In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SETH CRAVENS,** **Defendant and Appellant.**

Case No. S186661

Fourth Appellate District, Division One, Case No. D054613
San Diego County Superior Court, Case No. SCD206917
The Honorable John S. Einhorn, Judge

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

A. Issue Presented for Decision

This case presents the following issue:

Did the appellate court abuse its limited authority to review for sufficiency of the evidence where it found "no evidence" to support the jury's implied malice murder verdict and then fashioned an "expanded" version of voluntary manslaughter to affix liability?

B. Respondent's Argument on the Merits

Respondent has asserted in this case that the Court of Appeal, while purporting to apply this Court's decision in *People v. Knoller* (2007) 41 Cal.4th 139 regarding the elements of implied malice murder, ignored long-established principles of, and limitations on, appellate review of the sufficiency of the evidence to support a verdict. In so doing, the appellate court overruled the jury's determination, reweighed the evidence, and found insufficient evidence of second degree murder, based on a finding of implied malice. Specifically, the appellate court found "no evidence" of the subjective component of implied malice murder---the conscious awareness of engaging in conduct that endangers the life of another. (*Knoller,* at p. 143.) Then, in a transparent effort to impose its own sense of justice, the Court of Appeal diverted from the established law and definition of voluntary manslaughter, and based on an "expanded" application of *People v. Garcia* (2008) 162 Cal.App.4th 18, constructed a wholly new doctrine for its application - that an unintentional killing, without malice, during the course of an inherently dangerous assaultive felony, constitutes voluntary manslaughter. Respondent contends that the Court of Appeal's creation of a wholly new specie of voluntary manslaughter evidences both its abandonment of its proper role in reviewing the sufficiency of the evidence

to support a verdict, and, demonstrates conclusively why the appellate court's determination that the evidence was insufficient is simply wrong.

C. Appellant's Argument on the Merits

In his answering brief on the merits, Cravens argues the Court of Appeal was well within its authority to reduce the conviction to the lesser included offense of voluntary manslaughter because it found there was insufficient evidence to support the implied malice murder conviction. In making this argument, Cravens states: "substituting its own evaluation of the evidence for that of the jury is exactly what happens every time a trial or appellate court exercises its statutory authority and finds insufficient evidence to support a verdict. . . ." (Answer Brief on the Merits, p. 26.) Cravens contends that throwing a single punch at a professional athlete does not meet the subjective component of implied malice murder. He argues that the record contains no evidence that he consciously disregarded a risk to Emery Kauanui's life when he hit him.

Cravens then asserts that there is no correlation between the appellate court's determination that there was "no evidence" of the subjective component of implied malice murder and the Court of Appeal's formulation and imposition of a new specie of voluntary manslaughter. (Answer Brief on the Merits, at p. 44.)

Finally, Cravens contends that while the Court of Appeal was correct in reversing the second degree murder verdict based on insufficient evidence, and suggests that there is authority from this court "to the effect that under certain circumstances voluntary manslaughter need not involve provocation or imperfect self-defense" (Answer Brief on the Merits, at p. 62), he completely changes course from his original argument in the Court of Appeal that the *Garcia* decision supports a voluntary manslaughter conviction in this case. Now, he says that two of the predicates required by *Garcia*, that he committed a felony, rather than misdemeanor, assault when

he took a single swing with his non-dominant hand, and that assuming he did commit a felony, it was inherently dangerous, were absent. (Answer Brief on the Merits, at pp. 52-53, fn. 38.) He urges that *Garcia* not be adopted and says the Court of Appeal "erred" in applying it. (Answer Brief on the Merits, a pp. 59-62.) Cravens gives no hint where all of this leaves the case.

ARGUMENT IN REPLY

Cravens is grossly mistaken in asserting that in reviewing the evidence to determine its sufficiency to sustain a verdict, an appellate court is authorized to and routinely substitutes its own evaluation of the evidence for that of the jury. That is not true even in the continental system of law in Europe, where there is no jury. (See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944) 58 Harv. L.Rev. 70, 85.)

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record (1) *in the light most favorable to the prosecution* and (2) *presumes the existence of every fact the jury could reasonably deduce from the evidence.* (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Operating from these precepts, the appellate court determines whether the record contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200; *People v. Jurado* (2006) 38 Cal.4th 72, 118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Further, the test on appeal is not whether the evidence proves guilt beyond a reasonable doubt, but whether any rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Rich* (1988) 45

Cal.3d 1036, 1081.) Moreover, the conviction will be upheld unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict." (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

The same standard of review applies if the verdict is supported by circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Hodgson* (2003) 111 Cal.App.4th 566, 574.) A jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27, citing *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction."].) In a case based on circumstantial evidence, it is the jury, not the appellate court, that must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of facts' findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 668, citing *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

So, in this case the Court of Appeal should have simply reviewed the evidence and determined whether the jury had evidence and facts reasonably deducible from the evidence, *any* facts, that could have justified its second-degree murder verdict, based on a finding of implied malice, that is, that Cravens appreciated that his deliberate conduct endangered the life of another and acted with conscious disregard for that danger.

The determination whether an individual subjectively appreciated that his actions endangered the life of another and disregarded that risk is an inherently intuitive judgment based on the evidence, deductions of fact

from the evidence, and, critically, the common experience and common sense of the triers of fact. It is perhaps uniquely the very reason we entrust a jury of the defendant's peers with such a determination. Here, a properly instructed and conscientious jury heard the evidence, deliberated together and reached the grave decision beyond a reasonable doubt that Cravens subjectively appreciated that in striking Emery Kauanui he was endangering the victim's life.[1]

On the basis of the same evidence, the Court of Appeal determined that Cravens committed a *felony* assault on Kauanui, but second-guessed the jury's assessment that the circumstances showed Cravens was aware that his assault on Kauanui would put his life in jeopardy. By substituting its judgment on that critical determination for that of the jury, the Court of Appeal overstepped its role.

As this Court has held, the linchpin of implied malice murder is that before a defendant can be convicted of that crime, there must be evidence that the defendant appreciated that his deliberate conduct endangered the life of another and that the defendant acted with conscious disregard for life. (See *People v. Knoller , supra*, 41 Cal.4th 139, 157; *People v. Blakely* (2000) 23 Cal.4th 82, 87.) In nearly all cases, implied malice is determined based on circumstantial evidence and inferences the trier of fact draws from

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[1] The jury deliberated on this case for several days and sent out numerous questions and readback requests. It then announced that it could not reach a unanimous verdict on the murder charge. The trial court ordered the jury to continue deliberations, more jury questions were asked and answered, and the jury returned a second-degree murder guilty verdict the next day, along with a majority of guilty verdicts for the remaining charges. Thus, the jury thoroughly considered the evidence and was properly instructed. The jury decided unanimously that Cravens subjectively appreciated that, when he delivered the sucker punch haymaker to Kauanui's head over a concrete sidewalk after Kauanui had just suffered a gang beating by Cravens' friends, he risked killing him.

those circumstances. It is unnecessary that implied malice be proven by an admission or other direct evidence of the defendant's mental state; like all other elements of a crime, implied malice may be proven by circumstantial evidence. (*People v. James* (1998) 62 Cal.App.4th 244, 277.) "[A] conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life." *(People v. Knoller, supra*, 41 Cal.4th at p. 156.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another – no more, and no less." (*Id.* at p. 143.)

The Court of Appeal decided wrongly in two ways. First, it failed to faithfully apply the principles of appellate review, and reasoned to achieve what the appellate court believed was an appropriate verdict. It did not follow the mandates of *Jackson v. Virginia, supra*, 443 U.S. 307, 319 and *People v. Johnson, supra*, 26 Cal.3d 557, 576, because it substituted it own evaluation of the evidence for that of the jury. It did not accept any and all logical inferences that the jury might have drawn from the circumstantial evidence in support of the verdict and did not presume the existence of every fact the jury could have reasonably deduced from the evidence (*People v. Maury, supra*, 30 Cal.4th 342, 396).[2] The Court of Appeal

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[2] As evidence of its reasoning in this vein, the appellate court wrote: "The jury apparently reasoned that because Kauanui was standing on pavement when Cravens punched him, Cravens was necessarily aware that the punch was life-threatening....However, under that reasoning, every fist fight or punch to the head that occurs on pavement...would involve a conscious disregard for human life." (Slip opn. at pp. 32-33.) This conclusion, indeed derision, concerning the jury's decision is both emblematic of the appellate court's approach to its reviewing function and conceptually unsound. The jury's verdict did not purport to say that every fist fight on pavement involves a conscious disregard for life. Rather, the jury' verdict was that under all the unique circumstances disclosed by the evidence and reasonable inferences from that evidence, this punch to the

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concluded that the evidence clearly showed that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict." (*People v. Bolin, supra*, 18 Cal.4th at p. 331; *People v. Hicks, supra*, 128 Cal.App.3d at p. 429.)

Second, the Court of Appeal's own voluntary manslaughter finding shows how the jury's determination was supported by the evidence. Contrary to Craven's argument (Answer Brief on the Merits, at p. 44), there is a compelling relationship with the correctness of the appellate court's sufficiency of the evidence determination and its finding of voluntary "felony-manslaughter." Whereas the jury determined that the evidence proved Cravens harbored implied malice when he decided to deliver the knockout punch to Kauanui, the Court of Appeal took the same evidence but came to a different conclusion. The Court wrote:

> The evidence in this case supports the finding that Cravens unintentionally killed Kauanui, without malice, by committing a *felony* assault by means of force likely to cause great bodily injury. There was testimony that Cravens, who outweighed Kauanui by 60 pounds, was standing on the curb above Kauanui when he delivered an "extremely hard" knockout punch, and that Kauanui was not acting aggressively toward Cravens just before the punch, but was talking to him with his arms at his sides. There was evidence that Kauanui confronted Cravens right after fending off a group attack that could have left him in a weakened state and more likely to suffer great bodily injury if violently punched in the face without warning. Testimony regarding Cravens' boasting the day after the incident shows the fatal blow he delivered to Kauanui was more than a simple misdemeanor battery. A friend asked if he had been in a fight with Kauanui and Cravens responded, "I would hardly call it a fight. I punched him out." When another friend asked if Cravens and Kauanui had fought, Cravens laughed and said,

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head was such that it supported a finding of conscious disregard for human life.

> "We put him to sleep." It is undisputed that Cravens' blow to Kauanui caused great bodily injury and death. Because the evidence supports the finding that Cravens unintentionally killed Kauanui, without malice, by committing a felony assault by means of force likely to cause great bodily injury, we will reduce the conviction of second degree murder to voluntary manslaughter.

(Slip opn. pp. 47-49, emphasis in original, footnotes omitted.)

As the Court of Appeal explained, in order for a felony assault to support a finding of voluntary manslaughter, the felony assault must be an "inherently dangerous felony," meaning "one that by its very nature cannot be committed without causing a substantial risk that someone will be killed, or carries a high probability that death will result." (Slip opn. at p. 38.) This is obviously an objective test and the Court of Appeal necessarily determined that Cravens' actions objectively carried a high probability that death would result. All the jury did was find the subjective aspect---that Cravens appreciated this manifestly evident objective risk.

Indeed, the difference between implied malice murder and the appellate court's "felony manslaughter" theory hangs on whether the offender subjectively appreciated an objectively reasonable risk to life. A difference, so razor thin, that it is based on little more than inferences to be drawn from the self-same circumstances. And, this is precisely what the jury did here. For the Court of Appeal to say there was "no evidence" of implied malice, but enough for an objective determination of danger to human life, is intellectually disingenuous and legally erroneous.

In his second argument, Cravens asserts that the Court of Appeal had general authority "in the abstract" to reduce the verdict to voluntary manslaughter. (Answer Brief on the Merits, at pp. 46-48.) While it is true that a reviewing court may generally reduce a conviction to a lesser included offense where it finds insufficient evidence to support the greater offense, here the Court of Appeal had to invent a new crime---more

precisely, a new specie of voluntary manslaughter--- to serve as a lesser included offense. This, the appellate court has no authority to do.

Cravens grudgingly acknowledges that voluntary manslaughter is limited to cases involving an intent to kill or conscious disregard for life where malice is negated by provocation or imperfect self-defense. (Answer Brief on the Merits at p. 51.) And, he now disavows his reliance on *People v. Garcia, supra,* 162 Cal.App.4th 18, argues that it does not justify the reduction to voluntary manslaughter because two crucial elements of the *Garcia* formulation are missing---that he committed a felony and that it was inherently dangerous--- and says the Court of Appeal "erred" in applying it. (Answer Brief on the Merits at pp. 52-62.) On this point, Respondent agrees with Cravens. It seems as if he has been hung by his own petard.

CONCLUSION

Because the jury's verdict was supported by substantial evidence, the court should affirm the judgment of conviction.

Dated: March 28, 2011

Respectfully submitted,

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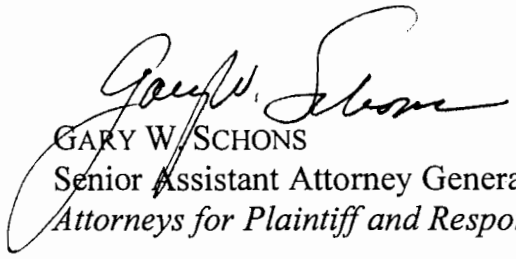

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 2,489words.

Dated: March 28, 2011

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 28, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on March 28, 2011, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 28, 2011, at San Diego, California.

C. Herrera
Declarant

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