

NO. 24482

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
PATRICIA ANN JENNINGS, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 00-01-0663(3))

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

\_\_\_\_\_ Defendant-Appellant Patricia Ann Jennings (Defendant or Jennings) appeals from the July 9, 2001 judgment, entered in the Circuit Court of the Second Circuit by Judge Joseph Cardoza, following a jury trial, convicting her of Theft in the Second Degree, Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993)<sup>1</sup>. Defendant was sentenced to probation for five years. Two of the terms and conditions of probation required her (a) to be confined for seven months with credit for time served and (b) to pay restitution in the amount of \$1,552.61 to the Hyatt Regency, Maui (Hyatt).

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 708-831(1)(b) (1993) states, "A person commits the offense of theft in the second degree if the person commits theft: . . . [o]f property or services the value of which exceeds \$300[.]"

HRS § 708-830(4) (1993) states that a person commits theft if

[a] person intentionally obtains services, known by the person to be available only for compensation, by deception, false token, or other means to avoid payment for the services. Where compensation for services is ordinarily paid immediately upon the rendering of them, absconding without payment or offer to pay is prima facie evidence that the services were obtained by deception.

Defendant contends that (1) the trial court abused its discretion in denying the motions for a mental examination of Defendant made by Plaintiff-Appellee State of Hawai'i (the State) and (2) the attorney representing her (Defense Counsel) provided ineffective assistance of counsel.

We affirm.

#### BACKGROUND

Defendant was a guest at the Hyatt from December 3, 2000, to December 8, 2000. During her stay at the Hyatt, Defendant enjoyed hotel accommodations and other hotel services but did not pay for most of them. Defendant tried to pay for them with a Bank of America VISA Check Card lacking sufficient funds to pay the full amount of the debt owed.

#### A.

##### State's Motions for Mental Examination

The trial commenced on Monday, April 2, 2001. Prior to the trial, on Wednesday, March 28, 2001, the State had filed a motion for mental examination pursuant to HRS § 704-404 (1993)<sup>2</sup>.

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<sup>2</sup> HRS Chapter 704 (1993) states, in relevant part, as follows:

**§704-400 Physical or mental disease, disorder, or defect excluding penal responsibility.** (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

(continued...)

The State requested an examination of Defendant

to determine whether the Defendant is fit to proceed and whether the Defendant was suffering from a physical or mental disease, disorder, or defect that would have affected the Defendant's ability to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law at the time of the offenses charged in the Complaint on file herein.

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<sup>2</sup>(...continued)

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

**§704-401 Evidence of physical or mental disease, disorder, or defect admissible when relevant to state of mind.** Evidence that the defendant suffered from a physical or mental disease, disorder, or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is required to establish an element of the offense.

**§704-402 Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense; form of verdict and judgment when finding of irresponsibility is made.**

(1) Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense.

(2) When the defense provided for by subsection (1) is submitted to a jury, the court shall, if requested by the defendant, instruct the jury as to the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

(3) When the defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the verdict and the judgment shall so state.

**§704-404 Examination of defendant with respect to physical or mental disease, disorder, or defect.** (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant.

In his declaration, the Deputy Prosecuting Attorney (Prosecutor) stated, in relevant part, as follows:

5. That the Defendant informed Detective Arthur Dadez that she has been living on Social Security since 1993 or 1994 when she was diagnosed with schizophrenia;

6. That the Defendant informed Detective Arthur Dadez that she was "in prayer" with God, and God told her to go to Hawaii;

7. That the Defendant repeatedly informed Detective Arthur Dadez that she was "in prayer and God was leading her down the path"; and

8. That the Defendant informed Detective Arthur Dadez that she does not hear voices in her head but does talk to God all the time.

Defense Counsel did not file a written opposition to the motion for mental examination. At the hearing on April 2, 2001, Defense Counsel objected to the motion on the ground that Defendant had been in custody for "a hundred and twenty-some days" and "knowing that she has a right to be tried within 180 . . . days[,]" was fit to proceed, and was ready for trial.

Defense Counsel advised the court, in relevant part, as follows:

I have been able to talk to her about her case. She understands the system. She understands what the role of the prosecutor is. She understands what the role of the judge [is]. She understands my role. We have been able to talk about the facts of the case effectively, so that eliminates any possibility that we are looking at a fitness to proceed problem.

You can see that [Defendant] here is a coherent person who understands the situation she's in. She understands the rights that she has, and she understands the whole situation as a whole, and she is able to help in her own defense.

Now, the state wants us to go to the second level of saying, "Well, okay, even if she's fit to proceed, what about the mental issue of culpability?"

And what we have to look at is that's her right to bring up if she wants to, and we are not bringing that up. We are not blaming this case on a mental disability. We are saying we are -- what we are saying is we want a trial and we want to hear what the evidence is, and if [Defendant] wants to testify, she has a right to testify.

Now, we are not blaming her actions on a mental disability. We are not saying that she's not culpable because she is affected by a mental diagnosis. What we want is a trial, and we want a trial as soon as we can. We want a speedy trial.

For them to come up on the hundred and twentieth day, knowing that she has a right to be tried within 180, is just -- it almost comes down to vindictiveness, knowing that they gave her an offer -- if she pled to what she's charged with, that she might be looking at only 30 days, and now they are almost increasing the punishment just because we turned down a deal and raised our right to have a trial and have a speedy trial.

And your Honor, we strongly object to this motion.

THE COURT: [Defendant], you have heard what your attorney had to say to the court; is that correct?

THE DEFENDANT: Yes.

THE COURT: Do you understand everything that your attorney has said to the court?

THE DEFENDANT: Yes, I do.

THE COURT: Do you agree with everything he has said?

THE DEFENDANT: Yes, I do.

. . . .

[PROSECUTOR]: . . . .

You know, Judge, . . . I would ask the defense attorney to make some type of representation to the court if [Defendant] is currently taking her medication for schizophrenia. I know this issue was discussed with Detective Dadez, and she had told him she had stopped taking her medication.

The [S]tate has concerns, Judge, and pursuant to 704-404, the [S]tate has reason to believe that this . . . mental issue will come up during the course of the trial, and the time to take care of it is before the trial. I think this should have been done by the defense attorney, but as an officer of the court, I had to come forward and file this motion.

. . . .

[DEFENSE COUNSEL]: Your Honor, . . . the conversation with [Defendant] is that as far as the medication, from what she tells me is that she was ordered to take medication, but the symptoms that she showed were not resultant to a physical manifestation.

She talked with her doctor about stopping the medication, and they had agreed together that they were going to stop taking the medications, not that she's just stopped taking the medication, as far as to clear up that aspect of the issue.

. . . .

. . . Judge, what I was going to say is that the manifestations of any illness came after a sexual assault, and that it wasn't manifestations of any particular problem with her mentally. She did -- was given medication, however, and counseling.

However, after the medication and counseling, and with the doctor's advice, that they stopped using the medication, so she's no longer taking medication, and that's the basis of the statements made to the police officer.

THE COURT: Do you agree with those representations, [Defendant]?

THE DEFENDANT: Almost all. The last part is that I did not ask permission to stop taking it, but I did discuss with my physician that they didn't change my ability to relate or function or anything, so I felt that it was best for me not to use the medication, and I have performed identical to the -- at the time of taking the medication and not taking the medication.

There's been no change in my emotional state at all, so --

THE COURT: All right. Thank you very much.

THE DEFENDANT: You're welcome.

. . . .

THE COURT: . . . I will note for the record that as to the question of fitness to proceed, [Defendant] seems to be very much in tune with what is taking place in court and seems to have a very clear understanding of what is taking place.

I don't see -- frankly, I don't see any signs, nor have I any at any time that she's appeared before this court seen any signs of any illness which would have any bearing on her fitness to proceed.

With respect to the request for the mental examination, the defense has indicated that they have no intention of raising the Chapter 704 defense, which is an affirmative defense under our statutes requiring the defendant to prove by a preponderance of the evidence the defense of physical or mental disease, disorder or defect excluding responsibility.

I essentially have two or three concerns with respect to the motion, although I understand [the Prosecutor's] representations to the court.

The basis for the motion is one that existed actually at the time of the commencement of this action, and to have this motion presented to the court at this time -- while I don't view it as some form of misconduct on the part of the government, I at the same time have a defendant who seems to be thinking very clearly and who wants to have a trial and has no intention of raising this as a defense -- raising a Chapter 704 defense.

So I do have a concern with respect to timing as it relates to the court's criminal trial court action calendar, as well as the fact that this matter has been on the calendar for trial by jury for some time. And on that basis alone, given the defendant's current status, I would deny the motion.

Additionally, when I look at the statements, I do see a significant difference between being led by God to do something and being in prayer with God and doing something, and I think a lot of people speak in those terms. And I see it -- a difference there in terms of -- when I compare that to being directed by God to do something, although even that would not necessarily be -- would not be troubling to the court, or being ordered by God to do something, being ordered by some voice or something of that nature.

But in essence here what I have before me is a defendant who allegedly has made statements indicating that she had been in prayer and God was leading her to do certain things. That I do not see as a basis for a Chapter 704 motion, especially in light of all the facts and circumstances and representations having been made by the parties.

Accordingly, I will find that there is no basis for the grant of the motion with respect to the defense of physical and mental disease, disorder, or defect excluding responsibility, and the motion will be denied. I am going to ask [Defense Counsel] to prepare the appropriate order.

B.

Trial

The State presented three witnesses. The first witness to testify was the Hyatt's Director of Safety and Security, Randy Coope (Coope). On direct examination, Coope testified, in relevant part, as follows:

Q. And when you went to the room with Ms. Morris and [Defendant], could you tell us what occurred?

A. We both entered the room. I spoke with [Defendant], introduced myself, informed her that I was following up with the report that I received concerning the outstanding bill, asked her if she had means of payment on the bill. She stated that she did not.

Q. What else did she say concerning --

A. She said basically that it was in God's hands, and she was willing to wash dishes if that would be the case of settling the account.

Q. Does the hotel allow guests . . . who cannot pay their bill to wash dishes to work it off?

A. No.

Q. Now, did you give her the opportunity to pay in some other way if she could?

A. We did. I asked her if there was -- you know, if she had any other form of payment, credit card, a family member, somebody that could mail her or wire her the money.

She stated that, no, she did not have any other means.

Q. Did she ever tell you that this was an accident or this was a mistake or anything like that?

A. No.

The State's second witness to testify was the Hyatt's Front Office Manager, Jean Morris (Morris). She testified, in relevant part, as follows:

Q. And when she checked in, what type of credit card did she present?

A. Looks like a VISA.

. . . .

Q. And what was the discussion that you had with [Defendant]?

A. She had called because we had left her the message.

I said, "Yes, we had left previous messages for you. There is a balance on your account which we haven't had sufficient credit to obtain. Is there another credit card or form of payment that you would like to leave for the rest of the charges?"

And at that point she said, "I don't have another credit card, and no other way to pay you."



. . . .

Q. And what was the outstanding balance, approximately?

A. Well, it was approximately 1800, and we had already had 300 approval, so minus that, it was about \$1550.

. . . .

Q. And what's the next item that appears on the bill?

A. That was the payment for the amount that we had received on her credit card upon the first day of arrival.

Q. And that amount would be?

A. \$381.

Q. So following her five-day stay from December 3rd through December 8th, what was the outstanding balance that was owed the Hyatt?

A. \$1552.61.

During her testimony, Morris responded to two questions from the jury as follows:

THE COURT: . . .

The first question reads as follows: "Was the card used a credit or debit card?"

You may answer the question.

THE WITNESS: A lot of times -- like, I have a card that's a VISA, that is a check card, plus a credit card if need be. And you can utilize that for either a credit card charge or a debit charge, but it always comes out of the same account.

So we don't ever know whether it's a debit or a check card. We just hold a certain approval amount, and then at the end of the stay we put through that charge, if that's the card that they would like to use.

THE COURT: All right. The second question reads as follows. "Was the hotel aware of [Defendant's] balance on the card, and if so, why was she allowed to continue to charge on an empty card?"

You may answer the question.

THE WITNESS: Well, on the first evening when we realized that she did not have enough credit for the full two weeks of her stay, that's when we leave a voice mail to let her know that.

We don't ever like to harass our guests at the hotel. We like to give them ample opportunity to come down and settle their account without having to involve the police in any way.

It came to the point where five messages left that were -- went unanswered was too many. So when she finally did call down and I was able to speak with her, that's why I became involved, because I did not let her get off the phone until we actually received some form of answer for the amount of credit that she owed us, which was over \$1500 at that point.

Immediately thereafter, on recross examination, Defense Counsel asked Morris, in relevant part, as follows:

Q. She didn't make any representations that she was going to use this as a VISA card; right? Or a charge card?

A. Well, being as I wasn't there, the agent that works for me actually checked her in. Normally a guest would just hand us a credit card to settle their account.

I don't know what the conversation was that took place at that time.

The State's final witness was Detective Arthur Dadez.

Upon examination by the Prosecutor, Detective Dadez stated, in relevant part, as follows:

Q. And did she tell you how she paid for that \$140 that she purchased at Right Aid?

A. She used her VISA debit card.

. . . .

Q. Did she tell you how she paid for that \$85 bill to Best Western?

A. She utilized her VISA debit card.

. . . .

Q. And after checking out did she make any more purchases?

A. She wanted to get some candy, so she went to the Kmart there at Eureka, California, and she got some candy.

And also at the same time asked to get \$20 in cash.

Q. And how did she do that?

A. She used the VISA debit card.

. . . .

Q. Now, did she tell you why she decided to come to Hawaii?

A. Yes, she did.

Q. And what did she say?

A. She told me that she's in prayer and God is telling her to come to Hawaii.

. . . .

Q. How did she pay for that one-way ticket from San Francisco, California to Honolulu, Hawaii?

A. She presented her VISA debit card.

Q. Did she make any statement concerning how much that ticket cost in reference to how much she had on her debit card?

A. At the time she told me that she knew that the cost of the airline ticket would be more than the \$787 she would be receiving from the Social Security disability.

With the court's permission, Detective Dadez read to the jury Defendant's written statement as follows:

Being led by God to purchase tickets to Hawaii and purchase hotel stays, I believed provisions to do so was there. I am responsible for any problems incurred and will do utmost to repay. I'm sorry for any problem or inconvenience and hope for peaceful resolution and blessing.

Defendant was the only witness for the defense.

Defendant testified, in relevant part, as follows:

Q. Where were you on [November 29th, year 2000]?

A. I was at the Best Western in Eureka, California.

Q. Okay. At that time could you tell us what your financial situation was?

A. My bank account has monthly deposits of \$787, but there was no funds at that time in my bank account.

Q. Okay. Now, what do you use to access that bank account?

A. I use a bank card which has VISA on the front, but it's an ATM bank card.

. . . .

Q. Okay. Now, you said you checked into a Best Western?

A. Yes, I did.

Q. And how did you do that?

A. I checked in using my bank card, the same ATM card.

Q. Okay. And what happened?

A. It was approved, accepted, and I was allowed to have a room and I went to my room.

. . . .

A. I had dinner at the mall that was close by. . . .

I did some shopping at the Right Aid Walgreen's. It was a drug store that was in the mall that was near the hotel.

Q. Okay. And at that time what was your understanding of how much money was in your account?

A. My -- the account would register at zero.

. . . .

Q. When you left [the Best Western] did you leave under good standing?

A. Yes, I did.

Q. So your debit cleared?

A. Yes, it did.

Q. Was this a surprise to you?

A. Yes, it was.

Q. Why was that?

A. It was a surprise to me because this is the first time that this type of miracle has happened to me.

Q. Now, what was going on while you were at the Best Western?

A. I did a lot of prayer work. I talked to the Father. I watched a few movies. I went shopping.

And it was during my time that I was at the Best Western that I received instructions that I was coming to . . . Hawaii.

. . . .

Q. Okay. And this whole time these purchases were from your debit card?

A. That's correct.

Q. And what was your understanding of the amount of money that was in there?

A. It still would be zero.

Q. And was your card ever rejected at that point?

A. No, it was not.

. . . .

Q. Okay. And what did you do at the airport?

A. I purchased a ticket for Hawaii.

Q. Okay. How did you do that?

A. I used the ATM debit card.

Q. Okay. And was . . . your card approved?

A. Yes, it was.

. . . .

Q. To your knowledge on December 1st, was there any money that was supposed to be deposited in your account?

A. No.

. . . .

Q. Okay. When did you arrive in Honolulu?

A. I arrived in Honolulu at approximately 1:00 p.m. that same evening, the 1st.

. . . .

A. That was the Honolulu Airporter Hotel.

Q. Okay. Did you eventually go there?

A. Yes, I did.

. . . .

Q. And how much were the rooms there?

A. I believe it was \$82 per night.

Q. And how many nights did you book there for?

A. I stayed for two nights.

. . . .

Q. Did you spend any money on the 2nd?

A. Yes, I did. At the hotel I purchased breakfast. I purchased lunch. I purchased cocktails. I purchased this dress that I am wearing and the t-shirt that's underneath it.

Q. Okay.

A. And cigarettes.

Q. Did you put all of that on your debit card?

A. Yes, I did.

Q. Was your debit card ever rejected?

A. No. It was always approved.

. . . .

Q. Now, on December 3rd, what did you do?

A. . . . I went to the airport directly. I purchased on Hawaiian Air a one-way ticket to Maui, and I waited in the airport until the flight arrived and I boarded the plane and came here.

Q. Okay. You purchased that ticket using the debit card?

A. That's correct.

Q. And your card was approved?

A. Yes, it was.

. . . .

Q. And . . . how did you get to the Hyatt?

A. To the Hyatt, I started to get a taxi, one of the -- I checked to see if the Hyatt had a bus or anything that they ran to the hotel -- to the airport, but they did not, so I needed to check into getting other accommodations.

But while I was going through the process, I heard again, "You're not going to get to that hotel if you use a taxi or a bus." And I was talking to the Father. I always talk to him wherever I am, and I was told that the only way I was going to get to the Hyatt is if I rented a limousine.

So I rented a limousine that was waiting out front. I didn't look for anybody else and I got in the limousine and I told him the Hyatt, and he drove me out here.

. . . .

Q. Okay. How did you pay . . . .?

A. With the ATM debit card.

Q. Okay. Was it approved?

A. Yes, it was.

Defendant testified that she checked into the Hyatt with her debit card. She also testified about her following discussion with the front desk manager:

Q. And what was the discussion about?

A. The discussion was about my inability to pay and -- to pay the hotel bill, and if I had other sources or other means, family members, an employer who would front me the money until my next check, some other form of -- or some other assistance to pay.

. . . .

Q. Okay. What was your intention as far as that bill?

A. Well, I know that God would not have let me be there without backing me up, so my thought was that, well, maybe there is something for me to learn here, you know. Maybe the tension is something that I can learn as a therapist -- you know, there is something that I can do.

. . . .

Q. And . . . about your knowledge of the funds?

Would you like to explain to the jury about that?

A. He . . . kept saying that I knew that there were no funds available in my account, but the funds were always there in that account. Every time since I was led to use that card it had always worked.

The only time that I had not been able to use it was at the Hyatt, and that wasn't even one hundred percent. There were several instances where I still continued to purchase things at the Hyatt using that card because God has directed me to and the funds were available.

So I just wanted to clarify that when God has led -- God led me to do it, the funds were there, and I believed firmly that the funds would continue to be there.

I know that -- I don't know how to explain it any better.

At the conclusion of Defendant's testimony on direct examination, the following was stated:

[PROSECUTOR]: Judge, after hearing [Defendant's] testimony on direct exam, I am going to renew my motion for a mental examination. I think this proceeding should be suspended at this point.

The court heard the testimony. There were a number of things which caused the [S]tate great concern.

THE COURT: Let me shorten this up and say that although she made reference to her belief that God wouldn't let her be there without backing her up, I don't see any signs of mental illness here.

I mean, that's -- that's the way she sees it, that she was led there by God and that God would have backed her up. I mean, she's testifying. I mean, she's obviously quite intelligent and very articulate and very coherent. You know, whether that's a reasonable belief is -- I think is a matter for argument.

But I don't see any signs of any kind of mental illness, number one. And number two, . . . [t]he fact that someone says they believe that God always provides may or may not be reasonable under the law, and I think that's for you folks to argue to the jury about. But I don't think she's raising a mental defense by her testimony.

[PROSECUTOR]: When she is saying, "God has directed me to," Judge, doesn't that raise a mental defense?

Those were her specific words towards the end concerning the knowledge of the funds. She said, "God has directed me to do this. God led me to do it."

THE COURT: Are you raising a mental defense?

[DEFENSE COUNSEL]: No.

. . . .

[PROSECUTOR]: . . . It's not based upon fitness to proceed. It's based upon her, you know, mental state at the time of the offense.

THE COURT: All right. Well, that's . . . very clear to me that she's very fit to proceed.

. . . .

THE COURT: . . . .

I am hearing her say that she prays to God and she gets direction. She talks to the Father.

[PROSECUTOR]: And he is talking back to her.

THE COURT: And I am not hearing that as a mental disease, disorder or defect excluding responsibility.

Let's proceed.



On cross-examination by the Prosecutor, Defendant once again made reference to conversations with God, in relevant part, as follows:

Q. And [Defendant], I think you stated you received instructions on coming to Hawaii?

A. Yes, I did.

Q. And who did you receive instructions from?

A. The Father.

Q. When you say the Father, who are you referring to?

A. God.

Q. And what did God tell you to do?

A. Within 12 hours I was supposed to board a plane going to Hawaii.

Q. He was that specific, within 12 hours?

A. Yes, he was.

Q. Did he tell you anything else at that time when he told you within 12 hours to board a plane and go to Hawaii?

A. Not that I'm aware of, no.

Q. Where were you at that time when God was telling you this?

A. At the Best Western in Eureka.

. . . .

Q. And the flight was from Eureka to San Francisco, continuing on to Honolulu; is that correct?

A. That is true, yes.

Q. And you used your VISA debit card to purchase that ticket; is that correct?

A. Yes.

Q. And you purchased a one-way ticket; correct?

A. Yes.

Q. Was that also on the instructions of God, to purchase a one-way ticket?

A. Yes.

Q. He specifically told you one way?

A. I asked.

Q. And he told you one way?

A. One way.

. . . . .

Q. Did God tell you to book a two-week stay or did you do that on your own?

A. I was led again to do that.

Q. Okay. Tell us what you mean when you say you were led to do that.

A. I was in prayer the whole time, and the first time that I called, I said seven days. And while I was still sitting there and this was still going through, I'm listening. You know, what should I do? You know, is this good? Because I discuss major decisions and minor decisions with him.

And I heard a voice telling me, you know, no, don't do seven days. I want you to do the full 14 days. Don't do eight days. Excuse me. Do the full 14 days. And it was very firm and very clear.

. . . . .

Q. You went to the luau?

. . . . .

A. Yes, I did.

Q. Did you decide to do that on your own or did God tell you to do that?

Q. Okay. All right. This -- I believe that this was a gift to me and therefore everything that I wanted to do was permitted. I charged in-room dinner, I went to restaurants there, I shopped, and I talked to the Father different -- at various times, and he told me some things that he really wanted me to have, like the pair of sandals.

And so I don't know that I consulted with him on every single thing that I purchased or that I did on these lists, but I did feel like this was my ability to do and that I was -- and that it was approved with God.

. . . . .

Q. You just told us before you knew the account was zero; right? That you had no money in the account?

A. No. What I'm saying is that as we speak, I am starting to recall information that happened at that time. I -- this is the first time that we have discussed this particular -- that particular day, and things are starting to come back.

If you say something that sounds familiar, I can agree to it. If it doesn't sound familiar, I won't agree to it.

Q. Okay. So as we speak, you're starting to recall things you didn't recall previously; is that correct?

A. Yeah. Well, we haven't -- it's been four months now almost.

Q. Right. Is God talking to you as we speak right now?

A. You know, actually I am trying to pay attention to you, so --

Q. Is he trying to break in?

A. Actually, he's throwing in a few things, or at least helped me clarify a few things to you, so --

Q. So let me ask you again, [Defendant]. I am not sure if I got the answer here.

Did you tell Mr. Coope and Ms. Morris that you thought you had enough money in your account to pay the bill?

A. I told them that I thought the account would have covered the bill, is what I said.

Q. But you told us before you knew that there was no money in the account?

A. No. Miraculous means is how it was being paid for. It had been being paid for by miraculous means, and when I went to the Hyatt I expected the miraculous means to continue. I expected God to continue to pay for every charge that I had made.

And so when I talked to Mr. Coope and Ms. Morris, I told them that I expected the bill to be covered.

Q. By God?

A. By the account.

Q. Because God was miraculously putting money into the account?

A. This is true, but I did not tell them that it was God that was leading me.

Q. Okay. Was it your belief that you could make all these charges because God was putting money into your account?

A. That's the only way I could have made them.

. . . .

Q. [Defendant], before the break you were just telling us that you knew there were no funds from Social Security income in that account, but you believe God had put the funds into your account.

Did he tell you he put the funds into your account?

A. He was the one that told me to use my account, so -- it wasn't anybody else.

Q. Well, my question more specifically is: Did God tell you he put funds in your -- in that debit account?

Did he tell you that specifically?

A. Yes.

Q. He did?

A. Yes.

Q. Did he tell you how much he put into that account?

A. No. He said as long as I didn't check, there would be funds available.

Q. Those were God's words to you? As long as you didn't check, there would be funds available?

A. As long as I did not look at my checking account balance, I would have funds available to me.

Q. When did he tell you that?

A. That was on the 29th of November.

In his closing argument, Defense Counsel stated, in relevant part, as follows:

Now, when you say, okay, somebody is stealing, you gotta look at what's going on. Why are we going to call them a thief? What is the difference between somebody who is negligent or reckless about their financial situation, writing a check, not balancing their checkbook, spending beyond their means, which is done every day in this country.

Corporate America is in debt up to the trillions. Are they thieves? Are they ripping you off? Are they in jail? No. They are financially and fiscally irresponsible, and that's what [Defendant] was, . . . .

. . . .

Now, you know, and she testified that this debit card -- if it's on zero and you're at a store, you are going to be standing there looking like a fool with a piece of plastic and you ain't going to buy nothing. That's what a debit card is.

You hold it in your hand. You tell the person you want a piece of candy. They zip it through the machine, and it says, sorry, no funds.

But she had funds when she thought it was zero. She goes, she takes the \$20. They wouldn't have given her the \$20 if she was ripping Kmart off. She got the \$20. She went to the . . . airport.

Again, with that card on zero, she hands it to them. They zip it through, approved \$760 for a plane ticket.

Now, we might not agree with [Defendant], but in her mind she thought she was on zero and something miraculous was going on, so she continued in that train of thought. That is, that as long as this card works, then you will use it.

. . . .

She's not a thief. She's not stealing those people's services. She went there on zero. She gave them that card in good faith, and in good faith it was paid for.

. . . .

[DEFENSE COUNSEL]: Look at this deception, and look at it carefully, because you can see in the heart of a thief is deception. In her heart there was no deception going on.

She had a card. It had worked for her. She believed it was going to work. She handed it over. And the same process, used two other times that she had gone to hotels, they had zipped it through, and if there was money they would say that it was approved.

She did not with intent go to the Hyatt to deceive. She did not knowingly create or confirm the impression which was false. In her mind she believed at the end of this stay that that bill would be paid.

. . . .

. . . If you find that [Defendant] was reckless, if she was negligent, or even that she was reasonable to believe that God would provide, then you have to find her not guilty.

. . . .

[DEFENSE COUNSEL]: If you find that in her heart was a thief who was aiming to deceive, then find her guilty. But you will not find that, because you saw her on the stand.

We are asking for a not guilty. Thank you.

On April 4, 2001, the jury found Defendant guilty as charged.

#### DISCUSSION

HRS § 704-404(1) (1993) states as follows:

Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.

The State twice moved for a mental examination of Defendant. Defendant opposed, and the court denied, both motions. On appeal, Defendant does an about-face and contends that the court reversibly erred when it denied the State's motions. In other words, the alleged error is being presented on appeal by a party who invited it at trial.

The State contends that the court's denial of the State's motions for mental examination should be examined for plain error. Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2002), states that "the appellate court, at its option, may notice a plain error not presented." The interpretation of this rule has been a bit more expansive.

It is the general rule that evidence to which no objection is made may properly be considered by the trier of fact and its admission will not constitute a ground for reversal. It is equally established that an issue raised for the first time on appeal will not be considered by the reviewing court. Only where the ends of justice require it, and fundamental rights would otherwise be denied, will there be a departure from these principles.

State v. Kotis, 91 Hawai'i 319, 343-44, 984 P.2d 78, 102-03 (1999) (citations omitted).

We disagree with Defendant and the State. We conclude that Defendant is not permitted, at trial, to request a denial of the State's motions and then, on appeal, challenge the denial of the State's motions.

Pursuant to the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action. Judicial estoppel partakes of positive rules of procedure based on manifest justice and to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation. This doctrine prevents parties from playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation.

State v. Kanamu, No. 24075 (Haw. August 19, 2002) (2002 WL 1943738 (Hawai'i)) (citations omitted).

It is clear that Defendant was fit to proceed at the trial. When the State, at trial, renewed its motion for a mental examination, it stated that its motion was based on Defendant's "mental state at the time of the offense." Defendant, however, expressly did not assert a mental defense. Therefore, Defendant cannot now, on appeal, contend that the court erred when it did not provide her with a mental examination regarding her mental state at the time of the offense.

Moreover, nothing in the record indicates that Defendant's mental state was any different at the time of the offense than it was at the time of trial. Her "fitness" at the

time of trial demonstrates her "fitness" at the time of the offense. Defense Counsel's statements to the court when objecting to the State's pretrial motion for a mental examination establish that Defendant did not have a basis for asserting that a mental disease, disorder, or defect excluded responsibility. Defendant agreed with "[a]lmost all" of Defense Counsel's statements and the part she disagreed with did not change her lack of such a basis.

Defendant contends that she is the victim of the ineffective assistance of counsel. The standard of review of the trial court's decision on the question whether a defendant was the victim of the ineffective assistance of counsel is "whether viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." State v. Pacheco, 96 Hawai'i 83, 93, 26 P.3d 572, 583 (2001), quoting State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980) (citation omitted).

When an ineffective assistance of counsel issue is raised, "the defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: (1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence and (2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."



State v. Janto, 92 Hawai'i 19, 32, 986 P.2d 306, 319 (1999)

(citation omitted).

Defendant presents three reasons why Defense Counsel's assistance was ineffective. Defendant's first reason and her alleged

most prominent example of [Defense Counsel's] lack of skill, judgment, or diligence was his unilateral decision to forego the affirmative defense of mental irresponsibility under [HRS] Chapter 704 without any investigation into whether [Defendant's] diagnosis of schizophrenia and her decision to stop taking her medication rendered her without substantial capacity to either appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law at the time of the alleged offense.

As stated in State v. Kahalewai, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972) (citations omitted):

The constitutional right to the assistance of counsel in a criminal case . . . is satisfied only when such assistance is "effective." "Effective" counsel does not mean errorless counsel but counsel whose assistance is "within the range of competence demanded of attorneys in criminal cases."

. . . A primary requirement is that counsel must "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf[.]"

In Kahalewai, the court noted that defenses which are crucial to a defendant's case and go unraised will be examined in order to determine whether counsel's decisions were informed judgments or constitutionally inadequate preparation.

The issue of informed judgment, on which appellant places so much emphasis, is only relevant where the actions or inactions resulting from that judgment seem unreasonable. If this were not so, every criminal conviction would be vulnerable on appeal to the allegation or admission that trial counsel's choice of defenses or tactics, reasonable on the surface, had actually been made in gross ignorance of important rules of law.

Id. at 32, 501 P.2d at 980.

In this case, Defendant alleges that the record is devoid of any evidence of any investigation by Defense Counsel regarding the affirmative defense of mental disease, disorder, or defect excluding responsibility. The State agrees. We disagree. Defense Counsel's statements to the court when objecting to the State's pretrial motion for a mental examination indicate Defense Counsel's conclusion, after communicating and interacting with Defendant, that Defendant was fit to proceed and did not have a basis for asserting that a mental disease, disorder, or defect excluded responsibility. The State alleged that Defendant had been taking "medication for schizophrenia." Defense Counsel responded that "the manifestations of any illness came after a sexual assault, and that it wasn't manifestations of any particular problem with her mentally." While fit to proceed, Defendant agreed with this statement. The record contradicts the allegation that the decision not to assert the affirmative defense of mental irresponsibility was Defense Counsel's "unilateral decision." Nothing in the record supports Defendant's allegation that Defense Counsel was ineffective in this regard.

Defendant's second reason for her conclusion that Defense Counsel was ineffective was his failure to object to the calling of Defendant's "ATM debit card" a "VISA charge card." In light of the evidence, including State's Exhibit S-4, which is a

picture showing that the card is a "Bank of America VISA Check Card," this point lacks merit.

Defendant's third reason for her conclusion that Defense Counsel was ineffective was the sentence outlined in bold in the following quote of Defense Counsel's closing argument:

If you find that [Defendant] was reckless, if she was negligent, or even that she was reasonable to believe that God would provide, then you have to find her not guilty.

. . . .

. . . **If you find that in her heart was a thief who was aiming to deceive, then find her guilty.** But you will not find that, because you saw her on the stand.

We are asking for a not guilty. Thank you.

Defendant argues that the sentence outlined in bold above was highly prejudicial and "[t]here could not have been any tactical basis upon which defense counsel's comment could have been predicated." We disagree. In context, the statement is not ineffective assistance.

#### CONCLUSION

Accordingly, we affirm the circuit court's July 9, 2001 judgment.

DATED: Honolulu, Hawai'i, September 30, 2002.

On the briefs:

Cynthia Kanoholani Wong for Defendant-Appellant.	Chief Judge
Arleen Y. Watanabe, Deputy Prosecuting Attorney, County of Maui, for Plaintiff-Appellee.	Associate Judge
	Associate Judge