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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari Colorado Court of Appeals Court of Appeals Case No. 10CA2609 Petitioner, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent, ISIDORE GRIEGO.	▲ **COURT USE ONLY** ▲ Case No. 15SC448
CYNTHIA H. COFFMAN, Attorney General KATHARINE GILLESPIE Senior Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 N Broadway, 9th Floor Denver, CO 80203 Telephone: (720)508-6468 E-Mail: kathy.gillespie@coag.gov Registration Number: 26109 *Counsel of Record	

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g). It contains 5,300 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Katharine Gillespie
Signature of Counsel

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Whether the court of appeals erred when it ruled that a specific, identifiable individual had to be harmed for the defendant to be found guilty of attempted reckless manslaughter and attempted second degree assault.

Whether the court of appeals erred when it ruled that the evidence was insufficient to convict the defendant of attempted reckless manslaughter and attempted second degree assault because there was some evidence to support the convictions.

SUMMARY OF THE ARGUMENT

The court of appeals erred when it ruled that the term "another person" in the reckless manslaughter and second degree assault statutes could not refer to any and all members of the public in the defendant's vicinity when the defendant was charged with attempting those crimes. When the defendant drove drunk, he consciously disregarded a substantial and unjustifiable risk of harm that anyone on the road with him that evening was at risk of death and/or serious bodily injury. This Court held in *People v. Hall*, 999 P.2d 207, 220 (Colo. 2000), that in a reckless manslaughter case "the risk can be a

risk of death to another generally; the actor does not have to risk death to a specific individual."

There was sufficient evidence to support the jury's finding that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct would kill or seriously injure anyone driving on the road with him. The defendant had an extensive history of driving while intoxicated, he knew that alcohol negatively affected his ability to drive a vehicle safely, and his extremely erratic driving put oncoming traffic at risk of death or serious bodily injury.

The question of whether the defendant's behavior created a risk of death or serious bodily injury was a factual question for the jury to decide. The court of appeals should have determined whether there was sufficient evidence, when considered in the light most favorable to the prosecution, to support the jury's verdict. Instead, the court of appeals improperly reversed the jury's verdicts because it would have reached a different conclusion based on the evidence.

STATEMENT OF THE CASE

I. Relevant Facts

The charges here were based on the defendant's two DUI arrests on December 26, 2005, and October 7, 2006. At trial, the prosecution introduced evidence of the defendant's previous DUIs as CRE 404(b) evidence, to show that the defendant was specifically aware of the risks associated with his drinking and driving (R.Tr. 8/25/10, p. 758).

A. December 2005 DUI

On December 26, 2005 at 9:30 p.m., Officer Hyde was driving on Platte Canyon Road when he saw the defendant driving northbound with his headlights turned off (R.Tr. 8/25/10, p. 642). Hyde did a u-turn, activated his overhead lights, and began to follow the defendant. The defendant was driving 10-20mph below the speed limit (R.Tr. 8/25/10, p. 647).

As Hyde followed him, the defendant turned his headlights on and off a few times and began to swerve back and forth over the center line between the southbound and northbound lanes of traffic (R.Tr. 8/25/10, pp. 643, 652). When Hyde saw a car coming towards the defendant in

the northbound lane, he activated his siren and the approaching car pulled to the side of road (R.Tr. 8/25/10, p. 643). Hyde saw other oncoming traffic behind the car that yielded to his siren (R.Tr. 8/25/10, p. 648).

As they passed the oncoming traffic, the defendant drifted back over into his lane. [1] He continued to drift across the southbound lane, through a bike lane, and into a ditch next to the road. As the defendant continued to drive in the ditch, he hit a road sign pulling it out of the ground. Instead of stopping, the defendant drove back up into the southbound lane of traffic (R.Tr. 8/25/10, pp. 644-46).

As the defendant approached the intersection at Mineral Avenue, the light was red; the defendant failed to stop. He went through the intersection, turned left onto Mineral, and then a block later turned right onto Utica. A short distance later, he turned into an apartment complex parking lot, hit a curb, and came to a stop (R.Tr. 8/25/10, pp. 644-46).

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[1] Hyde testified that this was not a "near miss" because when the defendant passed the oncoming car, he had already swerved back into the southbound lane (R.Tr. 8/25/10, p. 660).

B. October 2006 DUI

Ten months later, on October 7, 2006, Officer Jones was dispatched at 2:45 a.m. to the intersection of West Kaley Avenue and South Sycamore Street. Someone had called 911 to report a car sitting at the intersection, with the driver asleep behind the wheel and the car running. When Jones approached the car, he saw the defendant slumped over the wheel with his foot on the brake, the engine running, and the car in drive (R.Tr. 8/25/10, p. 677-79). Jones had another patrol car park in front of the defendant's car so that if the defendant became startled and took his foot off the brake, the car would not go move into the intersection (R.Tr. 8/25/10, p. 682).

Jones pounded on the driver's side window for 5 minutes before the defendant woke up. When Jones asked the defendant where he thought he was, the defendant told him he was at a restaurant in Littleton (R.Tr. 8/25/10, p. 680). Jones testified that when they arrived at the intersection, they did not see any other traffic (R.Tr. 8/25/10, p. 693).

C. CRE 404(b) DUIs

September 5, 1992. Agent Smith was on patrol at 4:00 a.m. when he saw a car traveling northbound on South Wadsworth with the headlights off. Smith activated his lights, did a u-turn, and followed the defendant. Smith saw the defendant weaving and pulled him over. The defendant was intoxicated and admitted to Smith he had had a couple of drinks (R.Tr. 8/27/10, pp. 853-63).

October 10, 1992. The defendant rear-ended Dennis Chislum as he was stopped at a red light right before midnight. After he hit Chislum, the defendant put his truck in reverse and backed up almost hitting another car behind him. The defendant fled and Chislum followed (R.Tr. 8/25/10, pp. 756-760). Chislum flagged down an officer who followed the defendant and saw him weaving over the center lane markers. The officer pulled the defendant over and eventually arrested him after a physical altercation with three officers (R.Tr. 8/25/10, pp. 765-770).

July 25, 2000. Officer Taborsky responded to a call that a driver was slumped over the steering wheel of a truck parked on the side of

the road at 7:45 a.m. When the officer arrived, he found the defendant in the driver's seat with the keys in the ignition. Taborsky thought the defendant might try to drive off so he attempted to pull the keys out of the ignition. The defendant fought the officer; the officer physically removed the defendant from the car when he could not get the keys. The defendant smelled of alcohol and urine when he got out of the car (R.Tr. 8/25/10, pp. 831-49).

September 30, 2001. Officer Bayles was dispatched at 12:42 a.m. to the intersection of South Prince and Riverwalk Circle on a report of a drunk driver passed out at the wheel. Bayles found the defendant in the driver's seat, passed out, with the engine running. The defendant was obviously intoxicated and could barely hold his head up or speak. The defendant admitted he "felt intoxicated." The defendant refused the roadsides, became combative, and kicked out the window when he was put into the patrol car (R.Tr. 8/27/10, pp. 873-79).

II. Trial Court Proceedings

At an August 2010 jury trial, the defendant was convicted of attempted reckless manslaughter and attempted second degree assault.

He was also convicted of a crime of violence count for using his vehicle as a deadly weapon. The felony complaint listed "any and all members of the public in his vicinity" as the person(s) at whom the defendant's reckless conduct was directed (R.CF. p. 52).

Prior to trial, the defendant filed a motion to dismiss alleging that the felony complaint did not "identify" any victim for the charges, did not allege that the defendant's conduct injured anyone, and did not allege that there was any "direct or remote danger" posed to any specific person (R.CF. p. 147). In his motion, the defendant also alleged that: (1) the prosecution should have charged the more specific crime of Driving Under the Influence §42-4-1301, C.R.S. (2015); and (2) the prosecutor did not have discretion to choose between two charges that criminalized the same conduct (R.CF. p. 147).

The People filed a written response to the defendant's motion and asserted that it did have discretion to choose what charges to file in a criminal case and the defendant had not cited any authority for his claim that a specific individual needed to be identified as the victim (R.CF. p. 187).

The trial court denied the defendant's motion in a written order. As is relevant to the issues accepted for review, the trial court held as follows:

> A person may commence and sufficiently pursue a risk-producing act or risk-producing conduct so as to constitute a substantial step toward the commission of Manslaughter even though a particular victim is not identified by name. That is, such act or conduct may proceed far enough to be strongly corroborative of the firmness of the actor's purpose to complete the acts that will produce a substantial and unjustifiable risk of death to unidentified persons. Whether a defendant took a substantial step toward the commission of manslaughter does not depend on whether a specific victim who was placed at risk can be identified by name. The defendant's conduct is not altered by the subsequent inability to identify a person placed at risk by such conduct.

(R.CF. p. 207).

At trial, defense counsel argued that the defendant's behavior was not attempted reckless manslaughter because there was no "near miss," the officers and DA investigator did not believe the oncoming traffic was threatened, or that an accident was "imminent" (R.Tr. 8/28/10, pp. 1162-68).

When the jury convicted the defendant, it specifically found that the two charges were based on both the December 2005 DUI and the October 2006 DUI (R.CF. pp. 376-78).

III. Direct Appeal

The court of appeals issued a published opinion on March 26, 2015 reversing the defendant's convictions and remanding the case with directions to enter acquittals on both counts. *People v. Griego*, 15COA31. The majority concluded that there was insufficient evidence to support the two convictions, because the prosecution failed to present any evidence that a specific identifiable person was put in danger by the defendant's behavior in either DUI incident. *Griego* at ¶20. The court held that in order to secure a conviction under either statute, "the prosecution must establish that the defendant's behavior placed 'another person,' that is, a discernible person, at substantial risk for likely death or serious bodily injury," and it was insufficient to "merely establish that the defendant placed any and all members of the public in his vicinity at risk." *Griego* at ¶42.

Applying its holding to the facts of this case, the court concluded that because Officer Hyde testified that the only vehicle he observed that could have conceivably been affected by the defendant's driving was over "half a football field away" from the defendant's vehicle, the oncoming vehicle was not sufficiently placed at risk. Similarly, when the defendant was arrested in October 2006, the court concluded there were no other individuals or vehicles in the vicinity of the defendant's vehicle. *Griego* at ¶43. Based on these facts, the court concluded that there was "no evidence in the record from which a reasonable jury could find that the defendant's driving on either date jeopardized or threatened any oncoming traffic or individuals." *Griego* at ¶44.

In a dissenting opinion, Judge Booras found that there was sufficient evidence presented at trial to show that there was at least one person at risk in the December 2005 DUI. *Griego* at ¶49. After providing a lengthy and comprehensive recitation of the facts presented at trial, Judge Booras found that it was "unnecessary to decide whether actions that threaten the 'general public' [were] sufficient to establish that 'another person' was put in danger, because there was at least one

actual, discernible driver who was threatened" in the defendant's December 2005 DUI. *Griego* at ¶53.

As Judge Booras correctly pointed out, Officer Hyde testified that as he followed behind the defendant's car with his lights on, the defendant's vehicle crossed into the lane of approaching traffic "about halfway over the road markers," then went all the way over across "the marker on the shoulder," and then back into the northbound opposing traffic lane multiple times. At one point, the officer noticed a vehicle approaching in the oncoming lane with additional vehicles coming behind it; he activated his siren to alert the oncoming driver(s). The approaching vehicle pulled to the side of the road and the defendant drifted back into his own lane of traffic as he passed, before swerving into a shallow ditch and driving another block and a half. *Griego* at ¶50. Judge Booras noted that the officer's ambiguous description that the cars were 100-150 feet apart at one point and his opinion that the defendant's driving did not threaten oncoming traffic did not preclude a jury finding that there was another person placed in danger of death or serious bodily injury when all of the evidence presented at trial was

considered in the light most beneficial to the prosecution. *Griego* at ¶55.

ARGUMENT

I. The court of appeals erred when it held that the term "another person" in the reckless manslaughter and second degree assault statutes could not, as a matter of law, refer to any members of the public in the defendant's vicinity when a defendant is charged with the attempted commission of those crimes.

A. Standard of Review

Questions of law are reviewed under a *de novo* standard of review. *Leyva v. People,* 184 P.3d 48 (Colo. 2008).

B. Applicable Law & Analysis

When interpreting a statute, this Court will "determine and effectuate the intent of the General Assembly ["GA"]." *Hernandez v. People*, 176 P.3d 746, 751-52 (Colo. 2008). When construing a statute, the court must look at the whole statute and give "consistent, harmonious and sensible effect to all of its parts…" *Id.* The court will not decide on an interpretation that leads to illogical or absurd results. *See Colo. Water Conservation Bd. v. Upper Gunnison River Water*

Conservancy Dist., 109 P.3d 585, 593 (Colo. 2005); *Frazier v. People,* 90 P.3d 807, 811 (Colo. 2004).

Where the plain language of the statute is clear and unambiguous, the statute is interpreted according to its plain meaning. The clarity or ambiguity of the statutory language is determined by looking at the language itself, the specific context in which the language is used, and the broader context of the statute as a whole. *Hernandez*, 176 P.3d at 752; *see also Vensor v. People,* 151 P.3d 1274, 1277 (Colo. 2007).

The crime of reckless manslaughter[2] occurs when a person recklessly causes the death of another person. §18-3-104(1)(a), C.R.S. (2015); §18-1-501(8), C.R.S. (2015). For attempted reckless manslaughter, the culpable mental state is that the accused knowingly engaged in conduct while consciously disregarding a substantial and unjustifiable risk of death. *People v. Thomas*, 729 P.2d 972, 974-75 (Colo. 1986); *Palmer v. People*, 964 P.2d 524 (Colo. 1998). It requires

[2] The People will address the Court's questions using only the attempted reckless manslaughter charge. The analysis, however, is equally applicable to attempted second degree assault. The only difference is attempted second degree assault requires serious bodily injury as opposed to death.

that the risk-producing act or conduct be commenced and sufficiently pursued far enough to be strongly corroborative of the firmness of the actor's purpose; the actor acts with the culpability otherwise required for completion of the crime and completes acts that will produce a substantial and unjustifiable risk of death to another person. *Thomas*, 729 P.2d at 975; *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

This Court has already determined that "[w]hen one engages in conduct that involves a risk of death that is both substantial and unjustified, and is conscious of the nature and extent of the risk, the actor demonstrates such a disregard for the likelihood that another will die as to evince a degree of dangerousness hardly less threatening to society than if the actor had chosen to cause death." *Thomas*, 729 P.2d at 976; *People v. Castro*, 657 P.2d 932 (Colo. 1983)(attempted extreme indifference murder is a cognizable offense); *People v. Eggert*, 923 P.2d 230, 235-236 (Colo. App. 1995); *People v. Krovarz*, 697 P.2d 378, 381 (Colo. 1985)(punishment is justified in the case of an attempted crime because there exists a high likelihood that the defendant's "unspent" intent will flower into harmful conduct at any moment).

The reckless manslaughter and second degree assault statutes use the phrase "another person." The plain language of the statutes does not require that a "near miss" take place or that "another person" must be within a certain distance of the defendant's reckless conduct before a jury can find the defendant guilty of an attempt to commit either crime. *See Patton v. People*, 168 P.2d 266, 270 (Colo. 1946)("One who, sufficiently under the influence of liquor to impair his capacity as a driver…puts himself at the wheel of an automobile and takes the road, is guilty of a willfull and wanton disregard of the rights of all persons who ride with him or sue the highways he travels."). An attempt to commit a crime presumes that not every element of the crime has been met. Instead, the crime of attempt targets those people who act with the culpability otherwise required for completion of the crime and who complete acts that will produce a substantial and unjustifiable risk of death or injury to another person.

As in this case, the defendant's conduct fulfilled every act required for the completion of reckless manslaughter. The only element not completed was the actual injury or death to another person. However,

the conscious disregard of a substantial and unjustifiable risk of injury or death to "another person" was met when the defendant drove in an extremely intoxicated state on a public roadway. Attempted reckless manslaughter does not require that a specific person be named for an attempt of the crime to occur.

In *Hall*, 999 P.2d 207, this Court outlined what is required in order to convict a defendant of reckless manslaughter:

- **Substantial Risk.** Whether a risk is substantial must be determined by assessing both the likelihood that harm will occur and the magnitude of the harm should it occur. Whether a risk is substantial is a question of fact and depends on the specific circumstances of each case. *Hall*, 999 P.2d at 218. To determine whether the defendant's conduct created a substantial risk of death, a court must consider the specific conduct in which the defendant engaged.

- **Unjustifiable Risk.** Whether a risk is justifiable is determined by weighing the nature and purpose of the defendant's conduct against the risk created by his conduct. If a person consciously

disregards a substantial risk of death but does so for a reason that justifies the risk, his conduct is not reckless.

- **Gross Deviation-Standard of Care.** A "substantial and unjustifiable risk" is a risk that is a gross deviation from the standard of care that a reasonable law-abiding person would exercise under the circumstances. This is a factual question for the jury to decide. *Cf. People v. Thompson*, 748 P.2d 793, 794 (Colo. 1988)(finding that question of whether a risk of serious bodily injury was a substantial risk is a question for the jury); *People v. Mann*, 646 P.2d 352, 362 (Colo. 1982)(whether the defendant's conduct was a "gross deviation" from the standard of care is a jury question).

- **Conscious Disregard of Risk.** The prosecution must demonstrate that the defendant "consciously disregarded" the risk in order to prove that he acted recklessly. A person acts with a conscious disregard of the risk when he is aware of the risk and still chooses to act. The jury may infer the defendant's subjective awareness of a risk from the particular facts of the case, including the defendant's particular knowledge or expertise, or from what a reasonable person

would have understood under the circumstances. *Hall*, 999 P.2d at 218-20.

- **Risk of Death.** The defendant must consciously disregard a substantial and unjustifiable risk of a particular result; in the case of manslaughter the defendant must risk causing death to another person. As to the last element-risk of death, this Court has held that "the risk can be a risk of death to another generally; the actor does not have to risk death to a specific individual." *Hall*, 999 P.2d at 220.

"Because the element of a 'substantial and unjustifiable risk' measures the likelihood and magnitude of the risk disregarded by the actor, any risk of death will meet the requirement that the actor, by his conduct, risks death to another. That is, only a slight risk of death to another person is necessary to meet this element." *Id.*; *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988)(It is rational for the legislature to differently punish knowing conduct of a type directed against a particular individual, and knowing, killing conduct -- aggravated recklessness or cold-bloodedness -- which by its very nature evidences a willingness to take human life without regard to the victim). In *People*

v. Deskins, 927 P.2d 368 (Colo. 1996), the defendant argued that he was not guilty of reckless child abuse because there was no evidence that he was aware a child would be in the car that he hit while he was driving drunk. This Court rejected the defendant's claim finding that "the risk in the case was not that children might be in the actual car the defendant hit that night. On the contrary, what [the defendant] consciously disregarded when he drove while drunk was the risk that children would be passengers in any of the cars on the road that night." *Id.* at 373.

The same is true with respect to attempted reckless manslaughter. When a defendant drives drunk on a pubic road, he is disregarding a substantial and unjustifiable risk that he will cause injury and/or death to any person he encounters while driving. While an "identifiable person" would need to be named if the crimes were completed and the prosecution had to establish death or serious bodily injury to that person, the same is not true with respect to the crime of attempt.

An attempt requires that the risk-producing act or conduct be commenced and sufficiently pursued far enough to be strongly corroborative of the firmness of the defendant's purpose. In an attempt case, where the defendant is extremely intoxicated and chooses to get into a vehicle and drive on a public roadway, he has completed every element of reckless manslaughter; the only element missing is the fact that "another person" has not been killed or injured. That missing element is the result of sheer luck and not the result of any mitigating conduct on the part of the defendant. With attempted reckless manslaughter, the focus is to criminalize the behavior of a defendant who disregards a substantial and unjustifiable risk that his conduct will injure or kill someone else. The risk the defendant disregards is the risk that he will very likely encounter another vehicle on the road while he is driving intoxicated and that his drunk driving will injure or kill any person driving a vehicle.

Thus, the prosecution does not have to identify a specific person as being at risk of death or serious bodily injury in an attempted reckless manslaughter or attempted second degree assault case.

II. The court of appeals erred when it ruled that the evidence was insufficient to convict the defendant of attempted reckless manslaughter and attempted second degree assault where "another person" was not specifically identified.

A. Standard of Review

Whether the evidence was sufficient to sustain a conviction is a question of law that is reviewed de novo. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

B. Applicable Law & Analysis

A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, viewed in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable fact finder that the defendant is guilty of the crimes charged beyond a reasonable doubt. *People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999). Resolution of the weight and credibility of the evidence is entrusted to the judgment of the jurors. *People v. Brassfield*, 652 P.2d 588, 592 (Colo. 1982). An appellate court may not set aside a verdict merely because it might have drawn a different conclusion from the same evidence. *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988).

Here, there was ample evidence to support the jury's finding that the defendant recklessly disregarded a substantial and unjustifiable risk that his conduct would kill or seriously injure anyone driving on the road with him.

Substantial Risk. Whether a risk is substantial is a matter of fact that will depend on the specific circumstances of each case. *Hall*, 999 P.2d at 218. Here, the defendant's drunk driving posed a substantial risk. The defendant swerved back and forth into the oncoming lanes of traffic. He was so intoxicated, he was oblivious to the police officer following him with his lights flashing; the defendant did not pull over or stop for the officer's lights or for his siren. The defendant drove in a ditch on the side of the road for over a block, and continued to drive for blocks after hitting a street sign and running through a red light. Based on the facts of this case, the jury had ample evidence from which to find that the defendant's conduct (intoxicated driving) created a substantial risk to anyone else on the road that night.

Unjustifiable Risk. 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. Here, the defendant's risk was unjustifiable as there was no reason for him to drive in such an intoxicated state.

Gross Deviation-Standard of Care. Drunk driving, especially at the defendant's level of intoxication, is a risk that is an obvious deviation from the standard of care exercised by reasonable law abiding people.

Conscious Disregard of Risk. The jury may infer the defendant's subjective awareness of a risk from the particular facts of the case, including the defendant's particular knowledge or expertise, or from what a reasonable person would have understood under the circumstances. Here, the People introduced CRE 404(b) evidence of the defendant's previous nine DUI cases to establish that the defendant knew what his conduct was like when he drove in an intoxicated state. The defendant had put people at risk for injury or death in the past when he drove drunk; in one prior DUI case the defendant caused an accident (R.Tr. 8/25/10, p. 757)(R.Tr. 8/27/10, pp. 888, 911-12). The defendant knew he did not have a valid driver's license because of his

prior drunk convictions and that the State of Colorado did not authorize him to be on the road. He knew from his previous alcohol treatment the effect his level of alcohol concentration had on his driving performance (R.Tr. 8/25/10, p. 722). Even without a specific alcohol treatment program, any reasonable person understands the dangers associated with drunk driving.

Despite all of his prior experiences and his understanding of the risks involved, the defendant chose to drink alcohol to excess, get behind the wheel of his car, and drive on the public roads. There was ample evidence to support the jury's finding that the defendant consciously disregarded the known risks associated with his drunk driving.

Risk of Death. The risk of death or serious bodily injury can be to another person generally. Here, the court of appeals found that the evidence was insufficient because the oncoming traffic was 100-150 feet away from the defendant's car at one point and was never in any real or imminent danger. The court also seemed to be persuaded by the

officer's personal opinion that the defendant's behavior did not create an "imminent risk" for oncoming traffic.

However, the appropriate standard of review does not permit the court of appeals to make its own factual and credibility assessments of the evidence. The question of whether the defendant's behavior created a risk of death or serious bodily injury was a factual question for the jury to decide. The court of appeals should have simply determined whether there was sufficient evidence, when considered in the light most favorable to the prosecution, to support the jury's verdict. The court of appeals should not have decided whether it would have reached a different conclusion based on the evidence presented.

At trial, the evidence established the following facts as to the December 2005 DUI:

- the defendant, who drove without his headlights on, crossed over the center line of traffic on multiple occasions in the four or five blocks before the officer activated his siren (R.Tr. 8/25/10, p. 652);

- the officer activated his siren when he saw the defendant weave into the northbound lanes with oncoming traffic approaching; a reasonable inference was the officer did this

to alert oncoming traffic to the danger the drunk driver posed to its safety (R.Tr. 8/25/10, p. 652);

- the oncoming traffic pulled to the side of the road when the officer activated his siren and the defendant drove by; the defendant continued to weave off the road, drive in a ditch, and run over a road sign (R.Tr. 8/25/10, pp. 644-45);

- because of his extreme level of intoxication, the defendant did not yield to the officer's lights or sirens and continued to travel for miles before finally crashing into a curb (R.Tr. 8/25/10, p. 646);

- the officer testified there were multiple places where the defendant could have pulled over safely in response to the lights and siren (R.Tr. 8/25/10, p. 671);

- the defendant drove drunk at 9:30 p.m. when the likelihood of other drivers being on the road and in his vicinity was very high (R.Tr. 8/25/10, p. 642).

At trial, the evidence established the following facts as to the October 2006 DUI:

- a person who saw the defendant asleep behind the wheel of his car at an intersection called 911 to report the danger (R.Tr. 8/25/10, p. 678);

- the defendant's car was running and in "drive" with the defendant's foot on the brake (R.Tr. 8/25/10, p. 679);

- it took the officers five minutes of pounding on the driver's side window to wake the defendant (R.Tr. 8/25/10, p. 679);

- officers placed a patrol car in front of the defendant's car so it would not lurch forward into the intersection; there was a reasonable inference this was done to prevent the defendant from injuring the officers or anyone who might drive through the intersection if the defendant released the brake (R.Tr. 8/25/10, p. 678).

Defense counsel argued to the jury that the defendant's drunk driving did not pose an imminent danger or near miss to anyone else on the road during either incident. Based on its verdicts, the jury clearly was not persuaded by the defendant's arguments. Instead, it found that the elements of both attempted reckless manslaughter and attempted second degree assault were met. Since the record provides sufficient evidence to support those verdicts, the court of appeals should have affirmed both convictions.

CONCLUSION

For the above stated reasons, the court of appeals' decision should be reversed and the defendant's convictions for attempted reckless manslaughter and attempted second degree assault should be reinstated.

CYNTHIA H. COFFMAN
Attorney General

/s/ Katharine Gillespie
KATHARINE GILLESPIE, 26109*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellant
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF** upon **SARAH KELLOGG**, via Integrated Colorado Courts E-filing System (ICCES) on June 14, 2016.

/s/ Tiffiny Kallina