

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**

Plaintiff-Appellee,

**vs.**

**THOMAS SABLAN DEMAPAN,**

Defendant-Appellant.

Supreme Court Case No. CRA03-001

Superior Court Case No. CF0180-02

**OPINION**

**Filed: December 22, 2004**

**Cite as: 2004 Guam 24**

Appeal from the Superior Court of Guam  
Argued and submitted on February 17, 2004  
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

**TYDINGCO-GATEWOOD, J.:**

[1] Defendant-Appellant Thomas Sablan Demapan appeals from his conviction for burglary. Demapan argues that the trial court erred in failing to *sua sponte* issue jury instructions on the lesser included offense of criminal trespass, the elements of theft and the specific intent to commit theft. We find that criminal trespass is not a lesser included offense of burglary and that the trial court's failure to issue instructions regarding theft and intent to commit theft was not plain error. We affirm Demapan's conviction for burglary.

**I.**

[2] On April 20, 2002, Yugi Yamashita and his wife were guests at the Guam Plaza Hotel in Tumon, Guam. That evening they left their hotel room to visit relatives who were staying in another room on the same floor of that hotel. Yamashita's wife left the door to their room unsecured. When Yamashita returned to his room, he discovered Demapan exiting the room. Yamashita stopped Demapan and the police were summoned. Yamashita later found his wallet on a fire extinguisher in the hallway leading to his hotel room. Demapan was found to be in possession of a hotel room key, a digital camera and other items, which had earlier that day been reported stolen by another tourist. A glass pipe used for smoking crystal methamphetamine was found nearby and possession was attributed to Demapan.

[3] On May 1, 2002, Demapan was indicted for burglary, theft of the digital camera and other items, and possession of a controlled substance. A jury trial commenced on July 26, 2002. On August 1, 2002 at the close of the evidence, Demapan moved for judgment of acquittal. The trial court granted acquittal on the theft charge, but sent the other two charges to the jury. On August 5, 2002, the jury found Demapan guilty on the burglary charge and not guilty on the possession charge. On November 7, 2002, Demapan was sentenced to ten years imprisonment for burglary. On January 27, 2003, the trial court entered judgment. Demapan appealed.

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## II.

[4] This court has jurisdiction over this appeal from a final judgment of the Superior Court. Title 7 GCA § 3107(b) (2004).

[5] On appeal, Demapan argues that the trial court erred in failing to issue certain jury instructions. The record shows that Demapan's trial counsel failed to object to the jury instructions issued by the trial court.<sup>1</sup> Generally, "[w]hen there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error." *People v. Perez*, 1999 Guam 2, ¶ 21. Plain error is highly prejudicial error affecting a substantial right and "will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.*

## III.

[6] The issues on appeal center on Demapan's conviction for burglary and whether the trial court erred in not issuing certain instructions to the jury. Specifically, Demapan argues that the trial court erred in not instructing the jury: (1) on the lesser included offense of criminal trespass; (2) on the elements of theft; (3) that there must be a concurrence of entry into the premises with the intent to commit theft; and (4) on specific intent, as burglary is a specific intent offense.

### A. Criminal Trespass

[7] Citing this court's opinion in *Angoco v. Bitanga*, 2001 Guam 17, Demapan argues that criminal trespass is a lesser included offense of burglary and that the failure of the trial court to instruct the jury on the lesser included offense requires automatic reversal. Our decision in *Angoco* does not, however, require automatic reversal when the trial court fails to instruct the jury on a lesser included offense. Rather, *Angoco* first requires a determination of whether the "lesser offense is within the offense charged," and if so, whether "based on the evidence presented at trial, a rational jury could find the defendant guilty of the lesser offense but not the greater." *Id.* at ¶ 12 (quoting *Perez*, 1999 Guam at ¶ 24).

[8] To support his argument that criminal trespass is a lesser included offense of burglary, Demapan

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<sup>1</sup> Demapan's trial counsel was excused and new counsel was appointed for this appeal.

cites to a Comment of the Compiler of Laws for Chapter 37 of Title 9 of the Guam Code Annotated, which states:

The crime of ‘burglary’ has been continued by this Code. . . .

A second offense, ‘criminal trespass,’ has been created as a lesser [sic] included offense that [sic] burglary. The main difference is that no intent to commit a crime is required for conviction of ‘criminal trespass.’

Title 9 GCA Chapter 37 introductory cmt. (1996). However, within the Guam code, “[a]nnotations and comments are not part of the law.” Title 1 GCA § 101(a) (2000). As always, we first must resort to the law in this jurisdiction.<sup>2</sup>

[9] Relevant to the instant appeal, a lesser included offense is defined by law as follows:

**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;

. . . .

(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.

Title 8 GCA § 105.58 (1996). If criminal trespass is established by the same or less than all the facts required to establish burglary, or if criminal trespass differs from burglary only to the extent that it results in a less serious injury or risk of injury or to the extent that a lesser kind of culpability suffices to establish its commission, then criminal trespass is a lesser included offense of burglary.

[10] Beginning with the “same or less facts” test, Guam law defines burglary as follows:

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<sup>2</sup> We acknowledge a District Court of Guam Appellate Division case cited by Demapan, *People v. Hilton*, D.C. Crim. Appeal No. 8200055A, 1984 WL 55539, at \*6 (D. Guam App. Div. Apr. 18, 1984), which shows that at least on one occasion a judge in the Superior Court of Guam considered criminal trespass to be a lesser included offense of burglary and issued a jury instruction to that effect. However, in *Hilton*, whether criminal trespass is a lesser included offense of burglary was not at issue in that appeal. Moreover, decisions of the Appellate Division are merely persuasive and do not control this court’s interpretation of law. *People v. Quenga*, 1997 Guam 6, ¶ 13 n.4. Thus, the issue of whether criminal trespass is a lesser included offense of burglary is one of first impression in this jurisdiction.

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A person is guilty of burglary if he enters or surreptitiously remains in any habitable property or a separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the defendant is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the property was abandoned.

Title 9 GCA § 37.20(a) (1996). Relevant to this case, criminal trespass is defined as follows: “A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any habitable property or any building.” Title 9 GCA § 37.30(a) (1996).

[11] From the statutes, it is clear that the scienter element of criminal trespass, knowledge that one is not licensed or privileged to enter, is different from the scienter element of burglary, entry with the intent to commit a crime therein. Thus, for the burglary charge it must be proven beyond a reasonable doubt that Demapan entered the hotel room with the intent to commit theft. If criminal trespass had been charged, the People would have to prove beyond a reasonable doubt that Demapan entered the hotel room knowing that he was not licensed or privileged to do so. Because criminal trespass contains a scienter element not included in the greater offense of burglary, it does not have the same or less facts required to prove burglary. Thus, criminal trespass is not a lesser included offense of burglary. *See Commonwealth v. Carter*, 393 A.2d 660, 661 (Pa. 1978) (adopting a dissenting opinion stating that “the crime of criminal trespass has a scienter requirement not necessary to prove the crime of burglary, and thus cannot be categorized as a lesser included offense.”) (quoting *Commonwealth v. Carter*, 344 A.2d 899, 903 (Pa. Super. Ct. 1975)); *see also State v. Ocheltree*, 289 S.E.2d 742, 745 (W.Va. 1982) (“In this jurisdiction, as in Pennsylvania, ‘the crime of criminal trespass has a scienter requirement not necessary to prove the crime of burglary, and thus cannot be categorized as a lesser included offense.’”) (quoting *Carter*, 393 A.2d at 661)).

[12] From the foregoing, it is clear that criminal trespass differs from burglary in two respects. First, criminal trespass requires proof that the defendant knew he had no authority to enter when he entered. Second, criminal trespass does not require proof that the defendant intended to commit a crime when he entered. These different proof requirements dictate against a finding that criminal trespass differs from burglary “only in the respect that a less serious injury or risk of injury to the same person, property or public

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interest or a lesser kind of culpability suffices to establish its commission.” 8 GCA § 105.58(b)(3) (emphasis added). Accordingly, we determine that criminal trespass is not a lesser included offense of burglary and that the trial court was not required to instruct the jury on it. Demapan’s substantial rights were not therefore prejudiced and we hold that the trial court did not commit plain error in this regard. *See Perez*, 1999 Guam 2 at ¶ 21.

### **B. Theft**

[13] Demapan argues that because theft is an element of the charge of burglary against him, the trial court’s failure to instruct the jury on the elements of theft was reversible error. In a criminal action, the People must prove all the essential elements of the charged offense beyond a reasonable doubt. Title 8 GCA § 90.21 (1996). Thus, our analysis begins with a determination of whether theft is an essential element of burglary.

[14] Under Title 7 Guam Code Annotated § 37.20, *supra*, the element relating to the underlying crime is “with intent to commit a crime therein.” 7 GCA § 37.20. The burglary charge against Demapan stated specifically, that he “enter[ed] . . . with the intent to commit the crime of theft.” Record on Appeal, tab 6 (Indictment). Theft, in and of itself, was not an element of the charge of burglary in Demapan’s indictment. The prosecution was not required to prove theft; it was required to prove that Demapan had the intent to commit theft. *See Commonwealth v. Lease*, 703 A.2d 506, 509 (Pa. Super. Ct. 1997) (“[I]t is clear that the Commonwealth need not prove the underlying crime to sustain a burglary conviction.”). Contrary to Demapan’s argument, theft is not a statutory element of burglary, and the trial court was not required to instruct the jury on the elements of theft.

[15] Moreover, the People’s case was premised on Demapan’s entry into Yamashita’s hotel room and the discovery immediately thereafter that Yamashita’s wallet was missing. “[T]he word theft is not . . . a technical word of art with narrowly defined meaning, but a word of general and broad connotation covering any criminal appropriation of another’s property to the taker’s use.” *Sharp v. State*, 385 S.E.2d 23, 25 (Ga. Ct. App. 1989). The common meaning of theft is “the act or an instance of stealing.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994). The Criminal Code of Guam expands

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somewhat on the common meaning of theft: “A person is guilty of theft if he unlawfully takes or obtains or exercises unlawful control over, movable property of another with intent to deprive him thereof.” Title 9 GCA 43.30(a) (1996). The statutory definition of theft is not a hypertechnical abridgement of the common meaning of theft.

[16] The jury was specifically instructed that the intent element of the charge against Demapan was the “intent to commit the crime of THEFT therein.” Record on Appeal (“RA”), tab 36, p. 45 (Jury Instructions). With this instruction and the common meaning of theft, it is reasonable to assume that the jury understood the charge and could decide whether Demapan had the intent to commit theft when he entered Yamashita’s hotel room. Accordingly, we conclude that Demapan was not entitled to an instruction on theft and that the trial court did not commit plain error in not so instructing the jury.<sup>3</sup> See *People v. Major*, 499 P.2d 1200, 1201 (Colo. 1972) (holding that the trial court’s failure to instruct the jury on the definition of theft was not plain error where the defendant failed to request an instruction on the definition of theft and “[t]he jury was instructed that the defendant was charged with unlawfully and feloniously breaking and entering a motor vehicle ‘with intent then and there to commit the crime of theft therein.’”).<sup>4</sup>

### C. Concurrent Intent

[17] Demapan argues that the trial court should have issued an instruction to the jury that it had to find that he entered the hotel room with the concurrent intent to commit theft. The jury was instructed generally that the People were to prove that Demapan entered with the intent to commit theft. The accuracy of a jury instruction is a question of law reviewed *de novo*. *Williams v. State*, 54 P.3d 248, 251 (Wyo. 2002).

[18] The burglary statute states in part: “enters or surreptitiously remains . . . with intent to commit a

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<sup>3</sup> While we decide based upon the circumstances of the case at bar that there is no plain error, it is advisable for a trial court to instruct on the underlying crime in a burglary charge.

<sup>4</sup> We note and distinguish another Colorado case, *People v. Jiron*, which held that “[t]he elements constituting the crime of theft must be explained to the jury when that is the ulterior crime referred to in cases alleging burglary offenses.” *People v. Jiron*, 616 P.2d 166, 168 (Colo. Ct. App. 1980). The *Jiron* court noted the Colorado Supreme Court decision in *People v. Major*, *supra*, and distinguished it stating “the information in *Major* alleged that the defendant intended to commit the crime of theft. Here, the information contained no reference to any underlying offense.” *Id.* at 168.

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crime therein.” 9 GCA § 37.20(a). Under a plain reading of the statute, one need either enter, or surreptitiously remain, with the intent to commit a crime in order to meet that element. The specific charge against Demapan was that he “enter[ed] in the habitable property of YUGI YAMASHITA at room 2817, Guam Plaza Hotel, with the intent to commit the crime of theft therein.” RA, tab 6 (Indictment). The trial court’s instruction to the jury was that the Government

had to prove that Demapan “entered or surreptitiously remained . . . with the intent to commit the crime of theft.” RA tab 36, p. 45 (Jury Instructions). The indictment and the jury instruction contained the language specified in section 37.20(a): entry “with intent to commit a crime.” Moreover, the statute does not state “concurrent” intent.

[19] Demapan cites a California case to support his argument. In *People v. Smith*, 144 Cal. Rptr. 330, 334 (Ct. App. 1978), the court stated: “In a crime such as burglary that requires a specific intent, it is essential that the court give an instruction ‘defining the required concomitant intent.’” The court also stated that “there is no requirement that the concurrence-of-act-and-intent instruction be phrased in any particular way.” *Id.* The court explained that the jury had been given two instructions, the first stating: “Every person who enters any structure of the type shown by the evidence in this case, with the specific intent to steal . . . is guilty of burglary,” and the second stating: “If you agree unanimously that defendant made an entry with the specific intent to steal . . . you should find the defendant guilty . . .” *Id.* at 333-334. The court held that these two instructions made it clear that the intent to steal “had to exist at the moment of defendant’s entry . . .” *Id.* at 334.

[20] Similar to the *Smith* case, in the case at bar, the trial court issued two instructions to the jury, the first defining burglary as: “A person is guilty of burglary if he enters or surreptitiously remains in any habitable property . . . with the intent to commit a crime therein . . .” and the second explaining the essential elements of burglary: “entered or surreptitiously remained in the habitable property of Yugi Yamashita . . . with the intent to commit the crime of theft.” RA, tab 36, pp. 42, 45 (Jury Instructions) (emphases added). As in the *Smith* case, these two instructions were sufficient to inform the jury that they had to find beyond a reasonable doubt that Demapan entered Yamashita’s room with the concurrent intent to commit theft. The trial court’s instructions on entry with intent accurately tracked the burglary statute

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and were sufficient for the jury to understand that Demapan's intent to commit theft was to be proven to exist concurrently with his entry. Accordingly, there is no prejudicial error affecting Demapan's substantial right and the trial court did not commit plain error in this regard. *See Perez*, 1999 Guam 2 at ¶ 21.

#### **D. Specific Intent**

[21] Demapan argues that because burglary is a specific intent crime, the trial court was required to instruct the jury that there must be a specific intent to commit theft. The jury was instructed on the general definition of intent rather than specific intent.

[22] Intent is defined in Guam law as follows: "A person acts intentionally, or with intent, with respect to his conduct or to a result thereof when it is his conscious purpose to engage in the conduct or cause the result." Title 9 GCA § 4.30(a) (1996). Burglary is a "specific intent" crime. *Commonwealth v. Kennedy*, 453 A.2d 927, 929 (Pa. 1982); *see also State v. Howard*, 637 P.2d 15, 17 (Mont. 1981) (stating that common law burglary is a specific intent crime). Specific intent "is a term used in the criminal law to describe a state of mind which exists where circumstances indicate that an offender actively desired certain criminal consequences, or objectively desired a specific result to follow his act or failure to act." 21 AM. JUR. 2D *Criminal Law* § 128 (2004) (footnote omitted).

[23] The specific intent element in the burglary charge against Demapan is whether he entered with the intent to commit theft. *See Commonwealth v. Alston*, 651 A.2d 1092, 1094 n.3 (Pa. 1994) (stating that the "specific intent element of the crime of burglary is limited to whether the accused entered with a 'general criminal intent' to commit any crime."). In other words, the jury had to find that Demapan entered with the specific intent to commit theft. Demapan's fear is that the jury may have "equated entry into the premises with entry with the specific intent at the time of entry to commit the crime of theft." Appellant's Opening Brief, p. 15 (Sept. 3, 2003). This fear is well founded and case law supports a specific intent jury instruction requirement for a burglary charge. *See Hilton*, 1984 WL 55539, at \* 6 ("Burglary cannot be committed unless specific intent exists and the jury should be so instructed."); *People v. Hill*, 67 Cal.2d 105, 118, 60 Cal. Rptr. 234, 242 (Cal. 1967) ("It has frequently been held to be error to instruct the jury on general intent in a case where the crime charged requires a specific intent.").

[24] The trial court instructed the jury that the People had to prove that Demapan "entered or

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surreptitiously remained . . . with the intent to commit the crime of theft.” RA, tab 36, p. 45 (Jury Instruction) (emphasis added). The trial court further instructed the jury on the definition of “intentionally” as follows: “A person acts intentionally, or with intent, with respect to his conduct or to a result thereof when it is his conscious purpose to engage in the conduct or cause the result.” RA, tab 36, p. 39 (Jury Instructions). In addition, the jury was given an instruction on knowledge and intent:

Knowledge and intent involve the state of a person’s mind. . . .

. . . Rarely is direct proof available to establish the state of one’s mind. This may be inferred from what he says or does: his words, his actions, and his conduct, as of the time of the occurrence of certain events.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanation of the act uttered long after it’s [sic] occurrence. Accordingly, intent and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn from them.

RA, tab 36, p. 29 (Jury Instructions).

[25] In this case, the Government introduced evidence of Demapan’s two prior convictions for theft. Transcript (“Tr.”) vol. III, p. 2 (Jury Trial, Aug. 1, 2002).<sup>5</sup> Such evidence may be used to show intent. See Title 6 GCA § 404(b) (1995) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”); *see also* *People v. Palisoc*, 2002 Guam 9, ¶ 13 (“Evidence that Palisoc committed a prior auto theft is both a permissible and helpful means of showing that Palisoc committed the current charged thefts with the requisite intent.”). At the time of his arrest, Demapan was found in possession of property that had earlier that day been reported stolen by another tourist. Tr. vol. I, pp. 25-26, 30-31 (Jury Trial, July 29, 2002). The jury may infer specific intent from the circumstances surrounding the entry by the accused. *See Kennedy*, 453 A.2d at 929.

[26] Although the trial court did not expressly instruct the jury that they had to find that Demapan had the “specific” intent to commit the crime of theft, in the totality of the instructions, the jury was adequately

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<sup>5</sup> Although this evidence was not made part of the record on appeal, the prior thefts involved victims named Matsukawa Saturo and Hiyawong Wihong. Transcript vol. IV, pp. 5-6 (Jury Trial, Aug. 5, 2002)

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instructed that they had to make a finding that Demapan “desired certain criminal consequences, or objectively desired a specific result to follow his act.” 21 AM. JUR 2D *Criminal Law* § 128 (2004). Demapan’s substantial rights were not prejudiced by the lack of a specific intent instruction and we hold that the trial court did not commit plain error. *See Perez*, 1999 Guam 2 at ¶ 21

#### IV.

[27] Pursuant to the foregoing, we hold that criminal trespass is not a lesser included offense of burglary and that the trial court did not err in not *sua sponte* instructing the jury on criminal trespass. Further, based on the jury instructions that were issued we hold that the trial court’s failure to instruct the jury on theft, the concurrent intent to commit theft and the specific intent to commit theft does not amount to plain error. Accordingly, the judgment of the trial court is hereby **AFFIRMED**.