IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,	)	Supreme Court Case No. **CRA97-019**
	)	Superior Court Case No. **CF0465-96**
Plaintiff-Appellee,	)	
	)	
vs.	)	**OPINION**
	)	
EDWARD B. PEREZ,	)	
	)	
Defendant-Appellant.	)	
	)	

Filed: February 12, 1999

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Appeal from the Superior Court of Guam

Argued and Submitted on 07 October, 1998

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS and JOSE I. LEON GUERRERO, Associate Justices.

SIGUENZA, C.J.:

INTRODUCTION

[1] Edward B. Perez appeals his conviction after a jury trial. He challenges the constitutionality of the Family Violence Act, embodied in Title 9 of the Guam Code Annotated, Sections 30.10 *et seq*., as being both void for vagueness and in violation of the Separation of Powers Doctrine. He also assigns as error the trial court's failure to charge the jury with the statutory definition of "deadly weapon" and with an instruction on a lesser included offense of Family Violence.

FACTS

[2] Appellant was charged by the Superior Court Territorial Grand Jury, by superseding indictment, with Possession of a Controlled Substance (As a Third Degree Felony), Attempted Criminal Mischief (As a Third Degree Felony), Possession of a Firearm Without an Identification Card (As a Felony), Family Violence (As a Third Degree Felony) and Assault (As a Misdemeanor). In addition, Appellant was charged with the Special Allegation of Possession and Use of a Deadly Weapon in the Commission of Attempted Criminal Mischief (As a Third Felony) and of Family Violence (As a Third Degree Felony).

[3] Jury selection and trial on the matter commenced on July 14, 1997, and at the close of evidence[1], the parties and the court discussed the instructions to be read to the jury. During that discussion, the court noted that the defendant did not file a written motion to reduce the Family

[1] The defendant did not call any witnesses on his own behalf.

Violence felony charge to a misdemeanor, as allowed by statute.[2] Neither party requested an instruction for the misdemeanor crime of Family Violence as a lesser included offense of the felony; however, the parties, did agree to instruct the jury on the lesser included offense of Attempted Criminal Mischief (As a Misdemeanor). The jury was also instructed on the essential elements of each of the Special Allegations of the Possession and Use of a Deadly Weapon during the commission of the felonies of Family Violence and Attempted Criminal Mischief; however, the statutory definition of "deadly weapon" was not given.

[4] Appellant was acquitted of Attempted Criminal Mischief (As a Third Degree Felony) and Assault (As a Misdemeanor). He was convicted of the remaining charges including the Special Allegations of Possession and Use of a Deadly Weapon during the commission of a Felony and the lesser included offense of Attempted Criminal Mischief (As a Misdemeanor).[3]

A. CONSTITUTIONALITY OF THE FAMILY VIOLENCE ACT

[5] This court has jurisdiction pursuant to 7 GCA § 3107 (1994) and 8 GCA §§ 130.15 and 130.60 (1993). The first question we address is whether the Family Violence Act, as contained in Title 9 of the Guam Code Annotated §§ 30.10 *et seq*., is constitutional.

[6] The constitutionality of a statute is a question of law reviewed *de novo*. *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1996); *United States v. Sahhar*, 56 F.3d 1026, 1028 (9th Cir. 1995);

[2] "Upon a written, noticed motion prior to the commencement of trial, the defendant may move that a felony charge filed pursuant to this § 30.20 be reduced to a misdemeanor. Whether any charge shall proceed as a misdemeanor or a felony rests within the discretion of the court." 9 GCA § 30.20(b)(1994)

[3] The parties and the court below recognized a problem with the conviction for the Special Allegation of the Possession and Use of a Deadly Weapon in the Commission of Attempted Criminal Mischief (As a Third Degree Felony) because the jury had acquitted Appellant of the underlying felony. Neither side has assigned this error on appeal.

United States v. Alexander, 48 F.3d 1477, 1491 (9th Cir.1995).

1. Void for Vagueness

[7] Whether a statute is void for vagueness is a question of law reviewed *de novo*. *United States v. Woodley*, 9 F.3d 774, 778 (9th Cir. 1993). It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972). "Generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983)(citations omitted). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, it has been recognized that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id*. at 358, 103 S.Ct. at 1858. (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1248 (1974)).

[8] In *Kolender*, the United States Supreme Court reviewed the constitutionality of a California penal statute challenged as vague. "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Id*. at 355, 103 S.Ct. at 1857 (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 S.Ct. 1186, 1191 (1982)). The Court looked at the construction of the statute by the lower California courts which had determined that, under the challenged terms of the statute, failure of an individual to provide "credible and reliable" identification permitted his arrest. *Id*. at 355-56, 103

S.Ct. at 1857-58. In striking down the challenged statute, the Supreme Court reasoned that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat", and that it "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 360-61, 103 S.Ct. at 1859-60.

[9] The crime of Family Violence, found in 9 GCA § 30.20(a) (1994), provides: that "[a]ny person who intentionally, knowingly, or recklessly commits an act of family violence, as defined in § 30.10 of the Chapter, is guilty of a misdemeanor, or of a third degree felony." Further, section 30.10 states:

> (a) Family violence means the occurrence of one (1) or more of the following acts by a family or household member, but does not include acts of self-defense or defense of others:
>
> > 1. Attempting to cause or causing bodily injury to another family or household member;
> >
> > 2. Placing a family or household member in fear of bodily injury.
>
> 9 GCA § 30.10(a) (1994).

[10] The statute informs an individual that if he or she engages in the proscribed conduct then he or she can be prosecuted for the crime of Family Violence, as either a misdemeanor or a third degree felony. The statute further informs an individual of the following: that prosecution as a misdemeanor or a third degree felony, upon conviction, involves the possibility of incarceration and/or a fine[4]; that

[4] *See* 9 GCA §§ 80.30, 80.31, 80.34, and 80.50 (1993)

he or she will be subject to mandatory incarceration for prior convictions[5]; or that he or she can be prosecuted for other violations of law.[6]

[11] The question for this court to decide is whether 9 GCA §§ 30.10 and 30.20 provide minimal guidelines for the exercise of prosecutorial discretion or do the statutes permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *See Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858. (citation omitted). We find that the Act provides sufficient guidelines for the exercise of prosecutorial discretion even though, on its face, it does not specifically address the prosecuting attorney.

[12] The Family Violence Act is a comprehensive statutory scheme that, when viewed as a whole, demands that the prosecuting attorney take into account a defendant's ability to move for a reduction of a felony charge. In the exercise of its discretion[7], the court is permitted to entertain such a motion and is statutorily required to consider the list of seven factors in its determination of the appropriateness of a felony charge of Family Violence.[8] While not all of the factors will be

[5] 9 GCA §§ 30.20(g) and (h) (1994)

[6] 9 GCA § 30.20(e) (1994) and 9 GCA § 1.22 (1993).

[7] *See* discussion *infra* on Separation of Powers.

[8]
That provision in the statute that discusses the appropriateness of a felony charge of Family Violence states:

> (b) Upon a written, noticed motion prior to commencement of trial, the defendant may move that a felony charge filed pursuant to this § 30.20 be reduced to a misdemeanor. Whether any charge shall proceed as a misdemeanor or a felony rests within the discretion of the court.
> (c) In determining whether any felony charge filed pursuant to this § 30.20 should be reduced to a misdemeanor, the court shall consider the following factors, among others:
>
> 1. The extent or seriousness of the victim's injuries;
> 2. The defendant's history of violence against the same victim whether charged or uncharged;
> 3. The use of a gun or other weapon by the defendant;
> 4. The defendant's prior criminal history;
> 5. The victim's attitude and conduct regarding the incident;

applicable to every case, those that are should be carefully evaluated. Because of the court's duty to consider those factors, a defendant's motion is necessarily predicated upon the same factors. Likewise, the prosecuting attorney must take into consideration those factors that guide a court's discretion because failure to do so would clearly make a felony charge of Family Violence vulnerable to a successful motion to reduce.

[13] Thus, we disagree with Appellant's conclusion that the Family Violence Act is unconstitutionally vague. We hold that the statute adequately informs an individual of the proscribed activity; and more importantly, that it provides specific guidelines that discourage the arbitrary enforcement of the statute by the prosecuting attorney. This is accomplished by delineating factors, relative to the determination of whether a felony or misdemeanor charge of Family Violence proceeds through the court system, that the prosecutor must take into account when making the charging decision.

2. Separation of Powers Doctrine

[14] The next question is whether a violation of the Doctrine of the Separation of Powers occurs by allowing the court to determine whether a Family Violence charge shall proceed as a misdemeanor or felony.

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6. The involvement of alcohol or other substance, and the defendant's history of substance abuse as reflected in the defendant's criminal history and other sources; and
7. The defendant's history of and amenability to counselling.

(d) If the court, after hearing, finds substantial evidence that a victim suffered serious bodily injury as defined in subsection (c) of § 16.10 of this title, no felony charged filed under this § 30.20 shall be reduced to a misdemeanor unless the court finds that due to unusual circumstances a reduction of the charge is manifestly in the interest of justice.

9 GCA § 30.20(b), (c) and (d) (1994).

[15] Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution. *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980). "The Organic Act specifically provides that "[t]he government of Guam shall consist of three branches, Executive, Legislative, and Judicial. . ." 48 U.S.C. § 1421(a) (1992). By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions." *Taisipic v. Marion*, 1996 Guam 9, ¶ 26 (citation omitted). Through strict adherence to the doctrine of separation of powers, courts throughout the United States have sought to protect the legislative and executive branches of government from judicial interference. *Id.* at ¶ 27.

[16] In *Taisipic*, the lower court had ordered the Appellee into a program that was available only to offenders who had been granted parole. The Territorial Parole Board had not yet granted parole to Appellee and it appealed the court's order on the grounds that it violated the separation of powers doctrine and that the relief ordered was erroneous. This court reversed the lower court's order. We found that the lower court's order impermissibly encroached upon the Territorial Parole Board's power to grant or deny parole and that it had usurped the power of the Guam Legislature, which vested authority over parole determinations in the Parole Board and not in the courts. *Id*. at ¶ 33.

[17] The United States Supreme Court set forth a framework for evaluating separation of powers challenges:

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790 (1977)(citation omitted). Thus, two separate elements must be evaluated: (1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need.

[18] Examination of the instant statute does not lead to the conclusion that a usurpation of the constitutional function of the executive, that is the authority to charge or not charge a person with a criminal offense, occurs. Indeed, the decision to allow a case to proceed upon the felony or misdemeanor charge is a judicial function. "When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature, or, to state it in

another way, when the jurisdiction of the court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." *State v. Jones*, 689 P. 2d 561, 564 (Ariz. 1984)(citing *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 113 Cal. Rptr. 21, 520 P. 2d 405 (1974)).

[19] Therefore, because we find no disruption of the charging function of the executive, the second prong of the inquiry need not be addressed and we hold that the instant statute does not violate the Separation of Powers Doctrine.

B. JURY INSTRUCTIONS

[20] Appellant assigns as error the trial court's failure to instruct the jury, *sua sponte*, on the lesser included offense of Family Violence (as a Misdemeanor) and to provide the jury with the statutory definition of "deadly weapon".

[21] When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. *United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995); *United States v. Ponce*, 51 F.3d 820,830 (9th Cir. 1995). Plain error is a highly prejudicial error affecting substantial rights. *United States v. Payne*, 944 F.2d 1458, 1463 (9th Cir. 1991); *See also* 8 GCA §§ 90.19(c) and 130.50 (1993). Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Ponce*, 51 F.3d at 830.

1. Lesser Included Offense

[22] We begin the analysis by determining whether the misdemeanor crime of Family Violence is a lesser included offense of the felony charge and then whether the court below should have given

the instruction. A lesser included offense is defined in 8 GCA § 105.58 which provides:

> **Guilt of Included Offense Permitted: Defined.** (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;
> >
> > (2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; 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 (1993).

[23] The misdemeanor crime of Family Violence can be established by proof of the same or less than all the facts required to establish the felony charge and it also differs from the felony in the respect that a less serious injury or risk of injury suffices to establish its commission. As such, Family Violence (As a Misdemeanor) is a lesser included offense of Family Violence (As a Third Degree Felony).

[24] Guam law requires the instruction on a lesser included offense when there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. *See* 8 GCA § 90.27 (1993). Due process does not automatically require the giving of lesser included offense instructions. *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389 (1980). Due process requires the giving of a lesser included instruction only when the evidence warrants it. *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2053 (1982). There must be evidence which

would permit the jury rationally to find a defendant guilty of the lesser included offense and to acquit on the greater offense before he or she is entitled to a lesser-included offense instruction. *Sansone v. United States*, 380 U.S. 343, 349-350, 85 S.Ct. 1004, 1009 (1965). Thus, to be entitled to an instruction on a lesser-included offense, the defendant must demonstrate that (1) the lesser offense is within the offense charged, and (2) based on the evidence presented at trial, a rational jury could find the defendant guilty of the lesser offense but not the greater. *United States v. Wagner*, 834 F.2d 1474, 1487 (9th Cir. 1987)(citations omitted). "The trial court is in a better position to determine whether there is sufficient evidence to give a lesser included offense instruction," and its determination "will not be disturbed on appeal without an abuse of discretion." *Id*. (citations omitted)

[25] In the instant case, we do not see how a rational jury could have acquitted the Appellant of the more serious crime and convict him of the lesser included offense when, other than the degree of offense, there is no distinguishing fact that would have justified a choice between the two. *See Sansome*, 380 U.S. at 349-50, 85 S.Ct. at 1009 (a lesser offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses). The gravamen of the charge against Appellant was that he had recklessly placed a family member in fear of bodily injury. There is no issue as to whether a more serious or less serious type of injury was sustained by the victim. The evidence adduced at trial indicated that there was a confrontation between the victim and Appellant; and that during the course of the confrontation Appellant pointed a handgun at the victim and fired it at him. The victim testified that, at the time when the Appellant fired the weapon at him, he thought he was a "goner".[9] A witness to the incident testified that he had witnessed the confrontation between the victim and Appellant,

[9]Tr., Vol. II at 104.

that the Appellant said he was going to kill the victim, and that the Appellant had discharged a firearm.[10]

[26] As the court below noted, the Appellant did not file a written motion for reduction of the felony charge pursuant to statute.[11] *See* 9 GCA § 30.20(b) (1994). Because Appellant did not avail himself of the opportunity to have the case proceed as a misdemeanor, rather than as a felony, there must not have been some distinguishing fact in the circumstances of the incident that would have justified proceeding on the lower charge. Moreover, if the fact that the possession and use of a firearm in the incident would have justified the court's refusal to reduce this felony to a misdemeanor then it can not be said that the judge would have committed error by refusing to put a charge of the lesser degree of the charged offense before this jury.

[27] Therefore, we hold that the court below did not have to instruct the jury, *sua sponte* on the lesser included offense of misdemeanor Family Violence.

2. Definition of Deadly Weapon

[28] Appellant next charges as error the trial court's omission of the definition of "deadly weapon" in its instruction to the jury. Neither the prosecution nor defense offered an instruction. The court properly instructed the jury with the essential elements of the Special Allegation, but it did not provide the statutory definition of "deadly weapon".

[29] The general rule is that when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning

[10]Tr., Vol. III at 3-10.

[11]Tr., Vol. III at 60.

are not required. *People v. Anderson*, 51 Cal. Rptr. 238, 242, 64 Cal. 3d 633, 414 P. 2d 366 (1966).

[30] Under Guam law, a deadly weapon is defined as "[a]ny *firearm, or* other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the defendant to be capable of producing death or serious bodily injury." 9 GCA § 16.10(d) (1993) (emphasis added).

[31] The court instructed the jury on the definition of firearm and the evidence adduced at trial was sufficient for the jury to find that a deadly weapon, a firearm, was used in the commission of the felony of Family Violence. No evidence of the use of something other than a firearm was before the jury that would have necessitated further clarification of the term "deadly weapon". Accordingly, we find no error in omitting the statutory definition to the jury.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

[32] Finally, Appellant argues that defense counsel's failure to request certain jury instructions rendered his assistance ineffective.

[33] Whether a defendant has received ineffective assistance of counsel is a question of law reviewed *de novo*. *People v. Quintanilla,* 1998 Guam 17, ¶ 9; *United States v. Span,* 75 F.3d 1383, 1387 (9th Cir. 1996). Generally, it is more appropriate that such claims are raised in a habeas proceedings. This permits the trial judge first to decide whether the claim has merit, and second, if it does, to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted. *See United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991). A reviewing court may address the merits of an ineffective assistance claim on direct appeal if the record is sufficiently complete to allow a decision of the issue. *Id*. (citations omitted). In *People v. Quintanilla*, 1998

Guam 17, this court first addressed the issue of ineffective assistance of counsel and adopted the bifurcated test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *Id.* at ¶ 8. First, it must be demonstrated that (1) trial counsel's performance was deficient, and (2) that this deficient performance prejudiced his defense. *Id.* In establishing whether the first prong is satisfied, the appellant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id*. at ¶ 9.

> The court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. (citation omitted).

[34] The only instance of alleged deficiency with counsel in this appeal concerns his failure to request certain jury instructions. With respect to the failure to instruct on the lesser included offense of Family Violence our review of the record leads us to believe that it was counsel's strategic choice to forego the instruction. During the discussion about the felony charge of Family Violence, counsel had moved for acquittal on the basis that the prosecution failed to put forth evidence that justified the felony[12], and counsel had even made an offer, which was rebuffed by the prosecutor, to discuss the reduction of the charge to a misdemeanor[13]. It is quite plausible that it was counsel's strategy to demonstrate to the jury that the felony charge of Family Violence was extreme and unreasonable and that the misdemeanor assault charge was perhaps all that could have been proven by the evidence.

[12]Tr., Vol. III at 58-60.

[13]Tr., Vol. II at 92.

Thus, his decision not to request for the lesser included offense of Family Violence may have been tactically designed to offer the jury a choice between a more reasonable, less onerous misdemeanor assault versus an extreme and unreasonable Family Violence felony. Likewise, we find no error in his failure to request for the statutory definition of deadly weapon.

[35] Thus, because we do not find deficient performance by counsel there is no need to address the second prong of the *Strickland* test which requires a showing that the deficient performance by counsel had a prejudicial effect on the outcome of the case.

CONCLUSION

[36] We therefore **AFFIRM** Appellant's conviction.

Nunc pro tunc to 07 October, 1998.

JANET HEALY WEEKS
Associate Justice

JOSE I. LEON GUERRERO
Associate Justice

PETER C. SIGUENZA
Chief Justice