IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JIMMY CHIN SONG,
Defendant-Appellant.

Supreme Court Case No.: CRA12-001
Superior Court Case No.: CF0329-11

OPINION

Cite as: 2012 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted on August 22, 2012
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant Jimmy Chin Song appeals from a final judgment convicting him of one count of Manslaughter (As a First Degree Felony) and one count of Aggravated Assault (As a Third Degree Felony). Song argues that the judgment should be reversed because the trial court erred in denying his motions for judgment of acquittal. The thrust of Song's argument for reversal is that there was insufficient evidence to prove the element of recklessness required by both charges.

[2] For the reasons discussed below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This case arises from the death of Yun Mo James Ku following an incident involving Defendant-Appellant Jimmy Chin Song during the early morning hours of June 18, 2011. The grand jury returned an indictment charging Song with one count of Manslaughter (As a First Degree Felony) and one count of Aggravated Assault (As a Third Degree Felony). A jury trial commenced a few months later.

[4] The following outline of facts is based primarily on the trial testimony provided by Plaintiff-Appellee People of Guam's ("the People") key witness, Sabrina Mabanta, who was Ku's girlfriend and present at the time of the incident.

[5] On the evening of June 17, 2011, Ku and Mabanta, in celebration of their 11-month anniversary as a couple, had dinner at Planet Hollywood followed by karaoke at the Sing-a-Song Café in Harmon Industrial Park. Ku and Mabanta arrived at Sing-a-Song around midnight on June 18, 2011, and were directed to a private karaoke room wherein they ordered soju, a Korean

alcoholic beverage, and sang songs. Around 1:00 a.m., Song, a man who neither Ku nor Mabanta knew prior to that evening, opened the door to their private room and looked in. He repeated this action shortly thereafter.

[6] A few minutes later, Ku and Mabanta decided to go home for the night. Ku stepped out of the room to pay their tab, then came back to the room to get Mabanta. While the couple was at the counter, Song rushed toward them from the back of the café. Speaking in Korean, a language which Mabanta did not understand, Song motioned for Ku to go outside. Immediately thereafter, both Song and Ku went outside of the café, with Mabanta following behind them.

[7] Outside of the café, Mabanta stood beside a pillar as she observed a discussion between Ku and Song. Mabanta described Ku as being calm during the incident, whereas she described Song as becoming increasingly loud and agitated, with his voice rising to the level of shouting. Fearing that things would escalate, Mabanta turned around and reentered the café in order to ask the owner, who spoke Korean, for assistance. Before she made it through the door, however, she heard a loud thud which she described as sounding like a coconut being forcefully dropped to the floor. She turned around and, though partially blocked by the pillar, she observed Song in a stance that suggested he had just thrown a punch. Once outside, she found Ku lying on the ground unconscious and stiff. He was bleeding from his lips. Meanwhile, Song paced next to them, smirking and grinning. Mabanta proceeded to try to revive Ku to no avail. Upset, she yelled at Song and asked him why he punched her boyfriend, to which he responded that he hit Ku because Ku hit him first. She noticed that the knuckles on Song's right hand were bloody. Mabanta then touched Song's face to look for any injuries, and Song poked her shoulder and said, "Do not touch me." Transcripts ("Tr.") at 120 (Cont. Jury Trial, Aug. 29, 2011). A photo of Mabanta's shoulder after the incident showed a half dollar-size bruise.

[8] Still unable to arouse Ku, Mabanta returned to the café and asked the owner for help. The owner, upon seeing Ku on the ground, proceeded to yell at Song in Korean. She then attempted to revive Ku, first by patting his face and then by pouring soju on his face. In the meantime, Mabanta yelled at Song to call 911. In response, he yelled, "I'll call 911, call 911" as he proceeded to raise his hand as if he were about to strike her. *Id.* at 126-27. As Mabanta cringed, the owner said something to Song in Korean, and Song stopped the threatening gesture.

[9] Mabanta then returned to the café and asked another patron to call 911, which he did. Before going back outside, Mabanta retrieved a bottle of whiskey from behind the bar and hid it behind her back. She said that she did so in order to arm herself and to smash it in Song's face.

[10] When Mabanta returned outside, Ku had yet to awaken. Song was still there, smirking and grinning as he looked down upon Ku. The owner, speaking in Korean, motioned for Song to leave, and Song left. Mabanta, still armed with the whiskey bottle, attempted to follow him. In the meantime, the police arrived. Mabanta returned to the outside of the café and discovered that Ku had awakened and was now sitting in his car.

[11] The responding police officer, Officer James Muna of the Guam Police Department, testified that when he first saw Ku in his vehicle, he appeared to be intoxicated. Officer Muna noticed a strong odor of alcohol emitting from Ku's breath. He also noted swelling to Ku's lower lip. When Officer Muna asked Ku about the source of the injury, Ku responded that nothing had happened and that he had merely fallen. Despite Mabanta's insistence, Ku declined to press charges against Song. Ku also refused the police officer's offer of medical treatment. The officer also testified that when he observed Ku walking, he appeared steady on his feet.

[12] Eventually, Mabanta drove herself and Ku home. During the drive, Mabanta argued with Ku over his refusal to press charges against Song and to seek medical attention. She also asked Ku to tell her what he and Song had argued about, but Ku refused to discuss it.

[13] At home, Mabanta continued to press Ku about the incident until finally he told her that Song punched him first, he ducked, and then he could not remember anything more. Before finally falling asleep, Ku vomited several times. It was later revealed that Ku induced the vomiting by sticking his finger down his throat.

[14] Ku slept through the rest of the night and well into the next afternoon. He finally awoke around 3:00 p.m., made himself a protein shake, and went back to sleep. At around 8:00 p.m., he ate some dinner with Mabanta's assistance. He complained of pain at the top of his head, as well as in his lips and jaw, and went back to bed after taking some Tylenol.

[15] The following morning, June 19, Ku woke up at about 9:00 a.m. to brush his teeth, and then swayed as he returned to bed. Mabanta noticed that he was becoming agitated for no apparent reason, the lights bothered him, he had sweats and chills, he did not want to be touched, and he was not acting like himself. At 11:30 a.m., Mabanta called Ku's mother to ask her to help take Ku to the hospital. Mabanta and Mrs. Ku helped Ku get dressed and supported him as he walked to the car, and then they drove him to Guam Memorial Hospital.

[16] At the emergency room, Ku slumped in his chair and covered his eyes against the light, complaining that it was blinding him. After 30 to 40 minutes of waiting, he saw a doctor. Ku reported to the nurse that his pain level was at an eight on a scale of one to ten. A CAT scan showed that he had brain swelling and bleeding. The doctor told Mrs. Ku that her son's brain was damaged, and that it was too late for an operation. Mrs. Ku told the doctor that she wanted

to take her son to Korea for treatment, but the doctor advised her not to do so because of the severe amount of pressure in his head.

[17] At the hospital, Ku's condition continued to deteriorate. While he was able to speak before arriving at the hospital, a few short hours later, he could not talk or communicate. At about 4:00 p.m. the following day, June 20, Ku had a seizure. He was placed on life support in the Intensive Care Unit. By 7:00 or 8:00 p.m., the doctor told Mrs. Ku that her son's brain was dead and that there was no hope for survival, and urged her to take her son off life support. Mrs. Ku refused.

[18] On June 21 and 22, Ku developed a fever and infection. Still, Mrs. Ku refused to take her son off life support. Finally, on June 24, 2011, after observing discoloration in her son's extremities and eyes, Mrs. Ku finally gave her consent to remove Ku from life support. He died later that day.

[19] Officer Jeremiah DeChavez of the Guam Police Department testified that he arrested Song on June 23, 2011. The officer testified that while Song was being processed, he did not observe any injuries to Song's face. The officer did, however, notice a Band-Aid on the base of Song's right, middle finger. A photograph of Song's right hand taken on the date of arrest was admitted into evidence.

[20] The Chief Medical Examiner, Dr. Aurelio Espinola, an expert in forensic pathology, performed Ku's autopsy on June 27, 2011. An external examination showed abrasion and contusion to Ku's lip and a contusion to the back of Ku's left hand, but no apparent injuries to the head or scalp. An internal examination revealed bleeding underneath the skull at the top rear portion of the head. Upon opening the skull, Dr. Espinola discovered a subdural hematoma, meaning that there was a blood clot covering the right side of Ku's brain as well as the base of

his brain. Dr. Espinola also found a contrecoup[1] injury on the opposite side of the impact, at the base of the brain at the same level as the eyes.

[21] At trial, Dr. Espinola opined that "because of the location of the hemorrhage at the top of the head, and the location of the contrecoup, my opinion was that [Ku] was hit here, so that the—the—the force transferred forward and produced the contrecoup injury to the brain." Tr. at 109-10 (Jury Trial (Cont.), Sept. 1, 2011). The force of the downward striking blow to Ku's head was from the top, back to front. Dr. Espinola also testified that because of the location of the contrecoup injury, the injury at the top of the head was not consistent with falling down. *Id.* at 110 ("No [he was not hit by falling]. Because if it was due from—If it was from [the] fall, the contrecoup would be located at the back of the head."). In Dr. Espinola's expert opinion, the blunt force trauma that caused the injury to Ku's brain was delivered by a closed fist. He further testified that the injury was likely caused by a downward striking blow with the side of a fist, not with the knuckles. Dr. Espinola also testified that only a very hard blow could have caused such an injury. The fact that there were no visible external injuries to the head led Dr. Espinola to believe that the injury was not caused by a hard, blunt object like a baseball bat. In addition, Dr. Espinola visited the scene and found nothing in the Sing-a-Song parking lot that could have accounted for the head injury.

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[1] According to Dr. Espinola, "contrecoup" describes an injury caused by the brain hitting the skull:

> The coup is underneath, exactly underneath the point of trauma. . . . [A]nd then exactly opposite the coup, there will be a wider bruise[ ] called contrecoup.
>
> The reason why the contrecoup is wider than the coup, because the contrecoup, the -- the cause of the contrecoup is the -- hitting the -- hitting of the skull itself to the -- to the brain.
>
> Like, for instance, if this is the head, falling, and this is the floor, or ground, the head is -- continues to go down, and then the -- the skull will -- will stop moving, but inside the skull, the -- the brain will hit this part of the skull, so it will produce a contrecoup.

Tr. at 100 (Jury Trial (Cont.), Sept. 1, 2011).

[22] A photo of Song's hand after the incident, which was presented as evidence, was shown to Dr. Espinola, who testified that the contusions and bruising were consistent with having hit someone in the mouth.

[23] Dr. Espinola concluded that the cause of Ku's death was subdural hematoma and laceration of the brain, and the manner of death was homicide.

[24] Song did not testify in his defense. Song moved for judgment of acquittal at the close of the People's case and renewed his motion at the close of all the evidence. The trial court denied both motions. The jury returned a guilty verdict as to both counts of the indictment. The trial court sentenced Song to twelve years of imprisonment, but suspended five of those years. Judgment was entered, and notice of entry on docket took place the following day. After an earlier appeal was dismissed for lack of jurisdiction, Song timely filed a Notice of Appeal.

II. JURISDICTION

[25] This court has jurisdiction over appeals from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 112-197 (2012)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10-.15(a) (2005).

III. STANDARD OF REVIEW

[26] Where a defendant raised the issue of sufficiency of the evidence by a motion for judgment of acquittal, we review the trial court's denial of the motion *de novo*. *People v. Anastacio*, 2010 Guam 18 ¶ 10 (citing *People v. Maysho*, 2005 Guam 4 ¶ 6). In determining whether there exists sufficient evidence to sustain a defendant's conviction, we review the evidence presented at trial in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Tennessen*, 2009 Guam 3 ¶ 14 (quoting *People v. Cruz*, 1998 Guam 18 ¶ 9); *see*

also 8 GCA § 90.21 (2005) ("No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."). "This is a 'highly deferential standard of review.'" *People v. Tenorio*, 2007 Guam 19 ¶ 9 (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 20).

IV. ANALYSIS

A. Motion for Judgment of Acquittal

[27] Before reviewing the trial court's decision denying Song's motion for judgment of acquittal, we discuss the principles governing such motions. Under Guam law, the trial court "on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." 8 GCA § 100.10 (2005). The trial court determines whether a motion for judgment of acquittal should be granted by applying the same test used when the sufficiency of the evidence is challenged. *Tennessen*, 2009 Guam 3 ¶ 14 (quoting *Cruz*, 1998 Guam 18 ¶ 9). Since the denial of a motion for judgment of acquittal is predicated on the sufficiency of the evidence, the resolution of the propriety of the denial necessarily encompasses a review of the sufficiency of the evidence. Thus, on appeal we review the evidence presented at trial in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (quoting *Cruz*, 1998 Guam 18 ¶ 9).

[28] A verdict of guilty removes the presumption of innocence to which a defendant had formerly been entitled and replaces it with a presumption of guilt. *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011) (citation omitted); *see also Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged,

the presumption of innocence disappears."). Accordingly, the "defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." *Sisk*, 343 S.W.3d at 65 (citations omitted). In conducting this analysis, the People "must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *Id.*; *see also Anastacio*, 2010 Guam 18 ¶ 17 ("[O]ur inquiry is whether, crediting all of the People's evidence and drawing every reasonable inference from it in favor of the prosecution, a rational trier of fact could find Anastacio guilty beyond a reasonable doubt").

[29] "It is not the province of the court, in determining [a motion for a judgment of acquittal], to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (quoting 75A Am. Jur. 2d *Trial* § 1026); *see also Anastacio*, 2010 Guam 18 ¶ 18; *People v. Jesus*, 2009 Guam 2 ¶ 61 ("The appellate court cannot merely substitute its judgment for that of the jury."). When ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, *State v. Weston*, 625 S.E.2d 641, 648 (S.C. 2006), and this standard remains constant even when the People rely exclusively on circumstantial evidence, *State v. Elmore*, 628 S.E.2d 271, 273 (S.C. Ct. App. 2006). A defendant is entitled to a judgment of acquittal when the People fail to produce evidence of the offense charged. *Id.* A trial court should grant a motion for judgment of acquittal when the evidence merely raises a suspicion that the accused is guilty. *Id.*; *Anastacio*, 2010 Guam 18 ¶ 18 (citing *United States v. Littrell*, 574 F.2d 828, 833 (5th Cir. 1978)). "However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." *Elmore*, 628 S.E.2d at 273 (internal quotation marks omitted).

[30] With these standards in mind, we turn to Song's particular claim, that there was insufficient evidence to sustain a conviction on either the Manslaughter or Aggravated Assault charge because the People were unable to prove beyond a reasonable doubt the element of recklessness required by both charges.

B. Whether Sufficient Evidence Existed to Prove the Element of Recklessness Beyond a Reasonable Doubt

[31] "[A] person is not guilty of a crime unless he acts intentionally, knowingly, *recklessly* or with criminal negligence, as the law may require, with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime." 9 GCA § 4.25 (2005) (emphasis added). Title 9 GCA § 4.30(c) defines "recklessly" as follows:

> A person acts recklessly, or is reckless, with respect to attendant circumstances or the result of his conduct when he acts in awareness of a substantial risk that the circumstances exist or that his conduct will cause the result and his disregard is unjustifiable and constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

9 GCA § 4.30(c) (2005); *see also* Tr. at 33 (Jury Instr. & Delib., Sept. 6, 2011).

[32] A person is guilty of criminal homicide if he recklessly causes the death of another human being. 9 GCA § 16.20(a)(4) (2005); *see also* Tr. at 33 (Jury Instr. & Delib., Sept. 6, 2011). "*Criminal homicide* is aggravated murder, murder, manslaughter or negligent homicide." 9 GCA § 16.20(b). When criminal homicide is committed recklessly, it constitutes manslaughter. 9 GCA § 16.50(a)(1) (2005); *see also* Tr. at 33 (Jury Instr. & Delib.). Thus, in the case of manslaughter, the People must have shown: that Song's conduct caused Ku's death; that Song acted in awareness of a substantial risk that he would cause Ku's death; and that Song's disregard of the risk was unjustifiable and constituted a gross deviation from the standard of care that a reasonable person would have exercised in the situation. *See* Tr. at 33-34 (Jury Instr. & Delib.).

[33] "A person is guilty of aggravated assault if he either recklessly causes or attempts to cause: . . . serious bodily injury to another." 9 GCA § 19.20(a)(2) (2005); *see also* Tr. at 33 (Jury Instr. & Delib.). "Serious bodily injury means bodily injury which creates: serious permanent disfigurement; a substantial risk or [sic] death or serious, permanent disfigurement, severe or intense physical pain or protracted loss or impairment of consciousness or of the function of any bodily member or organ." 9 GCA § 16.10(c) (2005); *see also* Tr. at 33 (Jury Instr. & Delib.). Thus, in the case of aggravated assault, the People must have shown: that Song caused or attempted to cause serious bodily injury to Ku; that Song acted in awareness of a substantial risk that he would cause serious bodily injury to Ku; and that Song's disregard of the risk was unjustifiable and constituted a gross deviation from the standard of care that a reasonable person would have exercised in the situation. *See* Tr. at 33-34 (Jury Instr. & Delib.).

[34] On appeal, Song does not argue that his conduct did not cause Ku's death or serious bodily injury to Ku. Song contends only that the evidence was insufficient to prove that he acted recklessly. We discuss each element of recklessness, slightly out of turn, and apply the legal principles to Song's conduct.

1. Substantial Risk

[35] To show that a defendant acted recklessly, the prosecution must establish that the defendant's conduct involved a "substantial risk." 9 GCA § 4.30(c). In examining the substantial risk element of recklessness, the Supreme Court of Colorado has held:

> A risk does not have to be "more likely than not to occur" or "probable" in order to be substantial. A risk may be substantial even if the chance that the harm will occur is well below fifty percent. Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great. For example, if a person holds a revolver with a single bullet in one of the chambers, points the gun at another's head and pulls the trigger, then the risk of death is substantial even though the odds that death will result are no better than one in six. As one court remarked,

> If the potential of a risk is death, that risk is always serious. Therefore, only *some likelihood* that death will occur *might create* for most people a "substantial and unjustifiable" risk . . . .
>
> Conversely, a relatively high probability that a very minor harm will occur probably does not involve a "substantial" risk. Thus, in order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of potential harm, mindful that a risk may be "substantial" even if the odds of the harm occurring are lower than fifty percent.

People v. Hall, 999 P.2d 207, 217-18 (Colo. 2000) (citations omitted).

[36] In *State v. Curtis*, 479 A.2d 425 (N.J. Super. Ct. App. Div. 1984), cited positively by the Supreme Court of New Jersey in *State v. Bakka*, 826 A.2d 604, 613 (N.J. 2003), the New Jersey Superior Court, Appellate Division, articulated the difference between the recklessness required to prove aggravated manslaughter and that required to prove ordinary manslaughter. New Jersey defines manslaughter as follows: "Criminal homicide constitutes aggravated manslaughter when: (1) The actor recklessly causes death under circumstances manifesting extreme indifference to human life; . . . ." N.J. Stat. Ann. § 2C:11-4a. "Criminal homicide constitutes manslaughter when: (1) It is committed recklessly; . . . ." N.J. Stat. Ann. § 2C:11-4b. The definition of recklessness applicable to both forms of manslaughter is found in N.J. Stat. Ann. § 2C:2-2b.(3). That definition requires a showing that the actor "consciously disregard[ed] a substantial and unjustifiable risk" that death "will result from his conduct" and further specifies that "[t]he risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." N.J. Stat. Ann. § 2C:2-2b.(3) (West 2012). This definition is substantially similar to the definition of "recklessness" found under Guam law.

[37] The court noted that the second and distinguishing element of aggravated manslaughter, that the defendant recklessly causes death "under circumstances manifesting extreme indifference to human life," is not defined in the New Jersey Code. *Curtis*, 479 A.2d at 430. The court "perceive[d], however, that the Legislature intended for this second element to require that the recklessness must involve a higher degree of probability that death will result from the actor's conduct because it made aggravated manslaughter a first degree crime and reckless manslaughter only a second degree crime." *Id.* The court continued:

> We are persuaded that the difference between aggravated manslaughter and reckless manslaughter is the difference in the degree of the risk that death will result from defendant's conduct. This difference in degree is to be established by the second element in aggravated manslaughter which is not required in a reckless manslaughter case. We envision that the Legislature intended that the degree of risk in reckless manslaughter be a *mere possibility* of death. In aggravated manslaughter, however, the additional element that death be caused "under circumstances manifesting extreme indifference to human life" elevates the risk level from a mere possibility to a probability.

Id. (emphasis added).

[38] Although Guam does not have a crime called "aggravated manslaughter," what would constitute "aggravated manslaughter" in New Jersey would be "murder" in Guam. "Criminal homicide constitutes murder when: . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life; . . . ." 9 GCA § 16.40(a)(2) (2005). Although murder and manslaughter are both felonies of the first degree, they carry different penalties. "[A] person convicted of murder *shall* be sentenced to life imprisonment," 9 GCA § 16.40(b) (emphasis added); there is no similar requirement for a person convicted of manslaughter, *see* 9 GCA § 16.50(b). While both reckless murder and manslaughter require that the defendant recklessly cause the death of another, each statute appears to contemplate a different degree of recklessness from the other. We find persuasive the analysis provided by the

New Jersey courts that reckless murder requires a heightened degree of reckless conduct, namely that the defendant's actions created a probability that death would occur, as opposed to the *mere possibility* that death would occur required by manslaughter.

[39] In any event,

> [w]hether a risk is substantial is a matter of fact that will depend on the specific circumstances of each case. Some conduct almost always carries a substantial risk of death, such as engaging another person in a fight with a deadly weapon or firing a gun at another person. In such instances, the substantiality of the risk may be evident from the nature of the defendant's conduct, and the court will not have to examine the specific facts in detail.

Hall, 999 P.2d at 218 (citations omitted).

[40] "Other conduct requires a greater inquiry into the facts of the case to determine whether it creates a substantial risk of death." *Id.* While kicking another person may not necessarily involve a substantial risk of death, a trier of fact can find that repeatedly kicking the head of another person can create a substantial risk of death. *See id.*

[41] "A court cannot generically characterize the actor's conduct (e.g., "driving a truck") in a manner that ignores the specific elements of the conduct that create a risk (e.g., driving a truck with failing brakes on a highway)." *Id.* "[T]o determine whether the conduct created a substantial risk of death, a court must inquire beyond the general nature of the defendant's conduct and consider the specific conduct in which the defendant engaged." *Id.*

[42] Song argues that because death by punching is such a rare occurrence, there was not a substantial risk that by punching Ku, he would cause Ku's death. In other words, he argues that for a defendant to have been aware of a substantial risk of death, there must have been a probability of death. Based on the persuasive analysis provided by jurisdictions with similar statutes, we disagree. We hold that the "substantial risk" element of recklessness is satisfied where there is proof of a possibility that death would occur. As stated above, "[s]ome risks may

be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great." *Id.* at 217.

[43] Like other activities that generally do not involve a substantial risk of death, such as driving a car, "punching another person" is not widely considered behavior that creates a high degree of risk. This conduct requires a greater inquiry into the facts of this case to determine whether it created a substantial risk of death. *See id.* at 218. In doing so, we cannot generically characterize Song's conduct as simply "punching another." Instead, we must be cognizant of the specific elements of Song's conduct that created the risk, namely, punching Ku in the top rear portion of the head with a great degree of force.

[44] We find that the specific facts of this case support a reasonable inference that Song created a substantial risk that he would cause serious bodily injury or death. The evidence went beyond proving just a mere possibility of death; the amount of force required to cause such an extensive injury to Ku's brain as well as the area in which Ku was struck arguably moved serious bodily injury or death from a mere possibility to a probability. This was not a case in which Song merely punched Ku in the face, which is not to say that such a punch would not result in serious bodily injury or death. The evidence, viewed in the light most favorable to the People, showed that Song punched Ku in the top rear portion of the head with such force as to not only immediately render him unconscious for several minutes, *see* Tr. at 114 (Cont. Jury Trial, Aug. 29, 2011), but to cause such severe internal bleeding that he died a few days after the incident, *see* Tr. at 96-97 (Jury Trial (Cont.), Sept. 1, 2011). The nature of Ku's injuries supports the inference that Song struck Ku with an inordinate degree of force. *See* Tr. at 112, 122 (Jury Trial (Cont.), Sept. 1, 2011). As Dr. Espinola testified, the severe injuries to Ku's brain could only have been caused by a "very hard" blow. *Id.* at 122.

[45] Based on the evidence viewed in the light most favorable to the People, a rational trier of fact could conclude beyond a reasonable doubt that Song punched Ku in a highly vulnerable area of the body and with an extreme amount of force, thereby creating a substantial risk of serious bodily injury or death. While punching another person ordinarily carries a low probability of death, a rational trier of fact could conclude beyond a reasonable doubt that Song's excessive force and the area of the body in which he struck Ku significantly increased the extent of the injuries that might result, including the possibility of death. Although fistfights rarely end in death, a rational trier of fact could have determined that Song's conduct was precisely the type of punching that risked this rare result.

2. Awareness

[46] In addition to showing that the defendant's conduct involved a substantial risk, the prosecution must demonstrate that the defendant "act[ed] in awareness of" the substantial risk. 9 GCA § 4.30(c). In contrast to acting "intentionally" or "knowingly," the actor does not have to intend the result or be "practically certain" that the result will occur, he need only be "aware" that the risk exists. *Compare* 9 GCA § 4.30(a)-(b), *with* 9 GCA § 4.30(c). However, unlike criminal negligence, recklessness requires that the defendant actually have been aware of the risk, not that he should have been aware of the risk but was not. *Hall*, 999 P.2d at 219-20. *Compare* 9 GCA § 4.30(c) ("A person acts recklessly . . . when he acts *in awareness* of a substantial risk . . . ." (emphasis added)), *with* 9 GCA § 4.30(d) ("A person acts with criminal negligence . . . when he *should be aware* of a substantial and unjustifiable risk . . . ." (emphasis added)).

[47] Absent an admission by the defendant, such awareness cannot be proven directly; thus, a defendant's subjective awareness of a risk may be inferred from the particular facts of a case.

Hall, 999 P.2d at 220; *see also In re William G.*, 963 P.2d 287, 292 (Ariz. Ct. App. 1997) ("[A]bsent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances."); *cf. People v. Yingling*, 2009 Guam 11 ¶ 18 ("[I]ntent, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.").[2]

[48] In addition to the particular facts of the case, including the defendant's particular knowledge and experience, a court may infer the defendant's subjective awareness from what a reasonable person would have understood under the circumstances.[3] *Hall*, 999 P.2d at 220.[4]

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[2] As expressed by the trial court in instructing the jury below,

> [r]arely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does: his words, his actions, . . . and his conduct, as of the time of the occurrence of certain events.
>
> The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after its occurrence. Accordingly, intent and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn from them.

Tr. at 29 (Jury Inst. & Deliberations, Sept. 6, 2011).

[3] The Massachusetts Supreme Court has approved jury instructions which stated that "even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger." *Commonwealth v. Catalina*, 556 N.E. 2d 973, 979 (Mass. 1990) (alteration in original). Thus, the court held, a defendant's subjective awareness of the reckless nature of his conduct is sufficient, but not necessary, to convict him of involuntary manslaughter. *Id.* "Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice as well." *Id.*

[4] In his appellate brief, Song cites to *Hall* for the proposition that in order to prove recklessness the People must show that the defendant was actually aware of the risk. Appellant's Br. at 12 (Apr. 12, 2012). However, Song fails to disclose that further in *Hall*, the court held that a defendant's subjective awareness can be inferred from the particular facts of the case as well as from what a reasonable person would have understood under the circumstances. *See Hall*, 999 P.2d at 220.

As for *State v. Huser*, 959 P.2d 908 (Kan. 1998), another case cited by Song for this proposition, we find that it, too, provides little support for Song's argument. In *Huser*, the court, reiterating the definition of "reckless" found under Kansas statutory law, stated that "[o]ne's behavior is only reckless if he or she realizes that his or her conduct creates imminent danger to another person but consciously and unjustifiably disregards the danger." *Id.* at 913. In that case, however, the court did not explore what it means to "realize" that one's conduct creates imminent danger. Instead, the court found that there was insufficient evidence to find probable cause for recklessness where the prosecution merely showed that the defendant had been driving under the influence, but not that she had been

> Although a court can infer what the defendant actually knew based on what a reasonable person would have known in the circumstances, a court must not confuse what a reasonable person would have known in the circumstances with what the defendant actually knew. Thus, if a defendant engaged in conduct that a reasonable person would have understood as creating a substantial and unjustifiable risk of death, the court may infer that the defendant was subjectively aware of that risk, but the court cannot hold the defendant responsible if she were actually unaware of a risk that a reasonable person would have perceived.

Id.

[49] We now consider whether Song acted "in awareness of" a substantial risk that he would cause Ku's death or serious bodily injury to Ku. *See* 9 GCA § 4.30(c). As in most cases requiring proof of a culpable mental state, the People did not present direct proof of Song's state of mind. We must therefore determine whether Song's subjective awareness of a risk of death could be inferred from the particular facts and circumstances of this case.

[50] Because Song did not testify, the relevant circumstances included only Song's conduct and Mabanta's testimonial assessment of Song's mindset at the time of the incident. In contrast to the assessment by the witness in *In re William G.*, who testified that immediately following the collision by the teenaged defendant with a shopping cart the defendant "was a little shocked," and "probably wasn't expecting that to happen," 963 P.2d at 292, here, the evidence showed not that Song appeared surprised or remorseful that his attack rendered Ku immediately unconscious and bleeding on the ground, but that Song appeared to be satisfied with the result. Mabanta testified that Song was smirking after Ku was knocked unconscious, and that he seemingly mocked her and made a threatening gesture as if he were about to hit her after she told him to call 911. Tr. at 118, 125-27, 130-31 (Cont. Jury Trial, Aug. 29, 2011). Mabanta also testified

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driving recklessly. *See id.* ("[S]imply driving under the influence does not, standing alone, amount to reckless behavior. . . . There was no evidence that this occurred here—no evidence of weaving, speeding, or a failure to stop quickly after the accident occurred. The State did not submit enough evidence to support a probable cause finding that the defendant committed reckless aggravated battery by recklessly driving her car.").

that Song initiated the confrontation, rushing over to the couple inside the bar, making a gesture which suggested he wanted Ku to go outside with him, and speaking with Ku outside the bar in a manner that indicated that he was becoming increasingly agitated and upset to the point where he was shouting. *Id.* at 89, 95-96, 104-05. Based on Song's actions before and after the assault, a rational trier of fact could have determined that Song was not only aware that his conduct carried a substantial risk of serious bodily injury or death, but in fact intended to inflict Ku's injuries. *See Commonwealth v. Burton*, 2 A.3d 598, 603 (Pa. Super. Ct. 2010).[5]

[51] Even if initiating the confrontation and reacting in a celebratory and unremorseful manner after the attack do not in and of themselves prove that Song acted in awareness of a substantial risk that his conduct would cause serious bodily injury or death, Song's awareness of the risk can be inferred from what a reasonable person would have been aware of under the circumstances.

[52] Song argues that he could not have been aware that he was creating a substantial risk of death by pointing to the low probability of death from a punch as evidenced by the fact that bar fights and mixed martial arts matches rarely end in death. While it may be rare for a person to die from a punch, fistfights often result in serious bodily injury and have been known to end in death. *See, e.g.*, *id.* at 599-600; *Hall v. State*, 951 So. 2d 91, 92 (Fla. Dist. Ct. App. 2007), *abrogated on other grounds by State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) ("This case is

[5] In *Burton*, the appellant delivered a single blow to the victim, resulting in significant permanent injuries. 2 A.3d at 599. In determining whether the appellant intended to cause serious bodily injury for purposes of an aggravated assault conviction, the court considered, among other factors, the appellant's aggressive initiation of the confrontation as well as the appellant's actions after the attack, namely, "saying 'I got you, I got you, I told you I was going to get you' while 'smiling and laughing.'" *Id.* at 603. Moreover, "[w]hile Appellant was making these remarks, the victim was unconscious, his eyes were rolled back into his head, blood was coming from his nose, his head was bloody, and he was involuntarily twitching." *Id.* The court concluded that "Appellant's gleeful remarks upon viewing the victim in that condition indicate that Appellant had intended that the victim suffer the resultant harm. . . . 'Because the victim manifested physical signs of sustaining severe injuries, [Appellant's] verbal outburst demonstrated the desire to inflict those very injuries.'" *Id.* at 603, 605.

another tragic instance of manslaughter by single punch to the head."). A reasonable person would have been aware of this possibility, particularly under the circumstances of this case. A reasonable person would have understood that the head is a vital and vulnerable part of the body, and that a significant enough blow to the head could prove fatal. Absent evidence that Song was actually unaware of this risk that a reasonable person would have perceived, we find the "awareness" prong of recklessness to have been met because a rational trier of fact could have determined beyond a reasonable doubt that Song acted in awareness that punching someone very hard in the back of the head creates a substantial risk of serious bodily injury or death.

3. Risk of Death or Serious Bodily Injury

[53] The next element of recklessness requires that the defendant was aware of a substantial risk of a particular result. 9 GCA § 4.30(c). In the case of manslaughter the defendant must have risked causing death to another person, while in the case of aggravated assault he must have risked causing serious bodily injury. Because the element of a "substantial risk" measures the likelihood and magnitude of the risk, any risk of death will meet the requirement that the defendant, by his conduct, risked death to another. *Hall*, 999 P.2d at 220; *see also Curtis*, 479 A.2d at 430. That is, only a slight risk of death to another person is necessary to meet this element. *Hall*, 999 P.2d at 220. Because aggravated assault is a lesser included offense of manslaughter, satisfaction of the "risk of death" element of manslaughter necessarily satisfies the "risk of serious bodily injury" element of aggravated assault.

[54] Although the risk that Song would cause Ku's death was probably slight in comparison to the risk that he would cause serious bodily injury, Song's conduct nevertheless created a risk of death. To reiterate, even though it is a rare occurrence, it is common knowledge that head injuries, even those delivered by a single blow, could result in death. Moreover, Dr. Espinola

described in detail the different injuries to Ku's brain and found the source of the trauma to be a closed fist, thereby providing evidence that death can result from a punch to the head. Based on the evidence viewed in the light most favorable to the People, a rational trier of fact could have found that Song's conduct involved not only a risk of serious bodily injury but of death.

4. Unjustifiable Disregard of the Risk Constituting Gross Deviation from Standard of Care that Reasonable Person Would Have Exercised in the Situation

[55] A defendant's disregard of a substantial risk must have been unjustifiable in order for his conduct to have been reckless. 9 GCA § 4.30(c). "Whether a risk is justifiable is determined by weighing the nature and purpose of the [defendant's] conduct against the risk created by that conduct." *Hall*, 999 P.2d at 218 (citing Model Penal Code § 2.02, cmt. at 125 (Tentative Draft No. 4 1955); David M. Treiman, *Recklessness and the Model Penal Code*, 9 Am. J. Crim. L. 281, 334 (1981)). If a person consciously disregards a substantial risk of death but does so in order to advance an interest that justifies such a risk, the conduct is not reckless. *Id.* For example, if a surgeon performs an operation that has a very high likelihood of killing the patient, but the patient will certainly die without the operation, then the conduct is justified and thus not reckless even though the risk is substantial. *Id.*

[56] In addition to being unjustifiable, the defendant's disregard of the risk must constitute "a gross deviation from the standard of care that a reasonable person would exercise in the situation." 9 GCA § 4.30(c). *Hall* describes this "reasonable person" as a reasonable *law-abiding* person. 999 P.2d at 218.

[57] In this case, Song's conduct had no justifiable purpose. Although there was some allusion to self-defense, that evidence was contradicted by Mabanta's testimony that Ku told her that Song had struck him first. Viewing the evidence in the light most favorable to the People, a rational trier of fact could have found that Song not only instigated the argument but also threw

the first punch, thereby satisfying the element of an unjustifiable disregard of the risk beyond a reasonable doubt, and that his conduct constituted a gross deviation from the standard of care that a reasonable law-abiding person would have exercised in the situation.

V. CONCLUSION

[58] For the foregoing reasons, we find that, viewing the evidence in the light most favorable to the People, a rational trier of fact could have found the essential element of recklessness beyond a reasonable doubt. This is so even though it is possible that a different finder of fact could have reached a different conclusion. *See Jesus*, 2009 Guam 2 ¶ 61. Thus, the trial court did not err in denying Song's motions for judgment of acquittal. Accordingly, we **AFFIRM**.

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice