NO. 26231

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GLENN K. McLEAN, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 03-1-0242(2))

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Nakamura, JJ.)

Glenn K. McLean (Defendant or McLean) appeals the October 29, 2003 judgment upon a jury's verdict entered in the circuit court of the second circuit, the Honorable Reinette W. Cooper, judge presiding, that convicted him of theft in the second degree by shoplifting.[1] We affirm.

I.

Defendant first contends the State failed to disprove his mistake-of-fact defense[2] and thus, there was insufficient

[1] Hawaii Revised Statutes (HRS) § 708-830(8)(a) (1993 & Supp. 2004) provides that, "A person commits theft if the person does any of the following: . . . . Shoplifting. A person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud." (Enumeration omitted; format modified.) HRS § 708-800 (1993) defines "intent to defraud" as, "An intent to use deception to injure another's interest which has value; or Knowledge by the defendant that the defendant is facilitating an injury to another's interest which has value." (Enumeration omitted; format modified.) HRS § 708-831(1)(b) (1993 & Supp. 2004) provides that, "A person commits the offense of theft in the second degree if the person commits theft: . . . . Of property or services the value of which exceeds $300[.]" (Enumeration omitted; format modified.)

[2] HRS § 702-218(1) (1993) provides in pertinent part that, "In any prosecution for an offense, it is a defense that the accused engaged in the

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evidence adduced at trial to show he had the intent to defraud the store. We disagree.

A Sears floorwalker testified that Defendant took tools worth a total of $739.97 from price-marked store shelves and placed them in a shopping cart, whereupon he took a meandering route past numerous open and operating cash registers out of the store. En route, he twice parked the shopping cart and walked up and down the aisles of the store, "looking for any type of associate that's in the department, just wandering around, pretty much just looking for somebody." When Defendant was stopped with the goods by store personnel about ten to fifteen feet outside of the store, he told them that his girlfriend was in the store, had already paid for the merchandise, and had the receipt to prove it. Store personnel paged his girlfriend, thrice, to no avail. The store's computerized inventory system showed that none of the items taken had been sold that day.

Defendant points out, however, that he did not attempt to conceal the tools in the see-through shopping cart; he did not run and was in fact cooperative when he was stopped by store personnel; he told the store personnel about his girlfriend's possession of a receipt for her prior purchase of the tools; he had in fact been seen wandering around inside the store looking

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[2](...continued)
prohibited conduct under ignorance or mistake of fact if: The ignorance or mistake negatives the state of mind required to establish an element of the offense[.]" (Enumeration omitted; format modified.)

for someone; and the pages for his girlfriend could not have been heard by someone waiting outside the store. Granted, but taking the evidence in the light most favorable to the State, and giving due deference to the exclusive province of the jury in matters of credibility and the weight of the evidence, we conclude there was substantial evidence that Defendant had the intent to defraud the Sears store. State v. Kido, 102 Hawai‘i 369, 379 n.16, 76 P.3d 612, 622 n.16 (App. 2003).

II.

For his other point of error on appeal, Defendant asserts that his trial attorney rendered ineffective assistance of counsel, in three respects.

A.

First, Defendant complains that trial counsel "failed to adequately investigate, obtain expert review, and assert [a] defense, which would have negated state of mind." Opening Brief at 11. The defense Defendant refers to is a pathological intoxication defense under HRS § 702-230 (1993),[3] based upon his

[3] HRS § 702-230 (1993) provides:

(1) Self-induced intoxication is prohibited as a defense to any offense, except as specifically provided in this section.

(2) Evidence of the nonself-induced or pathological intoxication of the defendant shall be admissible to prove or negative the conduct alleged or the state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind

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consumption of prescribed oxycontin, a narcotic pain medication. This point is devoid of merit.

More than a month before trial, trial counsel alerted the State that the oxycontin defense might be raised. This prompted the State to move the court for a mental examination of Defendant.[4] In written opposition to the State's motion,

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[3](...continued)

sufficient to establish an element of the offense.

(3) Intoxication does not, in itself, constitute a physical or mental disease, disorder, or defect within the meaning of section 704-400.

(4) Intoxication which (a) is not self-induced or (b) is pathological is a defense if by reason of such intoxication the defendant at the time of the defendant's conduct lacks substantial capacity either to appreciate its wrongfulness or to conform the defendant's conduct to the requirements of law.

(5) In this section:

(a) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "Self-induced intoxication" means intoxication caused by substances which the defendant knowingly introduces into the defendant's body, the tendency of which to cause intoxication the defendant knows or ought to know, unless the defendant introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of a penal offense;

(c) "Pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know the defendant is susceptible and which results from a physical abnormality of the defendant.

[4] See HRS § 704-404 (1993 & Supp. 2004), which provides in relevant part that, "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. . . . Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases and one qualified examiner

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Defendant informed the court that, "Defendant is of this date unaware of any basis for asserting 'pathological intoxication[,'] he having no known 'physical abnormality' as required by [HRS § 702-230(5)(c)]." And just before the trial started, trial counsel told the court, with Defendant present, that Defendant was withdrawing the oxycontin defense because the prescribing physician had opined that the prescription "shouldn't be bothering him" and "should not be clouding his mind."

Defendant did not below, and does not on appeal, assert that the decision to withdraw the oxycontin defense was other than his own knowing, intelligent and voluntary decision. All Defendant offers on appeal is mere speculation, unsupported by affidavit or other sworn statement, that further medical consultation might have revealed that he may have been over-medicated. State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32, 51 (1997) (a defendant's speculation about the potential testimony of witnesses who were not called to testify at trial is insufficient to show ineffective assistance of counsel); State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) ("Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses."

[4](...continued)
in nonfelony cases to examine and report upon the physical and mental condition of the defendant." (Enumeration omitted; format modified.)

(Citations omitted.)). At any rate, as Defendant conceded below, he had no "physical abnormality" that would have enabled him to assert a pathological intoxication defense under HRS § 702-230(5)(c). Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994) (there is no colorable ineffective assistance of counsel claim in the absence of "facts showing that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense" (citations and internal quotation marks omitted)).

In sum, Defendant fails to demonstrate, in this first respect, "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. Aplaca, 74 Haw. 54, 67, 837 P.2d 1298, 1305 (1992) (citations and footnote omitted).

B.

Second, Defendant avers that trial counsel was ineffective because he did not obtain the Sears store videotape of the incident, which purportedly would have supported the defense. Because the undisputed evidence at trial showed that Sears made no videotape or other recording of the incident, trial counsel was not ineffective in this second respect. Stanley, 76 Hawai'i at 450, 879 P.2d at 555; Aplaca, 74 Haw. at 67, 837 P.2d at 1305.

C.

Third, Defendant asserts that trial counsel was ineffective because he did not obtain the testimony of Defendant's mother, "an elderly woman that lives in California[,]" who would have testified that she had "made an arrangement with Sears to use her credit card to purchase birthday items for McLean and his son, so they could do construction work on the property owned (out right) by McLean." Opening Brief at 12. This version of the mistake-of-fact defense first surfaced during Defendant's Tachibana colloquy[5] with the court after all evidence had been presented at trial, and was reasserted at sentencing. Query first whether his mother's testimony would have helped Defendant, where his defense at trial was that it was his girlfriend who had purchased the tools. In any event, here again purported testimony is unsupported by affidavit or other sworn statement, Richie, 88 Hawai'i at 39, 960 P.2d at 1247, such that trial counsel was not ineffective in this third and final respect. Aplaca, 74 Haw. at 67, 837 P.2d at 1305.

[5] See Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995).

III.

Accordingly, the court's October 29, 2003 judgment is affirmed.

DATED: Honolulu, Hawaii, February 28, 2005.

On the briefs:

Matthew S. Kohm,
for defendant-appellant.

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge