as charged. State v. Mitchell, 94 Hawaii 388, 393, 15 P.3d 314, 319 (2000) (citations omitted); see also State v. Lima, 64 Haw. 470, 475, 643 P.2d 536, 539 (1980).

Furthermore, the HSH staff that treated Defendant reported to the court that

[i]n summary, at this time we have determined that [Defendant] is fit to proceed, but that there is a question in regards to his degree of responsibility at the time of the assault. As mentioned above, he may have been suffering from a state of diminished capacity secondary to his medications and psychiatric illness.

In arriving at that conclusion the staff consulted

psychopharmacological psychiatrist Dr. Ahmed, neuropsychologist Dr. Fujii, and forensic psychiatrist Dr. Smith. Members of the

HSH staff and their consultants should have been called as witnesses at trial to testify to the interaction of Defendant's mental illness and the medication given him. The failure to do so constituted, I believe, ineffective assistance of counsel. But even in the absence of such testimony, the proof adduced in this record was simply insufficient to sustain the prosecution's burden, and on that basis the law requires entry of a judgment of acquittal by reason of physical or mental disease, disorder, or defect excluding penal responsibility. See HRS § 704-400 (1993).

I would remand for a determination by the court as to the appropriate disposition of Defendant, as is required, including commitment to a mental health institution. See HRS § 704-411 (1997).