

NO. 23518

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
LANA SAYERS, also known as Donna Leilani Souza,
Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0858)

MEMORANDUM OPINION

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

Defendant-Appellant Lana Sayers, also known as Donna Leilani Souza (Sayers), appeals from the circuit court's^{1/} May 15, 2000 Judgment, Guilty Conviction and Sentence (May 15, 2000 Judgment), based on a jury verdict, convicting her of Murder in the Second Degree, Hawaii Revised Statutes (HRS) § 707-701.5, and sentencing her to a term of imprisonment for life with the possibility of parole. We affirm.

POINT ON APPEAL

"The trial court abused its discretion when it found [Sayers] fit to proceed despite her inability to assist in her defense and despite her . . . inability to understand the nature of the charges and the proceedings against her."

RELEVANT PRECEDENT

[I]t is constitutional/statutory law that a defendant in a criminal case cannot be tried, convicted, and/or sentenced for the commission of an offense if and when, (1) as a result of a

^{1/} Circuit Court Judge Karen S. S. Ahn presided in this case.

physical or mental disease, disorder, or defect, he/she lacks capacity (i) to understand the nature of the charges and proceedings against him/her, or (ii) to assist in his own defense, or (2) he/she does not have (i) a sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and (ii) a rational as well as factual understanding of the proceedings against him/her.

State v. Castro, 93 Hawai i 454, 459, 5 P.3d 444, 449 (App. 2000).

STANDARD OF REVIEW

In State v. Janto, 92 Hawai i 19, 29, 986 P.2d 306, 316 (1999), the Hawai i Supreme Court concluded that the trial court's determination of competence: (1) is "primarily a matter for the professional determination of the examiners appointed by the trial court in accordance with HRS Chapter 704"; (2) "relies upon the trial court's assessment of the testimony of expert witnesses and its observational assessment of the defendant"; and (3) is reviewed on appeal under the abuse of discretion standard of review.^{2/}

^{2/} In State v. Soares, 81 Hawai i 332, 350, 916 P.2d 1233, 1251 (App. 1996), this court decided to apply the two-part standard of review.

Under this standard, the appellate court must initially assess whether the trial court made its competency determination based on a correct legal standard. This is a question of law subject to *de novo* review. . . . If the trial court evaluated defendant's competency by the correct standard, the second inquiry on appellate review is whether the trial court's determination of defendant's competency is fairly supported by the record of the proceeding at which the determination was made. In other words, the substantial evidence standard of review governs the second inquiry.

The Hawai i Supreme Court subsequently disagreed, in relevant part, as follows:

[Hawaii Revised Statutes (HRS)] § 704-403 (1993) provides that "[n]o person who as a result of a physical or mental disease,
(continued...)

BACKGROUND

On April 21, 1998, Sayers was indicted for Murder in the Second Degree, HRS §§ 707-701.5(1) (1993)^{3/} and 706-656 (Supp. 1996).^{4/} The charges arose from an incident that occurred on or about April 10, 1998, during which Sayers allegedly caused the death of the father of their children and her common-law

^{2/}(...continued)

disorder, or defect *lacks capacity to understand the proceedings against the person or to assist in the person's own defense* shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures." (Emphasis added.) This is the statutorily mandated standard for determining competence of a criminal defendant to stand trial. There is no need for an appellate court to engage in *de novo* review of the legal standard utilized by the trial court, where there is only one standard to be applied.

We overrule *Soares* and hold that the trial court's determination that a defendant is competent to stand trial will be reviewed under an abuse of discretion standard.

State v. Janto, 92 Hawaii 19, 28-9, 986 P.2d 306, 315-16 (1999) (footnotes omitted; emphasis in the original).

The conclusion that "[t]here is no need for an appellate court to engage in *de novo* review of the legal standard utilized by the trial court, where there is only one standard to be applied" indicates that this court's opinion in Soares was misunderstood. This conclusion confuses the question "what is the legal standard to be applied" with the question "did the trial court apply the legal standard." HRS § 704-403 answers the first question. The appellate court must answer the second question and, since there is only one right answer to it, the answer is reviewed under the *de novo* or right/wrong standard of review.

Although the Janto opinion concluded that the second question was not a valid question, it in fact answered it. The heading of part "B." of the "II. DISCUSSION" section of Janto states as follows: "**B. The trial court followed the statutorily mandated procedures to determine that Janto was fit to proceed.**" Id. at 27, 986 P.2d at 314 (emphasis in the original).

^{3/} HRS § 707-701.5 (1993) provides, in relevant part, that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

^{4/} HRS § 706-656 (Supp. 1996) provides, in relevant part, that "persons convicted of second degree murder . . . shall be sentenced to life imprisonment with possibility of parole."

husband, Edwin K. Kalama, also known as Sanka (Kalama or the victim), by stabbing him with a knife.

On June 4, 1998, Sayers filed a motion for appointment of examiners to determine her (a) fitness to proceed^{5/} and

^{5/} HRS § 704-403 (1993) and HRS § 704-404 (Supp. 1997) provide, in pertinent part:

§ 704-403 Physical or mental disease, disorder, or defect excluding fitness to proceed. No person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

§ 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. . . .

(2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases . . . to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be either a psychiatrist, licensed psychologist, or qualified physician. One of the three shall be a psychiatrist or a licensed psychologist designated by the director of health from within the department of health. . . . The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness and participate in the examination. . . .

. . . .

(4) The report of the examination shall include the following:

. . . .

(b) A diagnosis of the physical or mental condition of the defendant;

(c) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;

(continued...)

(b) penal responsibility. On June 15, 1998, the court orally granted the motion.

On June 29, 1998, at the Hearing on Motion for Supervised Release filed on June 16, 1998, defense counsel stated, in relevant part, as follows:

[DEFENSE COUNSEL]: . . . Consider the fact that this was a domestic violence situation. The person who was killed was someone who [Sayers] had lived with for the last 16 years. They had children together.

We intend to present a defense in this case that would - is not a defense of extreme mental or emotional distress based upon the history of their relationship.

. . . .

This is a long-term history of drugs and domestic violence by these two individuals or by the complainant against her that culminated in her stabbing him. And I fully intend to present that to the jury, and let a jury decide if, in fact, her conduct was mitigated by his conduct toward her.

On May 28, 1998, Sayers moved for approval of costs for the expert services of Dr. Xanya Weiss based on the following alleged facts:

2. . . . [Sayers] is in need of a psychiatric examination.

3. On the date in question, [Sayers] may have been suffering from a mental disease and/or defect, and/or extreme emotional distress or disturbance, preventing her from forming the necessary criminal intent to commit the charged offenses.

4. . . . [Defense Counsel] believes [Sayers] was and may still be suffering from this mental disease and/or defect, and/or extreme emotional distress or disturbance, and therefore unable to assist in her own defense.

^{5/}(...continued)

(d) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was impaired at the time of the conduct alleged[.]

On June 4, 1998, Sayers moved for a mental examination of Sayers.

On July 17, 1998, the court appointed Olaf Gitter, Ph.D, Hawaii Licensed Clinical Psychologist (Dr. Gitter), Robert Collis, M.D., Hawaii Licensed Psychiatrist (Dr. Collis), and Duke Wagner, Ph.D, Hawaii Licensed Psychologist (Dr. Wagner), to render independent professional opinions regarding Sayers' (a) fitness to proceed and (b) penal responsibility.

On August 25, 1998, Dr. Wagner filed his report. Dr. Wagner interviewed Sayers and reviewed her medical records. Dr. Wagner diagnosed that Sayers suffered from "Polysubstance Dependence" and opined that "[Sayers'] mental condition [did] not impair her capacity to understand the proceedings against her and to assist in her own defense at the present time" and "the capacity of [Sayers] to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was not substantially impaired by any such mental condition at the time of the alleged conduct."

On September 1, 1998, Dr. Collis filed his report. Dr. Collis examined Sayers and reviewed her medical records. Dr. Collis diagnosed Sayers as having "Axis I Alcohol, Cocaine, Amphetamine, Cannabis, PCP abuse in remission . . . Axis II Personality disorder NOS [(not otherwise specified)] (with aggressive, antisocial and borderline features)." Dr. Collis

opined that Sayers understood the proceedings against her, could assist in her own defense, and "that [Sayers'] capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was moderately but not substantially impaired by drug intoxication and rage at the time of the alleged conduct." Dr. Collis also noted that "[Sayers] claims not to remember the actual stabbing though she could describe her increasing rage leading up to it" and that Sayers "feels no remorse" and "expresses only release from torment at [Kalama's] demise."

On September 15, 1998, Dr. Gitter filed his report. Dr. Gitter conducted three clinical interviews with Sayers and reviewed her medical records. Dr. Gitter opined that Sayers was fit to proceed with her trial. Dr. Gitter further opined, in relevant part, as follows:

Diagnoses

. . . .

Axis I	304.80	Polysubstance Dependence, With Physiological Dependence, In A Controlled Environment
	V61.1	Partner Relational Problem
Axis II	301.9	Personality Disorder NOS (with borderline narcissistic and schizotypal features)

. . . .

For the time of the alleged offense, the additional DSM-IV diagnoses applies [sic]: 292.89 Crystal Methamphetamine Intoxication, with perceptual disturbances. This diagnosis is based on the defendant's self-report which appears to be confirmed by witnesses' statements that she was under the influence of crystal methamphetamine at the time of the alleged offense. Also, Ms. Sayers reported to me that she heard a child cry and that this experience caused her to have "a flashback," i.e., a vivid memory

of the victim of her alleged stabbing abusing their children physically and emotionally.

Fitness to proceed

In my opinion, Ms. Sayers is fit to proceed with her trial. She shows an appreciation of her criminal charge and the range and nature of possible penalties if convicted. She is motivated to help herself in the legal proceedings, she knows her attorney's name and she indicated her willingness to cooperate with her attorney in her own best defense. Ms. Sayers can participate in the planning of her legal strategy. She has a basic understanding of the functions of the various courtroom participants and court procedure. She can testify herself relevantly and challenge prosecution witnesses realistically. There is no reason to believe that she would not be able to manage her courtroom behavior.

Penal Responsibility

In my opinion, [Sayers'] cognitive and volitional capacities at the time of the alleged offense were not substantially impaired as a result of any mental disorder but were impaired as a result of crystal methamphetamine intoxication.

At the April 26, 1999 hearing, defense counsel did not contest the findings of the reports by the three experts and the court decided pursuant to HRS § 704-405 (1993)^{6/} that Sayers was fit to proceed.

At a hearing on June 21, 1999, defense counsel agreed that "[t]he issue of penal responsibility was already addressed. I don't believe that would change." The court orally granted Sayers' motion for appointment of examiners to re-determine her

^{6/} HRS § 704-405 (1993) states, in relevant part:

When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to section 704-404, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. When the report is received in evidence upon such hearing, the party who contests the findings thereof shall have the right to summon and to cross-examine the persons who joined in the report or assisted in the examination and to offer evidence upon the issue.

fitness to proceed based on (a) the fact that the previous evaluations of Sayers' fitness to proceed were performed nearly a year before and (b) defense counsel's representation that Sayers' social worker at Women's Community Correctional Center (WCCC) "feels there is need for psychiatric care."

On June 30, 1999, the court ordered a re-evaluation of Sayers by Dr. Gitter, Dr. Collis, and Dr. Wagner to determine Sayers' fitness to proceed.

On July 14, 1999, Dr. Collis filed his report in which he opined that Sayers could understand the proceedings against her and assist in her own defense. Dr. Collis also stated that "[Sayers] claims not to remember the actual stabbing though she could describe her increasing rage leading up to it. She expresses only release from torment at the [victim's] demise. She feels no remorse."

On July 16, 1999, Dr. Gitter filed his report in which he opined that Sayers continued to be fit to proceed and stated, in relevant part, as follows:

Mental Status Examination

. . . .

[Sayers] was alert, well oriented in all spheres, pleasant and cooperative yet also somewhat evasive. No signs of psychomotor abnormality were noted. . . . No psychotic target symptoms were noted except that she claimed to hear God's voice on occasion. She denied paranoid ideation, ideas of reference and mind reading. No delusions were elicited. Prior psychological testing by me in September of 1998 had shown [Sayers] to be of normal intellectual functioning and without any obvious organic impairment.

. . . .

Fitness to Proceed

In my opinion, Ms. Sayers continues to be fit to proceed with her trial. She shows an appreciation of her criminal charge and the range and nature of possible penalties. She is motivated to help herself in the legal proceedings and she expresses her willingness to cooperate with her defense counsel in her own best defense. However, it should be noted that she claims to have fired her current public defender last week for the public defender's alleged failure to maintain good communication with her. [Sayers] can participate in the planning of her legal strategy. She has an understanding of the basic functions of the various courtroom participants and court procedure. She can testify herself relevantly and challenge prosecution witnesses realistically. Since she is apparently quick to anger, there is some concern as to whether she would be able to manage proper courtroom behavior, particularly in situations where she might dislike a witness' testimony. Thus, it is conceivable that she may have occasional verbal outbursts in the courtroom.

On August 2, 1999, Dr. Wagner filed his report in which he opined that Sayers' "mental condition [did] not impair her capacity to understand the proceedings against her and to assist in her own defense[.]" In fact, Dr. Wagner reported that Sayers "was appropriate in behavior and lucid in her responses to various inquiries" and "present[ed] an awareness of the court system, the parties involved, her situation, and is capable of responding to questioning."

At the August 9, 1999 hearing, the prosecutor and the defense counsel stipulated that Sayers was fit to proceed and the court agreed.

On February 1, 2000, the court held another fitness hearing. Defense counsel's concerns regarding Sayers' fitness to proceed stemmed from the following: (1) Sayers had been in solitary confinement for substantial periods of time and was not taking medication which would "help her deal with the lock down

state"; (2) Sayers remained incapable of explaining to defense counsel the state of events during the alleged incident;

(3) Sayers made conflicting statements with respect to the state of events of the alleged stabbing by allegedly telling a bystander at the scene of the alleged stabbing of her concerns of child abuse, mentioned child abuse to one of the workers at Waianae Coast Comprehensive Health Center, and subsequently allegedly made a statement to the police department that "there was an argument over money with the decedent at some point" and neglected to "mention child abuse as an antagonizing factor to her mental state"; (4) Sayers' lack of recollection of the alleged stabbing apparently rendered Sayers incapable of assisting in her own defense because she could not identify or locate witnesses leading defense counsel to have "no idea where the case was going"; and (5) defense counsel questioned Sayers ability to retain self-control through a hearing or trial as well as "assess tactics" and "testify in support of the tactical decision" made in her case.

At the February 1, 2000 hearing, the court engaged in the following extensive colloquy with Sayers on the question of her fitness to proceed.

Q. Have you talked with your lawyer about what your possible defenses are in this case?

A. We spoke. We talked about it. I don't know. It looks good what he was saying. It looks good.

Q. I am not going to ask you what defense you are going to use, but what defense do you think might be available to somebody with this charge?

A. What do you mean?

Q. What are some of the defenses that, [defense counsel], you have a problem with a defense?

[DEFENSE COUNSEL]: No.

THE COURT: Ms. Sayers, do you have any questions for your lawyer? You, you can just tell me. I will give you time to talk with him, okay? But can you tell me what defenses you may have discussed or you think might be available to somebody looking at a murder two charge.

A. I am hoping, with all this my innocence because I am innocent. Hoping they see I am innocent.

Q. Have you discussed with [defense counsel] a possible defense of something called maybe extreme emotional distress?

A. Did we speak about that? Help me out here. Come on.

[DEFENSE COUNSEL]: You have to tell the judge whether you remember or not. I can't tell you whether we did or not.

THE COURT: Maybe, if that's the name of the defense, it's, basically, a defense that lowers the murder in the second degree to manslaughter, under certain circumstances, where somebody was under a lot of emotional, emotion at the time. That's the general picture of this defense. Have you talked with your lawyer about that possible defense?

A. Um, hum, have we? I have been locked down with chains. Excuse me, I am, so much stress. Lot of tension and stress. It's been lock down, incarcerate. This is the first time. I don't really understand this type of thing.

THE COURT: If you don't understand--

A. I don't understand certain things. First time I wake up, everyday go out.

THE COURT: Miss Sayers, what I want to learn is whether you, we can go to trial in this case. One of the things I have to know is that you understand what we're looking at, what you, do you understand the charge and that you understand what your defenses are.

Now, you are not going to know right out of nowhere. It's going to be based upon probably a lot of your talking with your lawyer. Have you been talking with him about this case?

A. Yes, we spoke.

Q. Okay. And did, was one of the things you talked about the possible defenses you might use in this case? In other words, what are the different ways I might be able to win this case? Another way of putting it, have you talked to him about that?

A. Um, hum.

Q. What are, are some of the ways that you think you might be able to win in this case, if you understand my question?

A. Just, I don't understand. I just don't know how to explain.

Q. That's okay. Take your time. These questions are not . . . the . . . easiest to explain. I will grant you that.

A. Just to look at what really took place. What really happened. What provoked it.

. . . .

THE COURT: Miss Sayers, there are no really right or wrong answers. Don't worry about it. I just want to know what you know and that's fine. So, you have, you been talking about these possibilities with your lawyer, is that fair to say?

A. Um, hum.

Q. Did you tell him everything you know about what happened?

A. Yes, I did.

Q. Do you believe that you told him accurately what happened?

A. Um, hum.

Q. Did you tell him what you were thinking?

A. Um, hum.

Q. What other things did you know? What is plea of not guilty mean?

A. That I am not guilty.

Q. If you ever pled guilty, what would that be?

A. That I did commit something that I did.

Q. That you did it?

A. Yeah.

Q. So, you know that if you went to trial on this charge, you could be found guilty, could be, right, by the jury? You could also be found not guilty?

A. Yes.

Q. And if you remember, we were a few minutes ago talking about this possible defense of being, oh, emotional at the time. That it may have been something of a defense. Remember that?

A. Um, hum.

Q. You also said you had talked to your lawyer about what you were thinking at the time?

(Indicating.).

Q. If the jury found that then instead of life in imprisonment, you would be looking at, what is it, 10 or 20?

[PROSECUTOR]: It could be 20.

THE COURT: It could be 20 years. Lot shorter, obviously, than life, both times, with parole. Possibility of parole.

Q. You understand the difference between, do you understand these possibilities?

A. Um, hum.

Q. You have any questions about them?

(Indicating).

Q. No. So, tell me again, what do you think the possible outcome here is?

A. They could say, find verdict not guilty. And, on the other hand, they could say not guilty, guilty, or not guilty.

Q. Guilty or not guilty. Is that what you said?

A. Um, hum.

Q. Are there any other defenses you talked to your lawyer about besides this emotional one?

A. What do you mean by defense?

Q. Defense, kind of technical term. Any other ways that you talked to your lawyer about how can I win? How can I win this case? Did you talk to him about any other ways?

A. Um, hum.

Q. What?

A. I just told him I want to get this over as soon as possible.

Q. Because what?

A. Because I know we're going to win this case. I have, because I know that I am not guilty. I am innocent. I am not guilty. Like I said, this is the first time. No commit a crime every single day.

Q. That's fine.

A. I don't wake up every morning, go out there, try to, you, you know.

Q. When you talk to [defense counsel], how do you feel?

A. Um, I feel sometimes, I feel like he's lacking in confidence. I try come back, give him some, I do, where is your confidence? We're going to win this. Come one, man, I don't want to hear that kind stuff in your voice. We're going to take this all. Wait, we're going to win this. You know he clears up like, okay, wow. I guess.

Q. And when do you feel you want to tell him everything or is there?

A. No, I do. I feel like I can trust him. I want to tell him what needs to be said, what needs, he needs to know.

Q. Have you folks discussed possible witnesses? Who might be able to help you in some way at this trial?

A. Well, I guess, yes. We have our witnesses. Yes, we have those.

Q. Where did [defense counsel] get the names of the witnesses, if you know?

A. You ask me, ask him.

Q. Did you give him any who he knows? It's in the police report. Have you read the police report?

A. Um, hum.

Q. Have you any other witnesses who might be able to help you? That you know of?

A. Um--

Q. It's okay?

A. I don't know at the moment. I guess.

Q. You have talked about this with [defense counsel]?
Yes?

A. Um, hum.

Q. And if there were any witnesses who you thought could help, what would you do then?

A. I would definitely have them be brought in for the behalf of me. But definitely.

Q. How would you have them brought in?

A. I guess, would have possible to be subpoenaed.

Q. To be subpoenaed. Is that right?

A. I guess.

Q. That's fine. How would the name, how the people know, know about the names of these people?

A. I would have to tell them.

Q. Now, one thing that's going to happen at trial is, there is going to be a bunch of witnesses who are going to testify?

A. Yes.

Q. If you heard a witness say something that you didn't think was quite right, what would you do?

A. Ask him to --

THE COURT: Sorry.

A. Let him know.

Q. Him meaning who?

A. My attorney.

Q. Okay, when you say, would I, let him know. What, what do you mean?

A. I need to speak to you. This, tap him or something. He can cross-examine.

Q. Now, Miss Sayers, sometimes when there is a defense, use words, defense, one way of possibly, of making it, to let the jury find you not guilty, sometimes you may want, you might want to consider testifying. It's up to you. Completely up to you. Do you think that you could?

A. Testify?

Q. Yes.

A. On my behalf?

Q. Yes.

A. No. Yes, I know, I could, yes. Yes.

Q. You know you would come up here and take an oath and, essentially, it means telling these 12 people whatever it is you want to tell them. Could you do that?

A. Um, hum.

Q. One thing I want to say is this. Trial is not going to take two days. It's going to be a little longer than that. You say you feel a little stress with the solitary and being in custody. Do you think that you can take a deep breath, come in here, be very calm and cool through the whole thing even though sitting all day. Basically, is kind of stressful, too?

A. Yes.

Q. You know that's probably what's going to happen.

A. Um, hum.

Q. You think that is something you can tolerate and have no problem with?

A. Um, hum.

Q. When you, you have asked [defense counsel] questions, right, about, asked him what kinds of things, question him about, in general?

A. Yes.

Q. In general?

A. I guess, what the prosecutor had. What did they have.

Q. The prosecutor?

A. Yes.

Q. What did you, prosecutor, what, what do you mean?

A. Where they coming in with.

Q. With their evidence?

A. Yes.

Q. When [defense counsel] answered your question, . . . how do you feel?

A. He comes over with good, good, you know, good stuff.

Q. You feel satisfied or dissatisfied with him?

A. I like a lot of things that he came up with.

. . . .

Q. Okay. I guess my question is, you feel that [defense counsel] does answer your questions fully or you sometimes have other things you want to ask him about, doesn't get answered.

A. He answers it fully.

Q. There is one thing that you discussed with your lawyer, basically, how the trial, how you folks were going to try to handle the trial, handle the evidence?

A. We discussed it. Discussed it. All I can say, that's all I can say. I listen to what he says. He knows what he's doing. All I can say.

Q. And if he, you felt you didn't agree with what he was saying, what would you do?

A. Well, I would, you know definitely come out and let him know, you know, hey. You know, this is what we, you know, what's going to happen.

. . . .

THE COURT: Miss Sayers, . . . [y]ou said that you told [defense counsel] all that you know about what happened.

A. Um, hum.

Q. You remember that the day this incident was supposed to have happened, remember that?

A. Can you say that again?

Q. You know this day that this incidents, incident in question was supposed to have happened, you know that day?

A. Yes.

Q. Do you remember what happened that day?

A. Um, hum. Up to the point where, to the point where, supposedly, the thing happened. Other than that, I can't remember.

Q. You don't remember the incident?

A. No.

Q. Don't remember anything about the incident? Anything?

A. I do. Like I say, said, I remember what happened when I came out of the house. As far as -- um--

Q. All right. Have you talked to [defense counsel] about this? You talked to [defense counsel] about this?

A. Um, hum.

Q. Yes. You, but you have told him everything that you can remember? Miss Sayers, is that true? You told him everything you can remember?

(Indicating).

. . . .

THE COURT: . . . A defense is, you know, the government is going to put on its case. What are my defenses? In other words, how I am going to try and win this trial once you folks, you and [defense counsel], who is going, decides what the defense should be.

A. Who is going to decide?

Q. Yes.

A. On what the defense is?

Q. Yes. How are going, who is going to decide how to try to win this case?

A. You.

Q. You? You mean [defense counsel]?

A. Um, hum.

Q. But it's only going, what if you don't agree with what he's saying?

(No response).

THE COURT: What are you going to do then?

A. Going to slap him in the courtroom now. Then, I will let him know, I am not, I don't like what is going on.

[THE COURT]: Once you folks decide on a defense--

[DEFENSE COUNSEL]: Your Honor, that particular prong bothers me a little bit because I don't think that she's

THE COURT: I don't know--

[DEFENSE COUNSEL]: Had enough experience to understand the alternative defense theory. Still keep argument most of us learn in law school. That is that this is not a teapot but if, but it is, it's not broken. But if it is, I break it, that kind of thing. That can be more than one defense. So, that question bothers me. If the Court can think of a better way to deal with it, fine, but--

THE COURT: I don't know how, what--I don't know what kinds of questions you can ask unless a defendant is extraordinarily articulate.

On examination by defense counsel, Sayers testified, in relevant part, as follows:

Q. . . . This is a hearing on fitness, you understand that?

A. Yes.

Q. I am going to ask you maybe nine maybe ten questions. Starts now. Why is it that you think you are going to win this case?

A. Because I am innocent.

Q. Who says you are innocent?

A. I say.

Q. Do you remember what happened that day?

A. I have some recollection as far as up to the point where I went into the house. I was speaking to a lady friend. That's it. And after that, the fact.

Q. What's the first thing you remember after speaking to your lady friend in the house?

A. Like I said, I heard a little girl screaming and I thought it was my daughter. And I stepped out of the house. I said, I have to leave.

Q. Do you remember where you were?

A. I was in Makaha at, on Jade Street.

Q. Do you know where you were the night before, just don't say where, do you remember where you were?

A. Yes.

Q. Do you remember what you were wearing that day?

A. Yes, black.

THE COURT: No, no, no, you don't want to say.

Q. Do you remember going to any hospital, doctor's office or clinic that day?

A. Yes, I went to the Waianae Coast Comprehensive.

Q. Waianae Coast Comprehensive?

A. Yes.

Q. Did you talk to anyone there?

A. Yes. One of the nurse's receptionist.

Q. Do you remember what she said? Don't say, what it is, just, do you remember what she said?

. . . .

A. Just asked her if --

THE COURT: Don't. You, you don't want to say.

A. I, yes, I remember.

Q. You remember everything that you said?

A. I remember.

Q. Okay. Did you talk with the police at some time?

A. Hum.

Q. Did you talk with the police officer?

A. No.

Q. Do you remember whether you gave a statement to the police detective?

A. I did. I believe that, yes, when I got there.

Q. Do you remember whether they warned you of your constitutional rights to silence and an attorney, so forth?

A. I don't know. I was under little extreme stress. I can't recall. I can't remember.

Q. Do you remember if you told them it was the same kind of thing that you discussed with the lady at the Waianae Coast Comprehensive?

A. I don't believe I discuss anything with the lady.

Q. There was a fellow, at some point outside that house, who you were talking to your lady friend. Remember talking to anybody outside the house.

A. Where things take place?

Q. Yes.

. . . .

A. No, I don't remember speaking, I know someone dropped us off. As far as--

Q. Do you remember how you got, how you left Jade Street?

A. Um, hum.

Q. How?

. . . .

A. I remember, yes, somebody gave me ride.

Following the court's colloquy with Sayers, Dr. Wagner testified that Sayers remained fit to proceed because she was capable of assisting in her own defense, consulting with her attorney, and understanding the court proceedings against her. Dr. Wagner was present during Sayers' testimony and, upon questioning by the court, opined, in relevant part, as follows:

A. . . . Right now, although I have heard her respond here to the questions that were asked, [Sayers] does not seem to respond really any differently than she did the last time, as I recall, when I interviewed her.

. . . .

She responded appropriately to questions as she did today. And I had no reason to believe that she couldn't, at that time, answer questions on the part of someone, say to attorneys herself, any individuals that would ask her a series of questions about events of the past or currently.

. . . .

Q. Right here, you think [Sayers] can assist in her own defense? What does that mean?

A. I believe she's able to answer questions adequately that are presented to her by her own counsel, by the prosecuting attorney, by yourself, by the judges' presiding. And she seems to today, again, able to respond to inquiries similar to when I asked her questions at the time, I recall.

. . . .

Q. . . . Based on your interview, . . . what was your impression of the questioning and answers today?

A. I thought she is, she responds appropriately. Again, as I recall, very similar to the last interview that I had with her. Seems lucid. Able to respond, oriented, to questions.

As the questions get more technical, relate to the legal profession or even the psychiatric profession, going to have more difficulty in understanding the terminology. May have to be reexplained to her. But I think that's fairly normal. She seems like she was listening, paying attention, making a real, real attempt to respond to the questions honestly.

Q. Do you believe that based on your experience and training that she does sufficiently present the ability to consult with her lawyer with a reasonable degree of rational understanding?

A. I believe she does.

Q. You think she has the capacity to assist in preparing her defense?

A. I believe she does.

Q. Does she have a factual understanding of the proceedings against her?

A. I believe she does.

THE COURT: To what degree of certainty are those opinions?

A. Say, within, to a reasonable degree of professional, psychological probability.

Q. To that same standard, what is your impression of, with respect to her fitness or no fitness at this time?

A. To me, I believe she's fit to proceed.

Q. That would be based upon your interviews as well as today?

A. Yes.

Dr. Collis testified that when he interviewed Sayers, she "answered the questions clearly" and straightforwardly with respect to court procedures, punishment, the judge's and defendant's functions, and "engage[d] in a cogent discussion of the situation and the charge." Although Dr. Collis opined that Sayers was an emotionally unstable person, thereby making it difficult for her to remain in control under severe cross examination, Dr. Collis believed Sayers remained fit to proceed because she could be given a sedative and the court could recess

to give Sayers time to calm down after an outburst.^{7/} Dr. Collis also opined that Sayers had the ability to approve or disapprove of a legal strategy and testify in her own defense. Dr. Collis could not definitively conclude that Sayers' failure to recall the actual stabbing was "for the benefit of the Court or the authorities in the case[.]"^{8/}

^{7/} Upon examination by the court, Dr. Collis testified, in relevant part, as follows:

Q. You say that the, Miss Sayers may react to certain witnesses. Just because she reacts to some witnesses, does this have a meaning that we need to know about with respect to fitness?

A. No, nothing more. I don't think so.

Q. So, she may react. It doesn't have much to do with her fitness unless it reaches a stage of uncontrollability. Is that, basically, what I hear from you?

A. Right. If she is pressured too much, she becomes impulsive. She might say, say you are a liar or whatever.

Q. And at that point, are we, is there a question about her fitness or are we still, that's something that person could be fit and still do that?

A. I think so.

Q. So, you, at that time, at that point, you would not be worried about fitness?

A. No.

^{8/} Upon examination by defense counsel, Dr. Collis testified, in relevant part, as follows:

Q. . . . Doctor, referring to your . . . report of July 13, 1999, you notes [sic] at the bottom, in a PPS that the defendant claims not to remember the actual stabbing though she could describe increasing rage leading up to--do you have any reason to believe her failure to remember is put on for the benefit of the Court or the authorities in the case?

A. I don't really know the answer to that question. She could possibly have disassociated and forgotten. And she could have been partially under the influence of drugs and that in combination with the stress of the situation might have done it.

(continued...)

Upon examination by the court, Dr. Collis testified, in relevant part, as follows:

THE COURT: This personality disorder that you have diagnosed Miss Sayers as having, would you consider this a mental disease disorder or a defect or is it an abnormality manifested only by repeated penal or otherwise antisocial conduct?

A. No, I do regard it to be a mental disorder.

Q. That being so, is the, does this contribute to Miss Sayers alleged inability to remember aspects of what happened on the date in question?

A. Probably so, but I couldn't give a, an entirely definitive answer on that because I didn't see features of a narcissistic personality, and which would be the sort a hysterical person, who would be more likely to dissociate, have complete amnesic episodes. The fact that she does have severe features of a border-line personality as well as poor emotional control makes that quite possible.

Q. You will have to draw me a picture as to why that will contribute to an inability to recall.

A. If one has poor emotional control and is liable to lose control when under extreme emotional stress, that type of person also will sometimes disassociate. Can simply push out of consciousness something that is unpleasant or unnatural and not recall it. As I said, in her situation, this is not the first thing that would come to mind because a good deal (phonetic) of her, quite purposeful. But I can't recall it out as a possibility either.

. . . .

Q. You said some of her behavior was purposeful, what do you mean?

A. After the alleged episode, she hid the knife. And that was what I was thinking of particularly.

§(...continued)

I don't really know the answer to that question whether she totally remembers or not.

Q. . . . Another part to that statement that she could describe her increasing rage leading up to, did she give you any specification of what caused this rage that was described?

A. She was, I remember right, very angry at her boyfriend, who she felt was harming her children. And she was an enraged mother.

Q. That would point to her not being in a state where she truly cannot remember?

A. It is still possible that she could not remember that, also.

Q. Yet, you say that you don't, do not believe that any mental disease, disorder, or defect has caused her to lack capacity to assist her lawyers. Why do you say that?

A. Because on every occasion that I have examined her, she has been in very good command of herself, has been able to answer questions appropriately. And that's it.

Q. . . . But has she been able to recall the incident to you in any form or fashion?

A. No.

Upon examination by the prosecutor, Dr. Collis testified, in relevant part, as follows:

Q. Dr. Collis, is it possible that the defendant claims she does not recall the event in question, is it something, manipulative behavior or something that is to suit her purpose?

A. Yes.

Q. Is there any way to determine whether she really recalls or not?

A. It's possible that if it was a disassociated episode and she were willing to submit to hypnosis to a drug induced interview that she might recall. Or she might tell exactly what happened. But, well, that's it.

The court then examined Dr. Collis:

Q. So, there is no way of really knowing if the defendant truly cannot remember. If she cannot because of this mental disease disorder or whether she is simply saying that but it is not true.

A. No.

Q. Is it also possible that she really cannot remember but it is not really a function of a mental disease, disorder, or defect? In other words, to, do normal people do that?

A. No. I think many of us push things out of consciousness but that are unpleasant, but we can usually recall them again.

Upon questioning by the court, Dr. Gitter testified, in relevant part, as follows:

Q. If it might cause mental disease disorders or defect, is Miss Sayers' personality disorders, is there any likelihood it contributes to her alleged inability to remember aspects of events in date, in question, ability to remember aspect?

A. No, because she didn't have amnesia with me. . . . [W]hen I looked at the taped interview that was conducted by Detective Michael Tsuda with [Sayers] on 4/11/98, the notes I have here says that she spent the night before with her boyfriend, boyfriend's sister's house. She carried a knife for her own protection because somebody had said there was a contract out on her. She and her boyfriend argued about the missing \$100. She admitted to taking out the knife. The victim tried to grab it away from her and then that led to the so called accidental stabbing.

She also said that she pulled out the knife to scare the victim so he would tell the truth about what happened to the money. And that she was quote "upset and angry."

That she and the victim had two beers each, and also smoked a hundred dollars worth of ice. So, I didn't, from that I didn't see any memory defect. When I asked her, she was cagey. For instance, during a somewhat evasive, during the fitness evaluation, I gave her the competency assessment instrument. And one of the questions on the instrument was, how do you think you can defend against these charges? She said, well, self-defense.

Next question, what is, how can you explain your way out of these charges? She said, I am framed. I am set up. I didn't do it. So either you stab somebody and there was self-defense, or you didn't do it, made up. To me, that struck me as some very conscious behavior. She didn't know, what should I say, what best things for me to say to get off the hook here. That struck me as volitional.

Upon questioning by defense counsel, Dr. Gitter testified, in relevant part, as follows:

Q. Did she give you an explanation of what happened that day, doctor? She able to recall?

. . . .

A.

She had made a statement that at the time of the offense she had been under the influence of crystal methamphetamine.

Also, Miss Sayers reported to me that she heard a child cry.

And that this experience caused her to have a quote "a flashback, i.e., a vivid memory of the victim of her alleged stabbing, abusing the children physically and emotionally."

. . . .

Q. Did your test or interview deal at all with her mental state at the time of the alleged offense?

A. Well, that's what the penal responsibility--that's why I added for the time of the offense, in addition to these other diagnosis, polysubstance dependence, I also diagnosed crystal methamphetamine intoxication.

Later, on February 2, 2000, after interviewing Sayers for about 30 minutes and reviewing "her correctional medical records[,] " Dr. Gitter further testified, in relevant part, as follows:

A.

I readministered to her the competency assessment instrument. And what I personally found particularly interesting is when I asked her the question, how she thought that she could be best defended against these charges? She said, well, the Soares defense sounds pretty good, whatever my lawyer, sounds great.

.

. . . My sense is that [Sayers] says whatever she feels is helpful to her in her case. She's fighting for her life. She wants to go home.

Q. And to a reasonable psychological certainty are you, what is your opinion as to whether she lacks the capacity with respect to fitness?

A. In my opinion, she's fit to proceed with the trial.

Upon examination by defense counsel, Dr. Gitter testified, in relevant part, as follows:

Q. You expressed the opinion that [Sayers] is likely, saying whatever she things is going to be successful. And she has no real lapse of memory. Is that a fair statement?

A. Fair yes.

Q. Given the variation between her reports of the incident and immediately following, first report, first at the scene, it was related to sex abuse, one of the children. Second report within four hours of the incident at the Waianae Coast Comprehensive Center something about abuse of the children. Third report to the police, 24 hours later, that it was a fight over money.

And that she didn't intend to do him harm. He did it to himself during the struggle for the knife. And yet, subsequent notation in the report of the examining mental health professionals of the sex abuse theory, nothing whatsoever about accidental.

And then, finally, claim of not being able to recall. Does this pattern fit with what you are saying about her being intentionally conforming her report to what she things will be most successful in her case?

A. It could. I understand that [Sayers] herself has a sex abuse history. That's what she told me. I would think that she might be sensitized to the sex abuse issue. I don't know whether any abuse happened between the victim and the children.

So, all I know is, possibly, may have happened, and she may have been angry about that. Any person without a psychiatric illness would be angry about those issues. What really happened? She gives conflicting reports.

And my sense is that oh, my God, what happened, and how do I best talk my way out of it in a different time, different delusion. That's my opinion.

Q. . . .

Does this fact that she has told so many different stories without any natural progression, in other words, bounce from one to another to another, does that make any sense based on your diagnosis of her?

A. I don't see any conflict with it. The person in that situation, when she was arrested, when the incident, alleged incident happened, I would imagine she must have been under a lot of emotional turmoil and probably not thinking as clearly at that time as one normally would because she's emotionally stressed out. So, she gives conflicting reports.

Even when I first saw her, within two minutes, she gave me two excuses. One was self-defense, and the next, I didn't do it.

Q. But you still feel that this is a manufactured situation not the result of simply not functioning properly?

A. That's my opinion, sir.

Upon further examination by the court, Dr. Gitter testified, in relevant part, as follows:

Q. You know, when she gives this conflicting statement, do you have any sense as to whether she did know what she was doing in making those conflicting statements or is that a fair question for you?

A. In light of all the other statements, she was so rational in all other questions I asked her. I think she's trying

to talk, find some loophole or some way to get out of it. Just as documented when she told me. Soares, State versus Soares sounds pretty good to me. In her mind that, even this, got free if found unfit to proceed.

. . . .

Q. Is it possible that if she really cannot remember the incident, issue may be because substance intoxication? If you have an opinion on that?

A. I seriously doubt it, Your Honor.

Q. Why?

A. To me, would be unreasonable. One point, when she's interviewed by the police detective, she has a clear memory, next, suddenly gone.

On February 2, 2000, after the hearing, the court decided as follows:

THE COURT: . . . [T]he only real problem here is that [Sayers] claims she cannot remember the supposed incident. That's really the only problem. According to the doctor's report, she recalls the incident . . . right before this occurred . . . and . . . just after. And we have inclusive testimony from Dr. Collis.

We have what strikes me, facial credible testimony from Dr. Gitter. We have the report.

. . . I think I have, based upon the credible and admissible evidence in front of me, I believe that [Sayers] is fit to proceed. . . .

. . . .

THE COURT: . . .

With respect to the fitness issue, let me, just for the record, make the following findings:

I do believe [Sayers] has sufficient present ability to consult with her lawyer with a reasonable understanding. Also, believe she does have the capacity in assisting and preparing her defense.

Finally, she has rational as well as factual understanding of the proceeding against her.

On February 8, 2000, prior to jury selection, defense counsel stated, "I have no knowledge of what the defense will be."

At the trial, Sayers was the last person who testified.

Prior to her testimony, the following conversation occurred.

THE COURT: All right. Ms. Sayers, you have a right to testify under the Constitution at this trial in your own defense. Although you should talk with [defense counsel] and, really, whomever else you want to talk with about this decision to testify, it's your decision because it's your right. And if you decide you want to testify, nobody can stop you from testifying, including your own lawyer.

Now, if you decide you want to testify, the Prosecutor's going to get a chance to question or cross-examine you. You also have a constitutional right not to testify and remain silent. If you choose not to testify at this trial, I'm going to tell the jury that they cannot hold your silence against you or consider it in any way in deciding your case. If -- once I understand whether you're going to testify or not, we're going to go through this questioning again. Okay, you've understood everything I've told you?

[SAYERS]: Uh -huh.

THE COURT: Yes or no?

[SAYERS]: Yes.

THE COURT: Any questions?

[SAYERS]: No, not at this point.

THE COURT: I'm sorry.

[SAYERS]: Not at this point.

THE COURT: All right. If you have any questions, you can certainly, talk to your lawyer and have all the time you need to talk to your lawyer. If you have any questions for the Court, we'll stop the proceedings and try to answer them for you.

All right. Is [Sayers] going to testify?

[DEFENSE COUNSEL]: I don't know.

THE COURT: All right.

[DEFENSE COUNSEL]: Are you going to testify?

[THE COURT]: That's between the two of you.

[DEFENSE COUNSEL]: No. I think she needs to tell the Court, herself, yes or no. I think we're all waiting. That's the issue right now.

Are you going to take the stand in your own defense?

[SAYERS]: Yeah.

Upon examination by defense counsel, Sayers testified, in relevant part, as follows:

Q. You heard several of the witnesses describe a struggle between you and [the victim] when he was lying on the ground in the neighborhood of Jade Street, and you were kneeling over him, either a straddle or between his legs. Do you have any recollection of that happening?

A. There might -- yeah, we might, yeah.

Q. Do you know what was happening at that time? Why were you in that position?

A. Well, I guess I -- I had out a knife to scare him, I guess.

Q. Why did you say, "I guess?" Do you recall?

A. Because I didn't do it, you know. I mean I guess that's what happened.

Q. Do you remember doing it?

A. I -- somewhat.

Q. Does the word somewhat --

A. No, I did.

Q. Okay. Tell the jury what you remember.

A. Yeah, I remember pulling out a knife to scare him.

Q. Why?

A. Well, I was asking him for what happened to some money that was missing, not -- I guess. I was saying some other things. I don't know. I can't remember.

Q. Do you remember what other things you were saying?

A. No. But I remember that I did pull it, and there was a struggle and --

Q. And do you recall how you were holding the knife when you pulled it?

A. I don't know. I guess (indicating). I don't know. Like this (indicating).

Q. Ms. Sayers, if this pen is the knife and the silver clip is the handle, will you please show the jury how you remember holding the knife that day.

A. (Demonstrating.)

[DEFENSE COUNSEL]: Your Honor, may the record reflect that the handle portion is in the palm of her hand, and the point is sticking out of that side on which her thumb is located.

THE COURT: Very well.

. . . .

Q. . . . And why did you want to scare [the victim]?

A. Like I said, I thought -- I mean there was some money was missing, and I asked him where the money went.

Q. And what did he answer?

A. He said he didn't know.

Q. He gave you no explanation at all?

A. No.

Q. Did you have a suspicion where the money went?

A. Yeah, I kind of had a hunch, yeah.

Q. What did you think?

A. That he gave it to somebody else.

Q. Who?

A. Maybe, a former girlfriend. I don't know. Somebody. He was hiding out on me.

Q. Did you have any evidence or something that he had done to lead you to believe that he was seeing someone else?

A. I can't say.

Q. The words "I can't say" is it because you don't know or because you don't have anything or because you don't want to say?

A. Yeah, I believe he -- he was.

Q. What makes you think that?

A. His behavior, strange. I mean just strange.

Q. Describe it to us please.

A. Just far distance, not wanting to - I mean you know, I can't - I can see it, but I'm having a hard time explaining it. Just far distant, and just I don't know. You know, like when you're trying to hide something. Your know, you're - you're too good, too high - you know what I mean? - because it shows. You know, just say it. You know, what's the sense of hiding it because it's coming out. Coming out of your body, your pores, everything. So what's the sense of even hiding it. I mean you're giving yourself away.

. . . .

Q. And you're holding the knife out like this (indicating). Did you lunge at [the victim]?

A. I think so.

Q. At that moment in time, did you intend to hurt him?

A. No.

Q. What were you trying to do?

A. Just scare him.

Q. And what if anything, did he do in response?

A. I guess he get -- he panicked. He--

Q. And how did he show his panic?

A. I don't know if he went to grab it. I don't know. I can't remember. He might have grabbed it and tried to pull it, I mean, you know, to, I guess, prevent something from happening.

. . . .

Q. Do you recall seeing the knife enter [the witness'] body near the base of his neck on the left-hand side?

A. Uh-huh, when he pulled it toward him.

Q. And then what happened?

A. And he -- I don't know. He just kept pulling it. I don't know. He just kept pulling it toward him as if --

Q. Do you recall if he fell down at any point?

A. I believe he did.

Q. You've heard a lot of testimony in the court. Is what you just said, "I believe he did," based on your own recollection or what you've heard in court?

A. What I heard in court.

Q. So you don't independently remember that?

A. I don't remember him falling.

Q. Do you independently remember him being stabbed, the knife going into his body?

A. When he pulled it toward him.

Q. You do remember that?

A. Uh-huh, yes. I don't know.

Q. Do you --

A. I can't say. No, I can't say that I remember.

. . . .

Q. Do you understand there's a difference between guessing and speculating on the one hand and actually remembering on the other; correct?

A. Uh-huh.

THE COURT: Yes or no?

[SAYERS]: Yes.

[DEFENSE COUNSEL]: So you're testifying from memory, or you're guessing based on what you heard here in court?

A. What I heard. I don't want -- I mean say something that I -- you know, that I don't -- didn't see happen or I can't remember. I can't remember how he fell or when he fell or anything like that.

. . . .

Q. Ms. Sayers, on the morning of April 10th, 1998, did you intentionally cause the death of [the victim]?

A. No.

Q. On the morning of April 10th, 1998, did you know that, by pulling out the knife and threatening [the victim] with it, you might cause his death?

. . . .

A. I didn't know -- well, let's put it this way. I didn't think that it would have turned out or ended like that, you know.

. . . .

A. I got too much to lose to waste my time in prison, to waste my life in prison.

Q. On April 10th, 1998, did you take out a knife with the intent of harming [the victim]?

A. No.

Q. On April 10th, 1998, by taking out that knife and holding it out, did you know that [the victim] might become hurt by it?

A. No. Well, I sure wasn't going to hurt him with it. That wasn't my intentions.

On February 23, 2000, the jury found Sayers guilty as charged of Murder in the Second Degree.

DISCUSSION

In State v. Soares, 81 Hawai i 332, 350-51, 916 P.2d 1233, 1251-52 (Haw. App. 1996) (footnote omitted) this court stated, in relevant part, as follows:

According to the United States Supreme Court, the test (hereinafter, the Dusky/Drope test) for determining whether a criminal defendant is legally competent to proceed to trial is three-fold.

First, the trial court must determine whether the defendant "has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding[.]" Dusky v. United States, 362 U.S. at 402, 80 S.Ct. at 789. Second, the trial court must determine whether a defendant has "the capacity . . . to assist in preparing his [or her] defense[.]" Drope v. Missouri, 420 U.S. at 171, 95 S.Ct. at 903. Third, the trial court must determine whether the defendant "has a rational as well as factual understanding of the proceedings against him [or her]." Dusky at 402, 80 S.Ct. at 789.

To apply the foregoing test, the trial court must assess a defendant's ability to develop a working relationship with his or her attorney, provide the attorney with information that can be used to present a coherent defense, make fundamental defense decisions, testify in court, if necessary, and withstand the pressures of a trial. United States v. Horowitz, 360 F.Supp. at 777; State v. Hamilton, 373 So.2d 179, 182 (La.1979); People v. Swallow, 60 Misc.2d 171, 301 N.Y.S.2d 798 (N.Y.App.Div.1969). In this regard:

The decision as to a defendant's competency to stand trial should not turn solely upon whether he [or she] suffers from a mental disease or defect, but must be made with specific reference to the nature of the charge, the complexity of the case and the gravity of the decisions with which he [or she] is faced. . . . Appropriate considerations in determining whether the accused is fully aware of the nature of the proceedings include: whether he [or she] understands the nature of the charge and can appreciate its seriousness; whether he [or she] understands what defenses are available; whether he [or she] can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he [or she] has an awareness of his [or her] legal rights; and whether he [or she] understands the range of possible verdicts and the consequences of conviction. Facts to consider in determining an accused's ability to assist in his [or her] defense include: whether he [or she] is able to recall and relate facts pertaining to his [or her] actions and whereabouts at certain times; whether he [or she] is able to assist counsel in locating and examining relevant witnesses; whether he [or she] is able to maintain a consistent defense; whether he [or she] is able to listen to the testimony of witnesses and inform his [or her] lawyer

of any distortions or misstatements; whether he [or she] has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he [or she] is capable of testifying in his [or her] own defense; and to what extent, if any, his [or her] mental condition is apt to deteriorate under the stress of trial.

State v. Hamilton, 373 So.2d at 182 (quoting State v. Bennett, 345 So.2d 1129, 1138 (La.1977)) (footnote omitted).

Sayers argues that because the court only stated for the record that Sayers was fit to proceed and failed to explicitly enter findings pursuant to the Soares factors, the circuit court erred when it determined that Sayers was fit to proceed. It appears that Sayers fails to appreciate the significance of the following ruling by the Hawaii Supreme Court.

We overrule *Soares* and hold that the trial court's determination that a defendant is competent to stand trial will be reviewed under an abuse of discretion standard. The standard for determining competence is statutorily mandated by HRS Chapter 704 and primarily a matter for the professional determination of the examiners appointed by the trial court in accordance with HRS Chapter 704. An abuse of discretion standard is appropriate because the determination relies upon the trial court's assessment of the testimony of expert witnesses and its observational assessment of the defendant.

Janto, 92 Hawaii at 29, 986 P.2d at 316 (citations omitted).^{2/}

In other words, the trial court's determinations on the questions whether (1) as a result of a physical or mental disease, disorder, or defect, defendant does or does not lack the

^{2/} "The standard for determining competence is . . . primarily a matter for the professional determination of the examiners appointed by the trial court in accordance with HRS Chapter 704. . . . [T]he determination relies upon the trial court's assessment of the testimony of expert witnesses and its observational assessment of the defendant." Janto, 92 Hawaii at 29, 986 P.2d at 316 (citations omitted). In our view, the second sentence contradicts the first sentence.

capacity (i) to understand the nature of the charges and proceedings against him/her or (ii) to assist in his own defense, and (2) defendant does or does not have (i) a sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and (ii) a rational as well as factual understanding of the proceedings against him/her, are discretionary decisions.

A consequence of the application of the abuse of discretion standard of review to the trial court's answers to these questions is that the trial court is not required "to explicitly enter findings pursuant to the Soares factors[.]"

Sayers contends that her inability to recall and relate facts pertaining to her actions and whereabouts during the alleged stabbing precluded her from assisting in her defense. Sayers argues that she could not (1) identify or locate witnesses for trial, (2) maintain a consistent theory of defense, and (3) provide defense counsel with a solid direction because of the conflicting statements Sayers gave to a bystander at the scene of the alleged stabbing, the police, and the Waianae Coast Comprehensive Health Center.

Whether a trial court denies a criminal defendant due process by ruling him or her competent to stand trial when the defendant alleges that she has no memory of the alleged crime is a case of first impression in Hawaii. The question whether the

defendant has no memory is a question of fact. Assuming the defendant's allegation is true, Sayers cites no case which has held that lack of memory of the alleged crime creates a lack of fitness to stand trial. All the cases we have located hold that a lack of memory of the alleged crime does not in and of itself create a lack of fitness to stand trial. See Davis v. State, 354 So.2d 334 (Ala. Crim. App. 1978); Lawrence v. Arkansas, 39 Ark. App. 39, 839 S.W.2d 10 (1992); Beauregard v. State, 372 So.2d 37 (Ala. Crim. App. 1979); People v. Amador, 200 Cal. App. 3d 1449, 246 Cal. Rptr. 605 (Cal. App. 5 Dist. 1988); Mauldin v. State, 382 So.2d 844 (Fla. Dist. Ct. App. 1980); Aldrige v. State, 247 Ga. 142, 274 S.E. 2d 525 (1981); State v. Gilder, 223 Kan. 220, 574 P.2d 196 (1977); Commonwealth v. Lombardi, 378 Mass. 612, 393 N.E.2d 346 (1979); State v. Davis, 653 S.W.2d 167 (Mo. 1983); State v. VanNatta, 506 N.W.2d 63 (N.D. 1993); Siah v. Oklahoma, 837 P.2d 485 (Okla. Crim. App. 1992). Furthermore, Dr. Gitter, Dr. Collis, and Dr. Wagner unanimously and independently concluded during the February 1, 2000 fitness hearing that Sayers' alleged lack of recall of the stabbing, whether genuine or not, did not affect Sayers' fitness to proceed to trial.

Public policy also dictates that memory loss should not, *per se*, cause a criminal defendant to be unfit to stand trial. If this were the case, many criminal defendants would allege a loss of memory in an effort to avoid trial.

The argument by Sayers that witnesses saw her appear dissociated and vacant at the alleged crime scene does not support her contention that she was unfit to proceed. The behavior of Sayers at the scene of the alleged crime and the fitness of Sayers to stand trial are different questions.

Sayers also contends that her lack of understanding of alternative defenses and trial strategy rendered her incapable of assisting in her defense. We disagree. As noted by the Supreme Court of Washington in State v. Ortiz, 104 Wash.2d 479, 483, 706 P.2d 1069, 1072 (Wash. 1985), "[w]hile it is true that a defendant must be able to choose among alternative defenses in order to waive the insanity defense, the same is not true regarding competency to stand trial."

CONCLUSION

In light of the record, we decide that the circuit court did not abuse its discretion when it determined that Sayers (a) had sufficient present ability to consult with her lawyer with a reasonable understanding, (b) had the capacity in assisting and preparing her defense, and (c) had a rational as well as factual understanding of the proceeding against her.

Accordingly, we affirm the circuit court's May 15, 2000 Judgment, Guilty Conviction and Sentence.

DATED: Honolulu, Hawaii, December 14, 2001.

On the briefs:

Glenn D. Choy,
for Defendant-Appellant. Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu, Associate Judge
for Plaintiff-Appellee.

Associate Judge