

NOT FOR PUBLICATION

NO. 26187

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v  
EARLILY AGANON, Defendant-Appellant

EM RIMANDO  
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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(FC-CR NO. 99-0021)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Nakamura, JJ.)

This appeal raises only one issue: Was there sufficient evidence to prove the defendant was aware that it was practically certain that her conduct in inflicting injuries on a six-month-old baby would cause the baby's death?

On June 23, 1999, Defendant-Appellant Earlily Aganon (Aganon) was indicted and charged with Murder in the Second Degree. After a jury trial, Aganon was found guilty as charged. She was sentenced to life imprisonment, with the possibility of parole. Her sentence included a mandatory minimum term of fifteen years' imprisonment and restitution of \$3,621. The Hawai'i Supreme Court vacated Aganon's conviction and sentence and remanded for a new trial, concluding that the trial court committed plain error in instructing the jury and responding to a

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jury question. State v. Aganon, 97 Hawai'i 299, 36 P.3d 1269 (2001).

On remand, Aganon waived her right to a jury trial and proceeded to trial before the Honorable Karl K. Sakamoto, who had not presided over the prior trial. On July 10, 2003, Judge Sakamoto found Aganon guilty of Murder in the Second Degree and filed written "Findings of Fact, Conclusions of Law and Verdict." Judge Sakamoto imposed the same sentence on Aganon that had previously been imposed. Aganon appeals from the Judgment filed on September 30, 2003, in the Circuit Court of the First Circuit (circuit court).

**BACKGROUND**

Aganon was an experienced child care provider. After arriving in Hawaii from the Philippines in 1990, when she was 22 years old, Aganon took courses in early childhood education at Honolulu Community College. Her courses included an infant program where students took care of children in a classroom. As part of her education, Aganon worked with children in kindergarten through third grade and was certified as a substitute teacher. She was later employed by the Pearl Harbor A-Plus Program, Kama'aina Kids, and Sunrise School, where she was responsible for preschool and grade school children. At the Sunrise School, Aganon was the lead teacher in a class for two- and three-year-olds.

**NOT FOR PUBLICATION**

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In 1995, Aganon obtained a child care provider license, but did not take care of infants. Apparently in about May of 1997, Aganon began taking care of babies and infants out of her home. She reapplied for a child care provider license in September of 1997.

In 1997, Jocelyn Canencia (Jocelyn) and Randal Canencia (Randal) hired Aganon to care for their two youngest children, Karie and Anthony, during the weekdays. Jocelyn's co-worker had recommended Aganon as a babysitter and the Canencias lived only a block-and-a-half from Aganon. The Canencias began sending Karie and Anthony to Aganon on October 1, 1997.

On October 21, 1997, Randal dropped off Karie and Anthony at Aganon's house at about 5:30 a.m., which was Randal's normal routine. Karie was six months old and Anthony was twenty-two months old at the time. Karie had no history of health problems. Jocelyn did not notice anything wrong with Karie on the morning of October 21, 1997, or during the previous night or day. Randal also stated that Karie was "perfectly fine" when Randal dropped her off. Both Jocelyn and Randal testified that they never, at any time, did anything to hurt or injure Karie.

Aganon was caring for one other child besides Karie and Anthony on that day. Around noontime, Aganon called Jocelyn at work and indicated that Karie was having a hard time breathing. Jocelyn attempted to contact Randal, who had the day off, but

## NOT FOR PUBLICATION

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could not reach him. A short time later, Aganon again called Jocelyn and reported being "really concerned" about Karie's breathing. Jocelyn responded that she was leaving work and would come over to check on Karie. Because Randal had the car, Jocelyn caught the bus home. When Jocelyn arrived home, she saw Randal and their oldest daughter, Kristin, who both had also just arrived home. All three jumped into Randal's car, and he drove to Aganon's house.

Jocelyn went into the house and found Karie in a bedroom. Karie was lying on her back, unconscious, with her fists stiffly clenched at her sides. Karie's eyes were rolled up and all Jocelyn could see was "the white part of her eye and a little bit part of the black portion, bottom part, and it was kind of like shaking." Jocelyn screamed. She picked up Karie and found that Karie's body was "total lifeless, no strength, and her head was going one way or the other." Jocelyn yelled for Randal and told him, "[W]e got to go, we got to go." Randal ran into the house and saw Jocelyn carrying their baby who was "gasping for air and her eyes was just was all white." Randal angrily demanded of Aganon, "[W]hy you neva call 911?"

Randal and Jocelyn got into their car and raced to get Karie to Kapiolani Hospital, with Randal running red lights along the way. They arrived at the emergency room at about 2:15 p.m. The emergency room doctor described Karie as limp, experiencing

**NOT FOR PUBLICATION**

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seizures, and having a bulging fontanelle (the soft spot in her head). After Karie was admitted to the emergency room, Jocelyn and Randal on separate occasions asked Aganon why she had not called 911. Each time, Aganon responded that she had been trained by "licensing" not to call 911 unless the child turned "blue or purple."

At about 5:00 p.m. on October 21, 1997, Karie was transferred to the Pediatric Intensive Care Unit where she was treated by Dr. Cynthia Tinsley. Dr. Tinsley did not see any external signs of trauma or bruising. Dr. Tinsley was not sure what was wrong with Karie, but suspected that Karie had a brain infection, either meningitis or encephalitis, and treated her accordingly.

As the evening progressed, Karie's condition worsened and she was placed on life support. There was confusion in the reading of the CT scan taken when Karie was first admitted to the hospital. An emergency room doctor had read the CT scan as normal. Dr. Tinsley did not learn until hours later of a radiologist's conflicting view that the scan was not normal, but suggested damage caused by lack of oxygen to the brain.

Dr. Tinsley ordered a second CT scan which was done at about 2:00 a.m. on October 22, 1997. The second CT scan showed ominous signs of significant swelling of the baby's brain and bleeding in between the brain's hemispheres. This was consistent

with an injury induced by trauma. Dr. Tinsley explained that as the brain swells, it compresses against the skull, cutting off the blood supply to the brain and leaving the brain dead. Dr. Tinsley did not believe that the fatal injury could have been inflicted by a young child of two, three, or four years old. On October 24, 1997, Karie was declared brain dead, was taken off life support, and died. At the time of her death, Karie was 24 inches tall and weighed 18 pounds.

Dr. Kanthi Von Guenther, who later became Chief Medical Examiner for the City and County of Honolulu, performed an autopsy of Karie on October 27, 1997. Dr. Von Guenther testified that Karie "died as a result of head trauma, in other words, injuries to her head and brain sustained due to blunt force impact with or without shaking." Dr. Von Guenther shaved Karie's head and saw three contusions on her scalp. Dr. Von Guenther concluded that the contusions represented three distinct points of impact to Karie's head: one to the left side of the head toward the back, one on the top of the head, and one on the "middle top back" part of the head. In examining Karie's brain, Dr. Von Guenther found bleeding in both the subdural and subarachnoid spaces. This indicated that the brain had gone through "a rotational injury with some type of shearing force" that caused blood vessels in these areas to stretch and tear.

**NOT FOR PUBLICATION**

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The bleeding in these spaces was an indicator of "diffused injury to the substance of the brain matter."

Dr. Von Guenther explained that the shearing force applied to Karie's brain also stretched and tore axons and neurons deep in her brain. This was confirmed by microscopic examination. The disruption of axons and neurons to a severe degree would cause a baby to lose consciousness and have symptoms of irregular breathing and seizures. Dr. Von Guenther further discovered significant injury to Karie's liver, which was torn and resulted in blood seeping into her abdominal cavity. Dr. Von Guenther believed that the injuries to Karie's head and liver were inflicted by someone, were fresh injuries, and were consistent with having been inflicted during the same incident. Dr. Gregory Yim, a pediatric neurologist called by the defense, characterized the injury to Karie's brain as "nonaccidental trauma" and testified that it was an inflicted injury, in other words, child abuse.

Dr. Von Guenther opined that the fatal brain injury was caused by the baby's head being impacted on a firm surface. When asked about the force necessary to cause the fatal brain injury, Dr. Von Guenther testified as follows:

- Q. Doctor, what is -- in your expert opinion, what was the force necessary to cause this fatal brain injury?
- A. Rotational type of force with -- which means that you take the head and impact on a surface.

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Q. How much force are we talking about?

A. Well, considerable force. I -- I can't give you numbers.

Dr. Von Guenther stated on cross-examination by Aganon's counsel that the same injury inflicted on Karie could have killed a four- or five-year-old child.

Q. So -- and then we talked a little bit about the brain of a child this age, right?

A. Yes.

Q. And of course, if the same injury took place to a child that was 4 or 5, the result might not be the same, right?

A. That -- I cannot say it may not be the same, because it could be the same or it may not be.

Q. It may or may not, yes?

A. But -- well, can -- you said 4 or 5. Up until about 5 years, it could happen the same way.

Dr. Von Guenther elaborated on her opinion of how the fatal injury was inflicted:

Based upon my experience, expertise, and knowledge, this baby's head was struck on a flat surface, which caused the brain to go through this rotational type of injury with that diffused tearing of the axons and neurons of the brain with bleeding into the coverings of the brain.

In Dr. Von Guenther's opinion, after the infliction of the fatal injury, there was nothing the doctors could have done to prevent Karie's death. The force was "severe enough to have caused damage to the deeper axons and neurons," which set in motion the progression of events leading to the baby's death. Dr. Yim agreed that given the severity of the injury to Karie's brain, which he believed was more than likely caused by blunt trauma to



**NOT FOR PUBLICATION**

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the skull, the cascade of events leading to Karie's death was irreversible.

It was the general consensus of the doctors who testified at trial that Karie would have exhibited obvious symptoms a short time after sustaining the brain injury that caused her death. These symptoms included becoming limp and lethargic, losing consciousness, irregular breathing, gasping for air, and undergoing seizures. The doctors also agreed that a reasonable adult observing such symptoms would have realized something was clearly wrong with the baby.

Robert Asato (Asato), an investigative social worker with Child Protective Service, was assigned to investigate the circumstances surrounding Karie's injuries. On October 23, 1997, two days after Karie's admission to the hospital, Asato interviewed Aganon at her home. During this interview, Aganon appeared to make sexual advances toward Asato, placing her arm around his shoulder and kneeling in front of him and putting her hands on his knees, conduct which made Asato feel uncomfortable. The next day, Asato accompanied Robert Reed (Reed), who was Aganon's licensing child care social worker. Reed gave Aganon a letter stating that her license as a child care provider was being temporarily suspended until the investigation was completed. Aganon became extremely upset and angry, stating

three times that she would kill Asato if he did not complete his investigation quickly.

Aganon did not testify at the retrial. The prosecution admitted the transcript of Aganon's testimony from the first trial in evidence without objection. According to Aganon's testimony from the first trial, when Randal dropped off Karie on the morning of October 21, 1997, Karie was sleeping peacefully. Karie appeared fine and Aganon did not notice anything wrong with Karie. Karie was still sleeping when Aganon changed Karie's diaper at 10:00 a.m. Everything still seemed fine. But sometime between 10:00 a.m. and 12:30 p.m., Aganon noticed Karie was having difficulty breathing and twice called Jocelyn. Aganon did not notice that Karie's arms were stiff, her eyes had rolled back, and that she was having seizures until Jocelyn and Randal arrived.

During the prosecutor's cross-examination, Aganon agreed that taking care of children was her profession, that she had done so for a number of years, and that she had expertise in that area. Aganon had taken first aid class and been trained in recognizing signs of distress or illness in children, which were requirements for her child care provider license. Aganon also agreed that she had a keen eye for spotting trouble in children and was watchful and careful because that was part of her job.

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The prosecutor and Aganon engaged in the following colloquy:

- Q. Okay. Now, you know. You know just as a human being, but certainly as a caregiver, that the most sensitive part to injury or even to disease of a human body, much less of a child's body, is the head, right? You know that?
- A. Oh, yes.
- Q. You cannot injure or do anything to injure especially a baby or a young child in the head. You know that, right?
- A. That's correct.
- Q. That is not a secret to you?
- A. Oh, not at all. It's no secret to me at all.
- Q. Because when we're talking about a baby's head, we're talking about something that's potentially very, very serious?
- A. Yes.
- Q. And you know that?
- A. Yes.
- Q. You know, for example, that if you hit a baby on the head, or hit a baby's head on a hard surface even one time, that's potentially very, very serious. You know that, right?
- A. Oh, yes, attorney, yes.
- Q. And you know that if a baby's head is struck on a hard surface like a floor or wall multiple times, you know what is going to happen to that baby, right?
- A. That's correct.
- Q. That baby dies. That's not a surprise. You know that, right?
- A. That's correct.

(Emphasis added.) Aganon testified that she loved Karie and denied ever doing anything to physically harm Karie.

DISCUSSION

I.

Aganon was charged with Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §707-701.5 (1993), which provides that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person." HRS § 702-206(2) (1993), in turn, defines "knowingly" in relevant part as follows:

- (a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.  
.....
- (c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

In finding Aganon guilty of Murder in the Second Degree, the circuit court made the following Findings of Fact (FOF) and Conclusions of Law (COL) regarding whether Aganon knowingly caused Karie's death:

FINDINGS OF FACT

- .....
- 3. On October 1, 1997, Defendant was a licensed babysitter who, as a source of income, babysat at least three children in her home. Additionally, Defendant stated, in her prior trial testimony admitted into evidence in the instant trial, that she was not a novice babysitter, that she was experienced, that she had training in things such as first-aid, that she knew how to spot trouble in children, including babies, and that she was watchful and careful. She also agreed that she knew that if a baby's head is struck on a hard surface like a floor or a wall multiple times, the baby would die.  
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9. Nothing was wrong with Karie when Randal delivered her to Defendant at Defendant's home, at approximately 5:30 the morning of October 21, 1997.
10. Defendant herself stated repeatedly in her prior trial testimony that Karie was fine when dropped off by Randal, and that she noticed nothing wrong with Karie. Karie was placed in Defendant's custody without any physical problem or physical distress that required medical attention.
11. Defendant also agreed in her prior testimony that she did not notice anything wrong with Karie in the hours leading up to around 10:00 in the morning. At that time, she changed Karie's diaper and did not notice anything wrong with Karie. Defendant agreed that when she changed Karie's diaper, Karie still was "fine."
- . . . . .
25. On October 27, 1997, Dr. Kanthi Von Guenther, now Chief Medical Examiner for the City and County of Honolulu, a board-certified forensic pathologist, conducted an autopsy on Karie.
26. Upon autopsy, Karie's body weighed eighteen pounds.
27. The autopsy revealed that Karie had suffered both a severe injury to her brain, as well as a ruptured liver, both due to blunt trauma. The torn liver caused bleeding in the abdominal area and was confirmed microscopically. The liver injury was an inflicted, non-accidental injury caused by Defendant.
28. Defendant caused three separate and distinct bruises or contusions to Karie's head, which were clearly revealed when her head was shaved. There was also an area of subgaleal hemorrhage in the tissues directly under the skin associated with one of these external bruises located to the left rear of her head. Dr. Von Guenther opined, and the court finds, that the bruises were the result of blunt trauma to Karie's head. Dr. Von Guenther further opined, and the court finds, that because of the greater elasticity of a baby's skull, it would not be unusual if no external mark or subgaleal damage resulted from even a substantially forceful blow to the head.
29. Dr. Von Guenther opined, and the court finds, that the cause of Karie's death was blunt trauma, with or without shaking. The force of the blunt trauma to Karie's's [sic] head was severe and substantial enough to cause a rotational injury to her brain involving the shearing or tearing of the axon<sup>1</sup> and neuron relating to the control of the nervous system, and associated subdural and subarachnoid hemorrhage or bleeding. The injuries destroyed the auto regulation processes of Karie's brain leading to a diffuse and uncontrollable flow of blood to her brain. Cerebral edema, brain swelling, occurred, cutting off the oxygen to her

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- brain. The injuries indicated a massive and severe injury to the brain.
30. Karie's brain injuries lead [sic] to irreversible harm and death. No subsequent medical intervention or treatment would have prevented her death.
  31. Based on the persuasive and credible testimony of Dr. Von Guenther and Dr. Gregory Yim, a board-certified pediatric neurologist, the court finds that the fatal brain injury suffered by Karie was non-accidental and inflicted upon her. The injury to Karie's liver was also inflicted upon her in the same incident.
  32. The court finds persuasive and credible the testimonies of Dr. Von Guenther, Dr. Yim, and Dr. Tinsley, in finding that either immediately after suffering the fatal brain injury, or shortly thereafter, Karie would have been displaying clear and obvious symptoms of that severe brain injury, including unconsciousness, extreme lethargy, breathing difficulties, and seizure. It would be obvious to an adult observing Karie that something was wrong, and that Karie was in serious physical distress. Defendant observed the clear and obvious symptoms and knew something was wrong with Karie. Defendant made no calls for assistance of any kind until the telephone calls to Jocelyn at around noon the day of October 21, 1997.
  33. On October 21, 1997, after Karie was delivered to Defendant's sole care and custody, Defendant was the only adult present at the time of the offense. The substantial force which resulted in the blunt trauma that caused Karie's death could not have been committed by a child that was in Defendant's home at the time of the offense.
  34. Based on the foregoing findings, including the undisputed expert medical testimony, the court finds that when Karie was delivered to Defendant's sole care and custody at around 5:30 in the morning of October 21, 1997, there was nothing significantly or seriously wrong with Karie and she had not yet suffered the fatal injury to her brain.
  35. Based upon the totality of circumstances, the court finds that Defendant was the person that inflicted the fatal brain injury upon Karie. Significantly, Karie's injuries were of such severity that soon after its infliction, the obvious symptoms above-mentioned would have arisen. Defendant related her observations of Karie's symptoms at or around noon of that day. The court also notes several indicators of Defendant's consciousness of guilt. Defendant failed to call 911 even when presented with the obvious and severe symptoms of Karie's physical distress. Defendant also deceptively asserted to others that she was trained to call 911 only when a child turned purple. Defendant also engaged in deceptive behavior to avoid responsibility during an official investigation on October 23, 1997, which was conducted by Robert Asato ("Asato"), a Child Protective Services worker. During this investigation, Defendant moved

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closer and closer on a sofa to Asato, then placed her arm around his shoulders. She next knelt in front of Asato and placed her hands on his knees.

36. Based upon the totality of circumstances, the court finds that Defendant was aware that it was practically certain that her conduct would cause Karie Canencia's death. In reaching this finding the court took into account, inter alia, Karie's young age and size; the nature, extent, and severity of force used against Karie; the nature and severity of injuries Karie suffered; the multiple nature of injuries found, including the torn liver and three bruises to Karie's head; and Defendant's behavior and conduct following the infliction of injuries upon Karie.
37. The court finds that on or about October 21, 1997, to and including October 24, 1997, Defendant knew that Karie was a child less than eight years of age.

CONCLUSIONS OF LAW

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2. The State must prove beyond a reasonable doubt, each element of the offense of Murder in the Second Degree, and the state of mind required to establish each element of the offense, namely that on or about the 21st day of October, 1997, to and including the 24th day of October, 1997, Defendant EARLILY AGANON intentionally or knowingly caused the death of Karie Canencia. See Hawaii Revised Statutes § 707-701.5 (1993).
3. A person acts knowingly with respect to her conduct when she is aware that her conduct is of that nature. A person acts knowingly with respect to a result of her conduct when she is aware that it is practically certain that her conduct will cause such a result. Hawaii Revised Statutes § 702-206(2) (1993).
4. The State has proven beyond a reasonable doubt that Defendant was aware that her conduct was of that nature. The court reaches this conclusion based upon the totality of circumstances, including the nature and severity of Defendant's conduct which caused numerous and severe injuries to Karie.
5. The State has proven beyond a reasonable doubt that Defendant acted knowingly with respect to a result of her conduct (inflicting fatal injury to Karie) because she was aware that it was practically certain that her conduct would cause such a result (death).

6. The State has proven beyond a reasonable doubt that on or about the 21st day of October, 1997, to and including the 24th day of October, 1997, in the City and County of Honolulu, State of Hawaii, Defendant EARLILY AGANON, did knowingly cause the death of Karie Canencia, thereby committing the offense of Murder in the Second Degree.

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<sup>1</sup> Dr. Von Guenther definitively confirmed the diffuse and axonal injury to the brain with her observations of microscopic slides from Karie's brain.

II.

On appeal, Aganon claims that the circuit court's FOF numbers 35 and 36 and its COL numbers 4, 5, and 6 were erroneous. In particular, Aganon argues that "[t]he evidence presented was insufficient to support a finding that Defendant Aganon was practically certain her actions were of the nature and were practically certain to result in the death of Karie Canencia." In her brief, Aganon does not dispute the circuit court's findings that the injuries to Karie, including the fatal injury, were non-accidental and that Aganon was the person who inflicted the injuries.<sup>1</sup> Aganon's appeal therefore boils down to whether the circuit court correctly found that Aganon was aware it was practically certain that her conduct in inflicting injuries on Karie Canencia would cause Karie's death.

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<sup>1</sup> Aganon does not challenge the trial court's Findings of Fact (FOF) numbers 27 and 31, which found that Karie's fatal brain injury and her liver injury were non-accidental and inflicted injuries. In her points of error on appeal, Aganon listed FOF number 35, which found that Aganon was the person who inflicted the fatal brain injury on Karie, as one of the FOF she claimed was erroneous. Aganon, however, did not support her challenge to FOF number 35 with any argument and thus abandoned it. Hawai'i Rules of Appellate Procedure Rule 28(b)(5) ("Points not argued may be deemed waived.")



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In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997)). Even if it could be said that the conviction is against the weight of the evidence, the conviction will nevertheless be affirmed as long as there is substantial evidence to support it. Tamura, 63 Haw. at 637, 633 P.2d at 1117.

We review a trial court's findings of fact, both explicit and implicit, under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (internal quotation marks and citation omitted). Substantial evidence "is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion."

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992).

When applying the "clearly erroneous" test,

[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge.

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996)

(citations omitted).

We conclude there was sufficient evidence to prove that Aganon was practically certain that her conduct in inflicting injuries on Karie would cause Karie's death. Aganon first argues that the absence of clear signs of external trauma and the doctors' initial misdiagnosis of Karie's condition as a brain infection demonstrates that Aganon could not have known the severity of the injuries she inflicted on Karie. This argument is not persuasive. The evidence showed that Aganon was the person who inflicted the injuries. The difficulty experienced by the treating doctors in determining the true cause of Karie's condition does not mean that Aganon, the perpetrator, would not be aware of the severity of the injuries she caused.<sup>2</sup>

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<sup>2</sup> The doctors who treated Karie did not see the contusions to her head that were revealed during the autopsy when Karie's head was shaved. As explained by Dr. Kanthi Von Guenther, a forensic pathologist, because a baby's scalp is highly elastic, the force of blows to a baby's head are dissipated and absorbed, lessening the chance that visible bruises would be left. Dr. Von Guenther testified that most of the time when babies die from

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Aganon also argues that the evidence was insufficient to show that she was practically certain the injuries she inflicted would result in Karie's death because the doctors who testified could not specifically quantify the amount of force used. We disagree.

The evidence showed that Aganon was a licensed child care provider who had experience and training in child care, including first aid. Karie had no prior history of medical problems and there was no evidence that she was abnormally susceptible to head trauma.

On cross-examination, Aganon admitted she knew that if a baby's head was struck on a hard surface multiple times, the baby would die. The prosecution produced substantial evidence that the scenario of multiple, hard-surface impacts to a baby's head, which Aganon admitted knowing would result in a baby's death, is what happened to Karie in this case. Dr. Von Guenther testified that there were three distinct points of impact on Karie's head and opined that Karie died as the result of her head being struck against a hard, flat surface. Based on the evidence, the circuit court could reasonably infer that Aganon deliberately struck the head of Karie, a six-month-old baby weighing eighteen pounds, against a hard surface at least three

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inflicted head trauma, there are no visible bruises. With respect to the damage to Karie's liver, Dr. Von Guenther testified that it was not unusual to have massive internal injuries without evidence of external bruising.

times. The force of the blows was substantial enough to tear axons and neurons deep in Karie's brain, to shear blood vessels in the subdural and subarachnoid spaces, and to rupture her liver. The blunt trauma inflicted on Karie caused massive, irreversible injury to her brain and caused her death. While Dr. Von Guenther declined to assign a numerical value to the force used to inflict the fatal injury, she described it as "considerable."

In addition, Aganon's awareness of the true seriousness of the injuries she inflicted on Karie can be inferred from the evidence of her consciousness of guilt. As the circuit court found, Aganon failed to call 911 despite the obvious and severe symptoms of Karie's physical distress. She also deceptively claimed she was trained to call 911 only when a child turned blue or purple, and she made sexual advances toward the person assigned to investigate Karie's injuries.

We conclude that the circuit court did not clearly err in finding that Aganon was aware that it was practically certain that her conduct would cause Karie's death. When viewed in the light most favorable to the prosecution, there was sufficient evidence to prove Aganon's guilt of Murder in the Second Degree beyond a reasonable doubt.

CONCLUSION

We affirm the September 30, 2003, Judgment filed by the  
the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, October 14, 2005.

On the briefs:

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*James A. Burns*  
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