

DISSENT BY SUBSTITUTE JUSTICE KIM

In my view, the claim-of-right defense (CARD) is not implicated in the instant factual situation and, therefore, believe that the trial court correctly refused the CARD jury instruction. Accordingly, I believe the ICA gravely erred in reversing the trial court, and, consequently, I would accept the application in order to correct what I perceive to be analytical error by the ICA in its reversal of the trial court's ruling and the conviction here. In that regard, I respectfully dissent.

In my view, the CARD does not apply because I agree with the trial court that there simply was no claim of right on the part of the defendant. The statute requires more than a simple belief in entitlement to the property; rather, the statute specifically provides that such belief must be "under a claim of right," and such specific and explicit claim is missing from the facts of this case. I do not believe that the CARD can legitimately be implicated in a scenario involving an alleged deceptive or fraudulent claiming of welfare benefits by a lying defendant. I agree with the trial court that the CARD does not "really apply in this situation" because, far from explicitly claiming a right to the property, the defendant is allegedly attempting by deception to make such a claim superfluous.

What I take to be the ICA's erroneous analysis is also suggested by comparing that analysis with the commentary to the applicable statute, bearing in mind that, besides its holding on the CARD, the ICA specifically held that the defendant in this

factual situation was not entitled to a mistake-of-fact defense instruction, a ruling that I believe is correct. As the commentary explains,

[b]oth the defenses allowed under Section 708-834(1), [which includes the CARD in (10(b),] are probably unnecessary in light of an informed reading of the substantive definitions of the various modes of theft. The existence of . . . condition . . . (b) would relieve the actor of the culpability required to establish the offense [since] a claim of right, assuming that it amounts to a belief that the actor is the true owner, would not only indicate that the actor did not have the requisite mental state, it would constitute a mistake of fact defense under Section 702-218.

(Emphasis added).

According to the commentary, then, every time a defendant has a legitimate claim of right defense, she would also logically have a mistake-of-fact defense, which as the ICA itself correctly recognized, is not the case here. On the contrary, in this case, and in every case of alleged welfare fraud based on intentional factual misrepresentations by the recipient, there may be a claim of belief in the entitlement to benefits, but I do not believe there can be a claim that the defendant is somehow the "true owner" of the benefits as opposed to the supposed contemporary and conflicting ownership rights in those benefits by the state payer. Neither the CARD nor the mistake-of-fact defense applies.

Finally, I do not find cogent the analytical distinction which the ICA purports to find between the Model Penal Code (MPC) version of the CARD and HRS § 708-834(1)(b). Initially, the ICA, in my view, correctly concludes that, under the MPC, given the specific allegations of this case, the

defendant has no legitimate claim of right defense. However, the ICA then claims that section 708-834(1)(b) is somehow "broader than the MPC version" because unlike the MPC, the Hawai'i statute "does not require that the defendant's claim of right prompted his or her conduct[.]"

However, as the ICA itself recognizes, the only actions or "conduct" at issue here are the instances of alleged fraudulent misrepresentations of fact on the part of the defendant. That is to say, whether under the MPC or the HRS, the defendant necessarily acted, and those actions are exactly the same ones in either case. Yet, the ICA insists that our version of the CARD somehow does not require that the claim of right "prompt" the defendant's conduct. I fail to see how this can be so where the Hawai'i statute does require that the defendant's belief in her entitlement to the property must be a belief held specifically "under a claim of right." I do not understand how the allegedly fraudulent actions of a defendant can be made "under a claim of right," yet somehow not be "prompted" by such claim. And again, as noted by the trial court in refusing the CARD instruction, there simply was no claim of right at all on the part of the defendant in the instant case.

For the foregoing reasons, I would accept the State's application.

