IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM
Plaintiff-Appellee,

v.

SIREN NATHAN
Defendant-Appellant.

OPINION

Cite as: 2018 Guam 13

Supreme Court Case No.: CRA16-012
Superior Court Case No.: CF0281-15

Appeal from the Superior Court of Guam
Argued and submitted on May 17, 2017
Hagåtña, Guam

Appearing For Defendant-Appellant:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook
A Professional Corporation
210 Archbishop Flores St., Ste. 200
Hagåtña, GU 96910

Appearing For Plaintiff-Appellee:
Nicole Driscoll, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
590 S. Marine Corps Dr., Ste. 706
Tamuning, GU 96913

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

MARAMAN, C.J.:

[1] Defendant-Appellant Siren Nathan appeals his convictions of attempted murder in the first degree and aggravated assault in the second degree. First, he argues attempted murder in the first degree is a lesser-included offense of aggravated assault in the second degree and, therefore, his attempted murder conviction should be set aside as a lesser-included offense. Second, he argues that the trial court committed plain error when it did not *sua sponte* instruct the jury on intoxication as a defense to negate the requisite *mens rea* for his crime. Lastly, he contends that he was prejudiced by ineffective assistance of counsel.

[2] For the reasons discussed below, we affirm the conviction for attempted murder in the first degree, vacate the conviction for aggravated assault in the second degree, and remand to the trial court for sentencing not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On or about May 2, 2015, Defendant-Appellant Siren Nathan, two other co-defendants, and the victim, Saul Sos, were drinking alcoholic beverages around an apartment complex parking lot. Eventually, one of Nathan's co-defendants and Sos got into an argument that escalated into a fist fight.[1] During the fist-fight, one of the other co-defendants began shooting

[1] During witness testimony, the witnesses referred to Bernadino Kanistus, one of Nathan's co-defendants, as the "bald man." Kanistus is in fact the "bald man" as referred to by the witnesses at trial. *See* Transcript ("Tr.") at 36-37 (Jury Trial, July 14, 2015). Kanistus is also referred to by the witnesses at trial as "Ready." *See id.* at 24; *see also* Tr. at 175 (Jury Trial, July 15, 2015).

pieces of rebar at Sos using a slingshot. Sos then ran at that co-defendant and attacked him with a machete.[2]

[4] All of the defendants, including Nathan, ended up fighting against Sos. During the melee, as one of the co-defendants was choking Sos, Nathan, along with the other co-defendant, began striking Sos's head and legs with a machete. The fight continued until witnesses intervened. Nathan and the co-defendants then stopped their attack. When the fight was over, Nathan and the co-defendants got into a car while the victim remained lying unconscious on the ground. A co-defendant then drove over Sos's legs. Nathan was not the driver of the vehicle. At trial, this evidence was submitted by both witness testimony and video footage.

[5] The People of Guam ultimately filed three charges against Nathan. Charge Three in the Indictment was Attempted Murder as a first degree felony with a Special Allegation of Possession and Use of a Deadly Weapon (a machete) During the Commission of a Felony. Record on Appeal ("RA"), tab 94 at 3 (Am. Superseding Indictment, July 14, 2015). Charge Four in the Indictment was Aggravated Assault with a Special Allegation as a second degree felony of Possession and Use of a Deadly Weapon (a machete) During the Commission of a Felony. *Id.* at 4. Lastly, Charge Seven in the Indictment was Attempted Murder with a Special Allegation of Possession and Use of a Deadly Weapon (an automobile) During the Commission of a Felony. *Id.* at 5.

[6] During trial, Nathan introduced evidence of his self-induced intoxication through the testimony of two witnesses, as is permitted under 9 GCA § 7.58(b) to negate any element of the offenses charged. One witness confirmed that the suspects were drinking alcoholic beverages,

[2] At trial, Saul Sos was also known by witnesses as "Cabbage" and was referred to as "Cabbage" during the prosecution's case-in-chief. *See* Tr. at 175 (Jury Trial, July 15, 2015).

and the other testified that the defendants "were drunk, but I don't know if they were really drunk." However, Nathan's counsel did not request a jury instruction on self-induced intoxication nor did the trial court issue such an instruction *sua sponte*. Furthermore, while providing instructions to the jury, the trial court stated that "[t]he crime of aggravated assault as a second-degree felony is lesser to attempted murder as a first-degree felony." Tr. at 217 (Jury Trial, July 17, 2015). No objections were made to the instructions as given.

[7] Nathan was convicted of attempted murder in the first degree and aggravated assault in the second degree with special allegations for use of a deadly weapon for each crime. He was sentenced to ten years' imprisonment for the charge of Attempted Murder, three years' imprisonment for the charge of Aggravated Assault, and five years' imprisonment for the Special Allegations. The sentences for Attempted Murder and Aggravated Assault were to run concurrently. The sentences for the two Special Allegations were to run concurrently with each other, but consecutively with the Attempted Murder and Aggravated Assault charges. Nathan timely filed his Notice of Appeal.

II. JURISDICTION

[8] This court has jurisdiction over appeals from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-223 (2018)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] When no objections to jury instructions are made at trial, we review the instructions for plain error. *People v. Gargarita*, 2015 Guam 28 ¶ 11. Under plain error review, this court "will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of

justice or to maintain the integrity of the judicial process." *Id.* (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

[10] Whether the charge of Attempted Murder is a lesser-included offense of Aggravated Assault is a question of law reviewed *de novo*. *See People v. Anastacio*, 2010 Guam 18 ¶ 10. "Ineffective assistance of counsel claims are questions of law, which this court reviews *de novo*." *People v. Damian*, 2016 Guam 8 ¶ 11 (quoting *People v. Moses*, 2007 Guam 5 ¶ 9).

IV. ANALYSIS

A. Attempted Murder is Not a Lesser-included Offense of Aggravated Assault

[11] Nathan contends that, as charged, attempted murder in the first degree is a lesser-included offense of aggravated assault in the second degree. Appellant's Br. at 5 (Jan. 18, 2017). We resolve this issue by analyzing the convictions as charged. We view the evidence supporting the convictions in the light most favorable to the prosecution. *See, e.g.*, *State v. Morris*, 414 So. 2d 320, 321-22 (La. 1982); *State v. Johnson*, 554 N.W.2d 126, 127 (Neb. 1996).

1. Nathan's Charges and Convictions

[12] Nathan was convicted, under the Amended Superseding Indictment, of attempted murder in the first degree as follows:

> On or about the 2nd day of May, 2015, in Guam, [Nathan] did commit the offense of Attempted Murder, in that he did intentionally or knowingly attempt to cause the death of another human being, that is, [Sos], in violation of 9 GCA § 16.40(a)(1) and (b); 13.10; 4.60.

RA, tab 94 at 3 (Am. Superseding Indictment). Nathan's Aggravated Assault conviction under Charge Four of the Amended Superseding Indictment was as follows:

> On or about the 2nd day of May 2015, in Guam, [Nathan], did commit the offense of Aggravated Assault, in that he did attempt to cause serious bodily injury to another, that is, [Sos] in circumstances manifesting extreme indifference to the value of human life in violation of 9 [GCA] §§ 19.20(a)(1) and (b).

Id. at 4.

2. Statutory Scheme

[13] Nathan does not provide caselaw to support his contention that attempted murder in the first degree is a lesser-included offense of aggravated assault in the second degree. Instead, he points to two statutes. First, he points to 9 GCA § 1.22, which provides, in pertinent part:

> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each offense. He may not, however, be convicted of more than one offense if:
>
> > (a) One offense is included in the other as defined in § 105.58 of the Criminal Procedure Code . . . .

9 GCA § 1.22(a) (2005). Nathan's two convictions stem from the same conduct; namely, Nathan attacking the victim with a weapon. The issue, therefore, is whether one of Nathan's charges is included in the other. If so, Nathan cannot be convicted of the lesser-included offense. *Id.*; *see also People v. Aguirre*, 2004 Guam 21 ¶ 18.

[14] Nathan argues that, as charged, attempted murder is a lesser-included offense of aggravated assault.[3] Appellant's Br. at 8. To support his argument, Nathan points to 8 GCA § 105.58, which provides, in pertinent part:

> (a) The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is included in that with which he is charged.
>
> (b) An offense is included under Subsection (a) when:
>
> > (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

[3] Nathan argues that 8 GCA § 105.58 covers "included offenses" and not "lesser-included offenses" and therefore the People's use of the word "lesser" is a "misnomer." Reply Br. at 5 (Mar. 16, 2017). However, we use the terms "lesser-included offenses" and "included offenses" interchangeably under 8 GCA § 105.58. *See People v. Songeni*, 2010 Guam 20; *People v. Cummins*, 2010 Guam 19 ¶ 16; *People v. Demapan*, 2004 Guam 24 ¶¶ 9-12; *Angoco v. Bitanga*, 2001 Guam 17 ¶ 13; *Aguirre*, 2004 Guam 21 ¶ 18 (framing the issue of a case involving "included offense" as whether charges against defendant were "lesser included" offenses).

> (2) . . . ; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

8 GCA § 105.58 (2005); Appellant's Br. at 7-9. Nathan contends that the difference between the two charges is that for aggravated assault, "the Government is required to prove that [Nathan] acted in circumstances manifesting extreme indifference to the value of human life" and that "a lesser kind of culpability suffices to establish [attempted murder]." Appellant's Br. at 8-9. Therefore, Nathan argues, because attempted murder is established by proof of fewer facts than that required to establish aggravated assault and requires a lesser kind of culpability, attempted murder is a lesser-included offense of aggravated assault. *Id.* We disagree.

[15] Under 8 GCA § 105.58(b)(1), attempted murder is also not a lesser-included offense of aggravated assault. Attempted murder has the elements of: (1) attempting (2) to cause the death of another human being. RA, tab 94 at 3 (Am. Superseding Indictment); *see also* 9 GCA § 13.10 (2005); 9 GCA § 16.40 (2005). As charged, aggravated assault has the elements of: (1) attempting (2) to cause serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life.[4] RA, tab 94 at 4 (Am. Superseding Indictment); *see also* 9 GCA § 19.20 (2005). Attempted murder is not established by proof of the same or less than all the facts required to establish the commission of aggravated assault because attempted murder

[4] Attempt is a specific intent crime. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 351 n.2 (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill."); *see also* 21 Am. Jur. 2d *Criminal Law* § 150 (2018). Therefore, as charged, both offenses are specific intent crimes because both are attempts. RA, tab 94 at 3 (Am. Superseding Indictment) ("attempt to cause the death of another human being . . . ."); *id.* at 4 ("attempt to cause serious bodily injury to another . . . .").

The language of "in circumstances manifesting extreme indifference to the value of human life" is not a separate element. Rather, it quantifies "serious bodily injury" and elevates the risk level that serious bodily injury be caused from a mere possibility to a probability. *See People v. Song*, 2012 Guam 21 ¶¶ 37-38 (adopting reasoning from *State v. Curtis*, 479 A.2d 425 (N.J. Super. Ct. App. Div. 1984)).

requires the element of "cause the death of another human being," which aggravated assault does not require. *Compare* 9 GCA § 13.10, *with* 9 GCA § 19.20.

[16] Attempted murder is also not a lesser-included offense of aggravated assault under 8 GCA § 105.58(b)(3). Attempted murder involves a more serious risk of injury—death—as compared to aggravated assault, which involves risk of serious bodily injury in circumstances manifesting extreme indifference to the value of human life. Accordingly, it is not a lesser-included offense of aggravated assault. However, Nathan's aggravated assault charge does differ from the attempted murder charge "only in the respect that a less serious injury or risk of injury to the same person . . . suffices to establish its commission." *See* 8 GCA § 105.58(b)(3). As noted above, each offense has two elements, as charged. The first element relates to culpability and is the same for both offenses. The second element relates to injury and aggravated assault, as charged, requires a less serious risk of injury—serious bodily injury in circumstances manifesting extreme indifference to the value of human life. Therefore, Nathan's aggravated assault conviction is a lesser-included offense of his attempted murder conviction because aggravated assault, as charged, differs only in respect that a less serious injury suffices to establish its commission.

[17] Our holding that Nathan's aggravated assault conviction is a lesser-included offense of his attempted murder conviction is supported by Guam caselaw. Although we have not held in the past that aggravated assault in the second degree is a lesser-included offense of attempted murder in the first degree, Guam courts have held that aggravated assault is a lesser-included offense of other forms of homicide. *See, e.g.*, *People v. Song*, 2012 Guam 21 ¶ 53 ("[A]ggravated assault is a lesser included offense of manslaughter . . . ."); *People v. Kasinger*, DCA No. 83-00015A, SCC No. 100F-82, 1984 WL 48832, at *7 (D. Guam. App. Div. Aug. 17,

1984) ("[Defendant on trial for murder had] the intent to commit a lesser-included-offense; i.e., the completion of the previously begun aggravated assault.").

[18] In *Aguirre*, we held that if offenses are included offenses under 9 GCA § 1.22(a), a defendant cannot be convicted of more than one of those offenses. *See Aguirre*, 2004 Guam 21 ¶ 18. Additionally, the charging documents against Nathan support this result. The People specifically charged Nathan with aggravated assault under the "attempts to cause" portion of the statute. 9 GCA § 19.20. Our analysis in this case may be different if Nathan had been convicted under the "cause" portion of 9 GCA § 19.20. We are not, however, confronted with that situation in this appeal. Therefore, as a result of our holding that aggravated assault is a lesser-included offense of attempted murder in this case, we must vacate Nathan's conviction of aggravated assault in the second degree.

B. The Trial Court Did Not Err in Not Providing an Intoxication Instruction Regarding the Attempted Murder and Aggravated Assault Charges

[19] Guam law allows a defendant to introduce evidence of self-induced intoxication to negate an element of a crime, such as a crime's requisite intent. 9 GCA § 7.58 (2005). In pertinent part, 9 GCA § 7.58 states:

> (a) As used in this Section:
>
> (1) *intoxication* means an impairment of mental or physical capacities resulting from the introduction of alcohol, drugs or other substances into the body.
>
> (2) *self-induced intoxication* means intoxication caused by substances which the person knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would otherwise afford a defense to a charge of crime.
>
> (b) Except as provided in Subsection (d), intoxication is not a defense to a criminal charge. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

. . . .

(d) Intoxication which is not self-induced is an affirmative defense . . . .

Id.

[20] Nathan argues that the trial court was required to provide an intoxication instruction *sua sponte*, under 9 GCA § 7.58(b), because there was evidence in the record to support such an instruction. Appellant's Br. at 9-14; *see also* Reply Br. at 2. Under plain error review, we must first determine whether the failure to give the instruction regarding self-induced intoxication was error. *See Gargarita*, 2015 Guam 28 ¶ 11. Nathan contends that our holding in *People v. Root*, 2005 Guam 16, is binding precedent on this point. Appellant's Br. at 9-10; *see also* Reply Br. at 3. We disagree. In *Root*, we held that defendants are entitled to a self-defense instruction when there is evidence in the record to support it. 2005 Guam 16 ¶ 28. Self-defense differs from self-induced intoxication in that self-defense is an affirmative defense, *see* 9 GCA § 7.84 (2005), while self-induced intoxication is not, *see* 9 GCA § 7.58(b). Moreover, the Family Violence statute at issue in *Root* specifically stated that "[f]amily violence . . . *does not include acts of self-defense* or defense of others." *Root*, 2005 Guam 16 ¶ 15 (quoting 9 GCA § 30.10(a) (2005)). Unlike self-defense, self-induced intoxication "is not a defense to a criminal charge" and can only be used "to negate or to establish an element of the offense charged." *See* 9 GCA § 7.58(b). Given the differences between self-defense and self-induced intoxication, *Root* is not relevant to the case at hand.

[21] Nathan also impliedly argues that this court should follow California precedent and hold that for specific intent crimes, if evidence shows that a defendant was intoxicated at the time of the alleged crime, an intoxication instruction must be given *sua sponte*. Appellant's Br. at 10-11 (citing *People v. Robinson*, 84 Cal. Rptr. 796, 798 (Ct. App. 1970)). While Nathan contends that

an intoxication instruction must be given *sua sponte* regardless of the degree of intoxication shown by evidence at trial because "the degree of intoxication is relevant and therefore must be decided by the jury," he cites to no caselaw in support of this contention. *See* Reply Br. at 2-3 (citing only to a note to 9 GCA § 7.58). The court in *Robinson* noted that "[t]he mere fact a defendant may have been drinking prior to the commission of a crime does not establish intoxication or necessarily require the giving of an instruction thereon." 84 Cal. Rptr. at 798. Other jurisdictions that, like Guam, have adopted the Model Penal Code have held similarly. *See, e.g.*, *Commonwealth v. Brown*, 872 N.E.2d 711, 727-28 (Mass. 2007) (noting that "[a]n instruction on voluntary intoxication is not required absent evidence of 'debilitating intoxication'" such that "intoxication impaired the defendant's ability to form any requisite criminal intent" (quoting *Commonwealth v. Chaleumphong*, 746 N.E.2d 1009, 1016 (Mass. 2001); *Commonwealth v. Moses*, 766 N.E.2d 827, 831 (Mass. 2002))); *State v. Cameron*, 514 A.2d 1302, 1308-09 (N.J. 1986) (holding that intoxication must be of an extremely high level, to have caused "prostration of faculties" of a defendant, in order to qualify as a defense). The only evidence of Nathan's alleged intoxication adduced at trial was provided by two witnesses. One answered in the affirmative when asked whether "the suspects were drinking alcoholic beverages." Tr. 112-13 (Jury Trial, July 15, 2015). The other testified that the defendants "were drunk," and when asked how she knew the defendants were drunk, answered: "I saw them. They were drunk, but I don't know if they were really drunk." Tr. at 43 (Jury Trial, July 16, 2015). Therefore, even under *Robinson*, Nathan's argument that the trial court erred in not giving a self-induced intoxication instruction to the jury fails, as "[t]he mere fact a defendant may have been drinking prior to the commission of a crime does not establish intoxication." *Robinson*, 84 Cal. Rptr. at 798.

[22] Given that the evidence of intoxication does not appear to rise to the level of requiring an instruction under either California law—on which Nathan relies—or the law of other Model Penal Code jurisdictions, we do not find that the trial court erred when it did not provide an instruction on self-induced intoxication to the jury regarding Nathan's attempted murder charge. Because we find no error, we need not discuss the remaining three prongs of the plain error analysis.

C. The Record Is Not Sufficiently Developed to Determine Nathan's Ineffective Assistance of Counsel Claim

[23] "The Sixth Amendment provides that an accused shall enjoy the right to have the 'Assistance of Counsel for his defen[s]e.'" *People v. Guerrero*, 2017 Guam 4 ¶ 58 (alteration in original) (quoting U.S. Const. amend. VI). "Generally, this court employs the *Strickland* two-part test established by the United States Supreme Court, to determine whether a defendant was deprived of the effective assistance of counsel." *People v. Katzuta*, 2016 Guam 25 ¶ 83 (citations omitted). Under *Strickland*, a defendant must prove that: (1) trial counsel's performance was deficient so as to fall below the prevailing professional norms and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Damian*, 2016 Guam 8 ¶ 28; *People v. Meseral*, 2014 Guam 13 ¶¶ 45, 46.

[24] If the record is sufficiently complete to make a proper finding, an ineffective assistance of counsel claim may be brought on direct appeal. *Guerrero*, 2017 Guam 4 ¶ 60 (citations omitted). However, such claims are usually more properly brought by writ of habeas corpus. *Id.* (citations omitted). "Courts will often decline to reach the merits of ineffective assistance of counsel claims because such claims are 'more appropriately addressed in a habeas corpus

proceeding because it requires an evidentiary inquiry beyond the official record.'" *Id.* (quoting *Meseral*, 2014 Guam 13 ¶ 13).

[25] Nathan contends that the two crimes he was convicted of were specific intent crimes, and because his trial counsel did not request intoxication instructions to negate the specific intent element of those crimes, his trial counsel was ineffective. *See* Appellant's Br. at 15. The People respond by arguing the trial counsel did not err, but "rather exercised his professional judgment based on the state of the evidence." Appellee's Br. at 17 (Mar. 3, 2017).

[26] Besides the two references during witness testimony of alcohol consumption and possible drunkenness, there is no other evidence in the record that refers to intoxication or that shows that Nathan, specifically, was intoxicated or drinking alcohol. Although Nathan's counsel referenced alcohol consumption and intoxication in his opening statement, Tr. at 16 (Jury Trial, July 14, 2015), opening statements by counsel are not evidence. *See, e.g.*, *People v. Blas*, 2015 Guam 30 ¶ 39 (approving of jury instructions that stated that "closing arguments . . . [are] not evidence" (alterations in original)); *People v. Quintanilla*, 2001 Guam 12 ¶ 21 (approving of jury instructions that stated that opening and closing arguments are not evidence). In his opening statement, Nathan's counsel also mentioned that Nathan would be testifying about his own consumption of alcohol during the day in question. *See generally* Tr. at 15-18 (Jury Trial, July 14, 2015). Ultimately, however, Nathan did not take the stand.

[27] The record is not sufficiently developed to determine the merits behind Nathan's counsel's decisions. For example, it is unclear why Nathan's counsel did not further develop evidence on Nathan's possible drunkenness, intoxication, or lack of mental capacity and why defense counsel did not request a jury instruction on intoxication. Because the record is not

sufficiently complete to make a proper finding, this claim is best brought in a habeas corpus proceeding.

V. CONCLUSION

[28] As charged, Nathan's aggravated assault conviction is a lesser-included offense of his attempted murder conviction. We therefore **AFFIRM** Nathan's attempted murder conviction, **VACATE** his aggravated assault conviction, and **REMAND** to the trial court for sentencing not inconsistent with this opinion. We also hold that the record is not sufficiently developed to determine Nathan's ineffective assistance of counsel claim.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice