

NO. 23228

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
CHRISTOPHER J. MARTINEZ, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR NO. 99-2745)

MEMORANDUM OPINION

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

Defendant-Appellant Christopher Martinez (Martinez) appeals the January 14, 2000, Judgment of the Family Court of the First Circuit¹ (the family court), which found Martinez guilty of one count of Abuse of Family [or] Household Members, pursuant to Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2000).² The family court sentenced Martinez to forty-eight hours of incarceration with credit given for time served and one year of probation, assessed a \$50.00 Criminal Injuries Compensation fee

¹ The Honorable I. Norman Lewis presiding.

² HRS § 709-906 provides, in relevant part, as follows:

§709-906 Abuse of family or household members; penalty.

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

against Martinez, and ordered Martinez to attend domestic violence intervention classes until clinically discharged. Martinez filed this timely appeal. On appeal, Martinez contends that there was insufficient evidence adduced at trial to establish that he recklessly caused physical abuse in violation of HRS § 709-906. Martinez also contends he was denied effective assistance of counsel when, during closing argument, defense counsel committed error that substantially impaired an otherwise potentially meritorious defense. We disagree with Martinez's contentions and affirm the January 14, 2000, Judgment of the family court.

I. BACKGROUND

On October 18, 1999, Martinez was charged by complaint with Abuse of Family [or] Household Members in violation of HRS § 709-906. At the jury-waived trial held on January 7 and January 14, 2000, the parties stipulated into evidence photographic evidence of the scene prior to trial.

Michele Vining (Vining) testified first for the State. Vining is employed as a counselor by Catholic Charities Family Services Mary Jane Center (the Center) -- a pregnancy program where clients in transition reside. Gladys Durante (Durante) was a client in the program and lived at the Center for a little while. On October 8, 1999, at about 11:45 a.m., Vining and a co-worker were inside the Center when they heard arguing outside

between Martinez and Durante. When Vining glanced out a window, she saw a car driven by Martinez beginning to pull away while Durante was reaching into the back seat. She also saw Martinez's and Durante's baby on a bench near the stairs of the Center. As Martinez's car pulled away, Vining saw Durante still reaching into the back seat with her body about halfway in the car. Vining ran outside because the baby had been left unattended on the bench. It took Vining about ten to fifteen seconds to get outside, and at that point she saw that the car was in motion and Durante was hanging out of the car with her legs scraping the pavement. Vining heard Durante yelling and screaming while the car continued to move. Vining was positioned behind the car and a little to the left, from where she could see Durante hanging out of the left side back seat of the four-door vehicle.

Vining testified that it appeared Durante was holding onto something inside the car as she was being dragged, although Vining could not see what it was. Vining approximated the distance that the car continued to travel after Durante started screaming was 100 feet. After driving the 100 feet, Martinez slammed the brakes and Durante was thrown from the car. Vining ran to Durante to help her get up from the ground, but by the time Vining got to Durante, Durante was already getting up. Martinez had gotten out of his vehicle and was helping Durante get up. Durante was crying and upset, asking Martinez for her

wallet. Vining asked Martinez to give Durante back her wallet and asked him to think about Durante and the baby. Vining was unable to remember exactly what Martinez said, but it was something about Durante using the baby against him and he was not going to give the wallet back. Vining grabbed "the baby's bag and things" out of the back of the car; then Martinez got in the car and drove off. Martinez did not give Durante back her wallet.

Vining testified that Durante was still very upset, crying, and badly injured. Vining described Durante's injuries as running from her knees down to her feet, with no skin left on in sections, and gravel embedded in her skin. Vining sat Durante down, got a first aid kit, and tried to clean up Durante's wounds as best as she could. Vining tried to calm Durante down by talking with her. After trying to wash out the wounds with water, they determined that Durante needed medical attention. Vining asked Durante if she wanted the police called. Durante stated that she wanted to make a report, so Vining called the police. When the police arrived, they spoke to both Durante and Vining; Vining described Durante's demeanor as "still upset." Durante was "calming down" as the police and Vining talked to her and tried to cheer her up.

Officer Lawrence Santos (Officer Santos) testified that on October 8, 1999, he was employed as a Honolulu Police

Department (HPD) officer. At 12:19 p.m. on that day, Officer Santos was sent to the Catholic Charities portion of St. Stephen's Seminary at 6301 Pali Highway in response to a possible assault call. He arrived there at 12:28 p.m. Officer Santos was met at the scene by Vining, who referred him to Durante. The bloody bandages on her knees first drew his attention to Durante. The bandages on both knees measured approximately three inches by four inches and appeared soaked with blood. Officer Santos also observed dime-sized and quarter-sized abrasions to both of Durante's feet and around her toes. Officer Santos observed that Durante was alert, sober, and appeared to be crying because her eyes were red and filled with tears. Durante was holding a newborn baby. Durante told Officer Santos that she and Martinez argued over the custody of the baby and that Martinez drove off, dragging her along the roadway by the car. Durante filled out and signed an HPD's Statement Form 252 (statement form). Under cross-examination, Officer Santos testified that he did not photograph Durante's observable injuries because he did not have a camera available. Officer Santos stated there is no HPD policy requiring the taking of photographs, but that if a camera is available, officers would use it.

Durante's testimony at trial differed from the statements she gave to Officer Santos and wrote out and signed on the statement form on the day of the incident. Durante testified

that she and Martinez had been "[b]oyfriend and girlfriend" for approximately two years and together had a three-month-old baby boy. On October 8, 1999, she and Martinez got into an argument at approximately 11:45 a.m. as they drove to the Center. The argument was about Durante "going back to using drugs and [Martinez] taking away the baby." While Martinez did not threaten her, he made it "very clear" that he would take away the baby if she went back to using drugs. Once they reached the Center, Martinez stopped in front, took the baby out, and placed him on a bench; Durante unloaded the bags. As the bags were unloaded, Durante's wallet fell on the passenger's side front seat floor. Durante went into the car from the back driver's side door and leaned over the front seat to grab her wallet. Her legs were in the car as she started reaching for her wallet. As she leaned over the front seat, the car started moving. Durante wanted to jump out of the car because she and Martinez were arguing. Then the car stopped, and she jumped out on the grassy embankment next to the road and scratched and "strawberried" her knees. Durante stated that her only other injury was a small scratch on her left baby toe. When asked to clarify that while she was reaching for her wallet, she decided to jump from the car, Durante testified, "[y]eah, yeah. Whatever make him look bad so he can't touch baby, you know what I'm saying?"

Durante testified that her injuries were sore and bleeding. Durante believed she fell on her knees because she was

wearing slippers that were too big for her, causing her to lose her balance when she went to get out of the car. After she fell from the car, Martinez got out of the car and helped her up, and Vining helped her into the Center. Martinez then drove off with Durante's wallet still in the car.

Durante testified that Martinez never grabbed her wallet from her; Martinez never made any threats at any time and did not threaten to bury her if he did not get his son within six months; Martinez did not drive off while she was reaching into the car to grab her wallet; her legs were not dragged on the road while Martinez was driving; and Martinez did not abruptly stop the car causing her to fall out.

Durante testified that the police were called and talked with her about what happened. Durante acknowledged she told the police that Martinez drove off while she was trying to get her wallet from the car and she was injured when her legs dragged along the driveway. She acknowledged that when the officer arrived, her knees were cut up and bleeding and she was upset and crying. She acknowledged that she was given an opportunity to fill out the written statement form, she did so in her own writing, and she and the officer both signed it. The statement form was admitted into evidence.

Durante acknowledged she wrote the following in her statement form:

1. When Martinez dropped her off, they were arguing and he wanted to take the baby away from her within six months.
2. She told Martinez that was not going to happen, after which Martinez threatened her life, saying he was going to get their son within six months and would "bury me to get his son."³
3. She told Martinez she would get a TRO against him and she was not afraid of him.
4. When Durante took the baby out of the car, Martinez grabbed her wallet, and when she went to retrieve the wallet, Martinez began driving while her leg was out the door.
5. When Martinez stopped abruptly and jerked the car, she fell out scraping both knees on the road.
6. It all started because Durante was not going to cooperate and give Martinez the baby after six months.
7. When Durante was dragged on the road, she suffered two large abrasions, one on each knee that were "deep and really sore, bloody also, and a little one on my left foot," and she planned on going to the doctor.

Durante testified that on her statement form she never mentioned anything about jumping from the car.

Durante testified that since the October 8, 1999, incident, she and Martinez have made up, she has forgiven him, and he helps support the baby. Martinez is a part of the baby's life, and she wants him to continue to be. When asked if she

³ Durante testified that she wrote this, but then recanted it saying "[t]hat's what I wrote, but that's false."

does not want to see anything happen to him, Durante replied, "I wanna do the right thing."

Under cross-examination, Durante testified that she was all the way in the car with the door closed when she reached for her wallet and the car began moving. The car was accelerating because it was climbing a hill. When she reached out to grab the handle to open the car door, Martinez slammed on the brakes. Martinez has never physically abused her, and the injuries she received were the result of her own actions rather than anything Martinez did. Durante went to the police station on October 12, 1999, to make an amended statement because she wanted to "set the record straight," stating that she lied on the first statement and "felt bad." Durante lied in order to make Martinez look bad because she had taken drugs during her pregnancy. The statements Durante made in her October 12, 1999, statement contained the same information she testified to at trial.

The State next called Roxanne Marcum (Marcum), an education specialist and eyewitness to the October 8, 1999, incident, to testify. Marcum testified that she works part-time at the Center and was in a second floor room in the St. Stephen's building at the time of the incident. From the room she was in, she could hear Durante speaking in a loud voice, repeatedly saying phrases like "give me my wallet, I need my wallet." Marcum looked across the room to Vining and said "it sounds like

there's a problem outside," which drew Vining's attention outside to the incident. Marcum looked out the window and saw Durante leaning from the waist up into the stopped car. Marcum saw Martinez driving the car and the car move in a jerking motion; she stated that "[i]t would go and stop, and then go and stop, and then go and stop." At that point, Vining rushed out to the baby because he was unattended. After the car jerked one last time, it started to drive off with Durante's legs half in and half out of the car. Vining followed the car up the hill. Marcum saw Durante being dragged along with the car and Durante was screaming as the vehicle was moving.

Marcum testified that when Vining followed the car up the hill, Marcum left the room to go get the baby, who was still on the bench. When Marcum got outside, she saw that the car had stopped at just about the crest of the hill before the turn and Vining was attending to Durante on the ground. Marcum took the baby into the building and then went outside to the bench area where Durante and Vining had returned. Marcum described the injuries to Durante's knees as severe and bleeding profusely. Marcum saw blood dripping down Durante's legs and Durante crying. Marcum described Durante's legs as scratched from the knee caps down approximately five to six inches - almost mid-way on the shin.

At the close of the State's case, the defense made a motion for a judgment of acquittal, submitting that the State failed to make a prima facie case that Martinez violated § 709-906, Abuse of Family or Household Member. The court denied the motion.

Martinez testified on his own behalf. Martinez testified that on October 8, 1999, he dropped Durante and their four-day-old son off at the Center after taking the baby to the doctor for a checkup. He and Durante had talked about Durante's "present situation as far as her going through her divorce with her ex-husband and drug abuse and all this kind of stuff." Martinez and Durante were not arguing at this point, but he was talking to her in order to get her to realize that when she gets upset or mad, she can't "just go off" and "do stupid kind of things." Martinez repeatedly testified that he was not threatening or arguing with Durante, but rather he "tried to make her realize":

If she's gonna continue, you know, just flying off the handle every now and then and getting into drugs and stuff like that, then I [Martinez] would have to look at, you know, taking precautions and, you know, addressing the court and taking legal action so I can get my son.

Martinez repeatedly testified that Durante became emotional saying that Martinez was going to take the baby away from her; Martinez told her that was not the case, that she was getting "this thing thrown out of proportion." Martinez repeatedly testified that Durante insisted Martinez was going to

take the baby away from her and he continually tried to calm her down, saying the Center was not the appropriate place to have the conversation -- they should leave if she wanted to talk about it. Durante became upset, took the baby out of the car, and unloaded some bags and placed them on the bench while slamming car doors and saying, "you ain't gonna take this baby away from me," over Martinez's assurances that he did not say he would take the baby away from her.

Martinez testified that after Durante put the baby on the bench he began to reverse the car, but was stopped by Durante who said she had one more bag in the back seat. Durante was yelling at Martinez as she got in the back seat and closed the door; she told Martinez that she did not want him to go. Durante continued yelling at him and asking him why he was going to take the baby away from her. Durante's wallet was in the front seat, and Martinez stated that if it fell out of Durante's bag, it was Durante's way of keeping him there to talk. Throughout her yelling, Durante moved from the front seat to the back seat, to the front seat, to the back seat, causing the wallet to fall out of the bag. Martinez put his hand on the wallet "[t]o talk to her," saying, "you gotta slow down and think of what you're doing." Eventually Durante began screaming, "help, he doesn't want to give me my wallet." Martinez testified that he responded, "here, take the wallet; Durante said, "no you don't

wanna give me"; and Martinez replied, "I said take the wallet." Durante then got in and out of the car, moved from one seat to another, and opened and closed car doors. Martinez was concerned about Durante's yelling because "cops going come and everything for what, what did I do, you know, and she said, you said you going take the baby away from me, you ain't never going touch this baby." Martinez told her that he was going to go, she knew how to contact him, and they should talk later.

Martinez testified that throughout the argument, "we knew exactly what was happening with the child." He believed the argument lasted 30 to 45 minutes although it "could have been even longer than that." Martinez believed that throughout the period during which Durante got in and out of the car, the car moved approximately "six different times, and each time it moved, it was like a car length, maybe a car length and a half." Martinez claimed he would stop the car each time Durante said she was going to get out of the car and opened the door. Throughout the period where Durante was slamming the doors and yelling at him, Martinez did not become angry, yell, or threaten Durante, but rather tried to calm her down because he "didn't want her to make a scene."

Martinez testified that Durante ended up sitting on the driver's side back seat. Each time Durante said she was going to get out, he would stop the car. Durante would open the car door,

but "stay right there" with one foot out, repeating her claims that he didn't want to give back her wallet. Martinez told her "[y]our wallet's right there, take 'em." Durante tried to open the door about four different times. Martinez approximated that the car moved "about maybe eight car lengths, nine car lengths, about 80 feet." Martinez testified that he realized they were getting kind of far away from the baby and that:

the car was already stopped, and I was trying to tell her let me reverse the car down the hill (indiscernible) kine'a little bit far away, and she reached in the front seat and she got the birth certificate and went towards the other way, unlocked the door, got out, and I seen her start, you know, falling. So, I opened up my door, I went out and I said, look, look, she had fallen down on her knee, I said, look now what happened, now you wen hurt your knee.

Martinez testified Durante went down like she had lost her balance. Martinez claimed that when Durante's "knees hit the ground, and the rest of her body was going down, I was already out of the car and just about next to her and trying to help her get up." Martinez stayed about three minutes longer and then left, saying to Durante, "just give me a call when you calm down. You know how to get in touch with me."

Martinez testified that he never at anytime dragged Durante behind his car; Durante was never hanging out of the car with her knees dragging; he never intended to hurt Durante or physically abuse her with the car that day; and he never jerked the car.

The family court found:

In this case, the Court will make the finding that (indiscernible) that there was an intention here on the part of the defendant to physically abuse the complaining witness[.] However, the Court does find that the prosecution has proved to this Court beyond a reasonable doubt that the defendant did engage in reckless conduct which did cause the injuries to the complaining witness. Accordingly, the Court will find the defendant guilty as charged under abuse of family and household member.

II. STANDARD OF REVIEW

A. Sufficiency of the Evidence

Regarding appellate review for insufficient evidence, the Hawaii Supreme Court has repeatedly stated:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support the conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Quitog, 85 Hawaii 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawaii 131, 135, 913 P.2d 57, 61 (1996)) (emphasis omitted). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Eastman, 81 Hawaii at 135, 913 P.2d at 61.

State v. Richie, 88 Hawaii 19, 33, 960 P.2d 1227, 1241 (1998).

B. Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76

Hawai i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and brackets omitted).

[T]he 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.

[Ritchie, 88 Hawai i at 39, 960 P.2d at 1247] (quoting State v. Silva, 75 Haw. 419, [440], 864 P.2d 583, 593 (1993)). Determining whether a defense is "potentially meritorious" requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of "actual" prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai i 20, 27, 979 P.2d 1046, 1053 (1999)

(ellipsis in original, internal quotation marks omitted) (quoting

State v. Fukusaku, 85 Hawai i 462, 480, 946 P.2d 32, 50 (1997)).

III. DISCUSSION

A. Sufficiency of the Evidence

Martinez contends the family court erred in convicting him because there was insufficient evidence to establish that he recklessly engaged in physical abuse by dragging Durante from his moving vehicle. Martinez contends the State failed to prove Martinez knew of the risk that Durante was not fully in the car or that Durante was intending to jump from the car.

It is well-settled that "even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be

affirmed." State v. Pone, 78 Hawai i 262, 265, 892 P.2d 455, 458 (1995) (quoting State v. Batson, 73 Haw. 236, 248, 831 P.2d 924, 931, reconsideration denied, 73 Haw. 625, 834 P.2d 1315 (1992)).

Hawai i Revised Statues § 709-906(1) does not describe a culpable state of mind attendant to the prohibited acts. Therefore, we look to the Hawai i Penal Code provision regarding state of mind: "When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." HRS § 702-204 (1993). Hawai i Revised Statutes § 702-206 (1993) defines "recklessly" as:

§702-206 Definitions of states of mind.

-
- (3) "Recklessly."
 - (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
 - (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
 - (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
 - (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

While the State did not introduce evidence at trial showing that Martinez consciously disregarded a known risk, it is not necessary for the State to introduce direct evidence of a

defendant's state of mind in order to prove the defendant acted intentionally, knowingly or recklessly. State v. Eastman, 81 Hawai i 131, 140-41, 913 P.2d 57, 66-67 (1996). The Hawai i Supreme Court has stated that given the difficulty of proving the requisite state of mind by direct evidence in criminal cases:

We have consistently held that . . . proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the [defendant's conduct] is sufficient Thus, the mind of an alleged offender may be read from his acts, conduct and inferences fairly drawn from all the circumstances.

State v. Sadino, 64 Haw. 427, 430, 642 P.2d 534, 536-37 (1982) (citations omitted); see also State v. Simpson, 64 Haw. 363, 373 n.7, 641 P.2d 320, 326 n.7 (1982).

The family court found the State proved beyond a reasonable doubt that Martinez did engage in reckless conduct, which did cause the injuries to Durante. The State introduced substantial evidence, which the family court found credible, that Martinez's car continued moving approximately 100 feet after Durante began screaming. The injuries Durante sustained were consistent with the testimony and support a finding that Martinez consciously disregarded a substantial and unjustifiable risk of physically abusing Durante. Therefore, the family court properly inferred that Martinez physically abused Durante with the minimum requisite state of mind (recklessness) to support a conviction under HRS § 709-906(1).

B. Ineffective Assistance of Counsel

Martinez also contends he was denied effective assistance of counsel because defense counsel committed error during closing arguments, an error that substantially impaired an otherwise meritorious defense.⁴

Specifically, Martinez points to the following section of defense counsel's closing argument as the source of the alleged error:

[Defense Counsel] He's charged with physical abuse here, your Honor. He never struck her, he never touched her, he's driving a vehicle [. . . .] I would concede he's operating a vehicle, he's on a driveway, he goes a very short distance, and I don't think there's any dispute, everybody is in accord here, he's going under five miles an hour. He's barely rolling.

Your Honor, you know, he may have been guilty of some poor judgment in not just giving her [her] wallet, but that doesn't rise to the level of physically abusing her here. He may have been negligent in continuing to move the car when she wanted to get out, but your Honor, I don't think the statute could be applied to these types of facts and this type of alleged, the State is saying reckless, but you know, I think if anything, it's negligence.⁵

Martinez contends defense counsel erred because defense counsel stated that Martinez "may have been negligent in continuing to move the car," thereby conceding "an essential element of the offense charged, that [Martinez] continued to move the car while Durante was getting out." Martinez's claim is

⁴ Martinez relies on article I, section 14 of the Hawaii Constitution and the sixth amendment to the United States Constitution.

⁵ January 14, 2000, Transcript of Proceedings at 148 (emphasis added in opening brief; ellipsis added above; bracketed material in original transcript).

without merit. This court recognizes that "[s]pecific actions or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny." State v. Timas, 82 Hawaii 499, 516, 923 P.2d 916, 933 (App. 1996) (internal quotation marks omitted, emphasis in original). Martinez misstates the record. Defense counsel stated that Martinez "may have been negligent in continuing to move the car when she wanted to get out," rather than, as Martinez claims, "while she was getting out."

The Commentary to HRS § 702-204 states that "[n]egligence with respect to the element of an offense will not establish that element unless specifically so provided." Accordingly, defense counsel did not concede an essential element of the offense charged; the State was required to prove that Martinez acted intentionally, knowingly, or recklessly before Martinez could be found guilty pursuant to HRS § 709-906. By "conceding" negligence, defense counsel argued a potentially meritorious defense.

Finally, defense counsel prefaced the statement that Martinez points to as prejudicially erroneous with, "[g]ranted, if the Court believes everything those two witnesses said, there may be offenses which the defendant committed here, but I submit that's not what he's charged with." By employing such a strategy, defense counsel argued an inconsistent defense, further

saying, "I submit [Martinez's] testimony is credible." A criminal "defendant has the right to argue inconsistent defenses." State v. Pavao, 81 Hawai i 142, 144-45, 913 P.2d 553, 555-56 (App. 1996) (quoting State v. Lira, 70 Haw. 23, 29, 759 P.2d 869, 873, reconsideration denied, 70 Haw. 662, 796 P.2d 1005 (1988)). By arguing contrasting positions, Martinez could potentially have presented a meritorious defense whether the family court found the testimony of Vining and Marcum credible or not.

Therefore, Martinez fails to meet his burden of establishing that he was denied effective assistance of counsel.

IV. CONCLUSION

Accordingly, the January 14, 2000, Judgment of the family court is affirmed.

DATED: Honolulu, Hawai i, August 6, 2001.

On the briefs:

Tracy S. Fukui,
Deputy Public Defender,
for defendant-appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge