IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee

vs.

EDWARD BOHNAM STOVER JONES II,
Defendant-Appellant.

OPINION

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Supreme Court Case No.: CRA04-005
Superior Court Case No.: CF0372-03

Appeal from the Superior Court of Guam
Argued and submitted on March 3, 2006
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 Edward Bonham Stover Jones II appeals from his conviction on the charges of Money Laundering and Continuing Criminal Enterprise (CCE). Jones argues on appeal that both charges must be dismissed because the indictment failed to allege essential elements of the offenses. Furthermore, Jones contends that the trial court erred in failing to instruct the jury on essential elements of both charges.

[2] We find that the indictment for the Money Laundering charge and the CCE charge contained the essential elements of the respective offenses and therefore the indictment was sufficient as to both charges. In addition, we hold that the jury instructions for the Money Laundering charge do not amount to plain error and therefore affirm the defendant's conviction on that charge. The jury instructions for the CCE charge, however, were plainly erroneous and had a prejudicial effect on the outcome of the case. Reversal of the defendant's conviction on that charge is warranted. We therefore remand for further proceedings.

I.

[3] A trained drug detection dog, inspecting incoming mail packages alerted to a package at the Guam Main Postal Facility, Barrigada, Guam. A federal search warrant was obtained for the parcel which was addressed to Sean McCauley. After determining that the parcel contained marijuana, a controlled delivery of the package was conducted. McCauley picked up the package and brought it home. The next day, the package was opened which set off the transmitter device inside. Shortly after being alerted to the opening of the package, the law enforcement officials arrested McCauley and performed a search of his home. In the course of the search, the law enforcement officials confiscated the package, coolers, marijuana, and scales. Following his arrest, McCauley implicated Jones, alleging that he was working for the defendant, selling marijuana and sending Jones the proceeds.

[4] Jones was subsequently indicted by a grand jury on nine charges. Following Jones' defense counsel's objection concerning the failure to present the defendant's statement denying the allegations to the grand jury, a superseding indictment was issued on October 14, 2003 which

was nearly identical to the original indictment. As in the original indictment, the superseding indictment contained nine charges. The relevant charges of the superseding indictment, for purposes of this appeal, were the third and eighth charges. The third charge was for Money Laundering, "knowingly receiv[ing] or acquir[ing] proceeds from transactions that were in violation of the Uniform Controlled Substances Act of Guam, in violation of 9 GCA § 67.410(a)." Appellant's Excerpts of Record (ER), Tab 1, at 2 (Superseding Indictment). The eighth charge was for CCE, or engaging in a continuing enterprise relative to a controlled substance by: committing a felony under a provision of the Act as a part of a continuing series of offenses pursuant to the Act undertaken in concert with at least two other persons with respect to whom a position of management was occupied and from which substantial income and resources were obtained. In addition, Jones was charged with importation and conspiracy to import, in the first and second charges, with the manufacture or distribution of marijuana with the intent to import in the sixth and seventh charges, money laundering in the fourth and fifth charges, and terrorizing in the ninth charge.

[5] On November 20, 2003, the jury returned verdicts of guilty on the third and eighth charges. For each of the other charges, the jury returned a verdict of not guilty. Following the return of the verdicts, Jones was sentenced to three years for the third charge, Money Laundering, and fined ten thousand dollars. For the eighth charge, CCE, Jones was sentenced to Money Laundering as a lesser included offense for a period of three years to run concurrently with the sentence imposed for the third charge. The final judgment of conviction was entered on September 30, 2004. Jones filed this appeal on the same day.

II.

[6] This court has jurisdiction over a final judgment of conviction pursuant to 7 GCA § 3107(b) (2005) and 8 GCA § 130.15(a) (2005).

III.

[7] Jones challenges both his conviction for Money Laundering and for CCE. Arguing that both convictions should be reversed, he contests first the sufficiency of both charges in the indictment and second the jury instructions for each charge. We address first the arguments

advanced by Jones pertaining to the Money Laundering Charge and then turn to those related to the CCE Charge.

[8] Jones challenges the sufficiency of the indictment with respect to both the third and eighth charges. As no objection was made to the indictment, we review for plain error. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); *see also People v. Chung*, 2004 Guam 2 ¶¶ 8, 9; *United States v. Godinez-Rabadan*, 289 F.3d 630, 632 (9th Cir. 2002). Additionally, Jones challenges the jury instructions with respect to both the third and eighth charges.

[9] We review the trial court's jury instructions for plain error because no objection was made at trial. *People v. Jung*, 2001 Guam 15 ¶ 28 (citing *People v. Perez*, 1999 Guam 2 ¶ 21).

> There are limitations on a reviewing court's authority to correct plain error: (1) there must be an actual error and not a waiver of rights; (2) the error must be plain in that it is 'clear' or 'obvious' under current law; (3) the error was prejudicial in that it affected the outcome of the proceedings; and (4) the reviewing court's discretion should be employed only in those cases in which a miscarriage of justice would otherwise result.

Jung, 2001 Guam 15 ¶ 50(citing *United States v. Olano*, 507 U.S. 725, 736 (1993)). "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.'" *People v. Demapan*, 2004 Guam 24 ¶ 5 (quoting *People v. Perez*, 1999 Guam 2 ¶ 21).

IV.

A. Money Laundering

1. Indictment

[10] Jones argues that the third charge of the indictment must be dismissed for failure to charge essential elements. Generally, objections to the indictment should be made prior to trial; such failure to object constitutes a waiver in the absence of a showing by the defendant of good cause. *People v. White*, 2005 Guam 20 ¶ 14 (citing 8 GCA §§ 65.15, 65.45 (2005)). However, 8 GCA § 65.15(b) lists two exceptions to this general rule: if the indictment "fails to show jurisdiction in the court *or to charge an offense*." 8 GCA § 65.15(b) (2005) (emphasis added).

[11] Elements of a crime must be alleged in an indictment and failure to do so, if timely raised, is generally reviewed for harmless error.[1] Review of an untimely objection to the sufficiency of an indictment is treated differently. Although one can raise a defective indictment claim at any time, review of such a claim made for the first time on appeal is limited to plain error. *Leos-Maldonado*, 302 F.3d at 1064.

[12] "It is a cardinal principle of our criminal law that an indictment is sufficient which apprises a defendant of the crime with which he is charged so as to enable him to prepare his defense and to plead judgment of acquittal or conviction as a plea to subsequent prosecution for the same offense." *Portnoy v. United States*, 316 F.2d 486, 488 (1st Cir. 1963) (citations omitted). Guam law is in accordance with this view, holding an indictment to be sufficient where it contains the elements of the crime alleged, adequately informs the defendant of the crime to allow him to defend against the charges, and is stated with sufficient clarity to bar subsequent prosecution for the same offense. *See People v. Salas*, 2000 Guam 2 ¶ 19. Furthermore, it is also well established that an indictment "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985).

[13] Jones asserts that the third charge in the superseding indictment failed to charge him with a crime. This assertion is based on Jones's belief that the third charge fails to allege two essential elements of the crime. Jones argues first that the indictment fails to allege that Jones knew that the proceeds were derived from a violation of the Uniform Controlled Substances Act and second that the indictment fails to specifically identify the violation from which the proceeds were derived.

[1] On October 9, 2006, oral argument was heard by the Supreme Court of the United States on the issue of whether the omission of an essential element of a criminal offense from a federal indictment can constitute harmless error. The Court granted the People's Petition for Writ of Certiorari to review the Ninth Circuit's judgment in *United States v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3476 (Apr. 17, 2006) (No. 05-998). The circuits are currently split on the issue. A majority of the circuits that have addressed the issue have held that such an omission is subject to harmless error analysis. *See United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001); *United States v. Higgs*, 353 F.3d 281, 306 (4th Cir. 2003); *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002); *United States v. Trennell*, 290 F.3d 881, 889 (7th Cir. 2002); *United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005); *United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001) (en banc). Only the Third and Ninth Circuits have decided that omission of an element in a criminal indictment is not subject to harmless error review; both circuits find that such an error requires automatic reversal. *See Resendiz-Ponce*, 425 F.3d 729; *United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999).

[14] As discussed *supra*, since the objection to the indictment was made for the first time on appeal, we review the indictment for plain error. Before this court grants relief under the plain error standard of review, we must find: (1) that there was error; (2) that the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) that a miscarriage of justice would otherwise occur. *Jung*, 2001 Guam 15 ¶ 50; *see also Johnson v. United States*, 520 U.S. 461, 467 (1997).

[15] We must decide initially whether there was error in the indictment with respect to the third charge and whether the error is clear and obvious under current law. In so doing, we read the indictment broadly and in its entirety.

a. Second scienter element

[16] Title 9 GCA § 67.410(a) (2005) states that "[a] person shall not knowingly or intentionally receive or acquire proceeds, or engage in transactions involving proceeds, *known to be derived from* a violation of the [Guam Uniform Controlled Substances Act]." (Emphasis added). Charge three in the superseding indictment states that Jones did "knowingly receive or acquire proceeds from transactions that were in violation of the Uniform Controlled Substances Act of Guam, in violation of 9 GCA § 67.410(a)." Appellee's ER, Tab 3, at 2 (Superseding Indictment). Jones argues that the indictment failed to charge him with a crime because the indictment did not explicitly recite the second scienter requirement delineated in the statute. Specifically, Jones argues that the indictment failed to charge him with knowledge that the proceeds were derived from a violation of the Act.

[17] "Indictments, however, need not always plead required scienter elements in precise statutory terms such as 'willfully' or 'knowingly' so long as other words or facts contained in the indictment 'necessarily or fairly import guilty knowledge.'" *United States v. McLennan*, 672 F.2d 239, 242 (1st Cir. 1982) (quoting *Madsen v. United States*, 165 F.2d 507, 509-10 (10th Cir. 1947)); *see also United States v. Wallace*, 578 F.2d 735, 741 n. 6 (8th Cir. 1978) (finding an indictment that did not explicitly include knowledge sufficient to inform the defendant of the nature of the charges, "the charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent"). In *United States v. Clemmons*, 892 F.2d 1153 (3d Cir. 1990), the Third Circuit undertook a similar review of an indictment. In *Clemmons*, the

defendant was charged in the indictment with "knowingly selling stolen bonds" in violation of a statute which states "[w]hoever with the knowledge that such Treasury check or bond . . . is stolen. . . buys, sells, exchanges, receives, delivers, retains or conceals any such Treasury check or bond." *Id.* at 1158. Clemmons argued that he understood the indictment to mean that he was "cognizant only of the sale, and not of the fact that the bonds were stolen." *Id.* Addressing the defendant's argument that the indictment failed to apprise him of an essential element of the crime, knowing the bonds were stolen, the Third Circuit found "this reading to be unduly crabbed and that an objective reader would understand from the charging document that the grand jury found probable cause to believe that Clemmons sold bonds he knew were stolen." *Id.* at 1159.

[18] Similarly, Jones argues that the indictment failed to inform him of the essential element of the crime charged in the instant case, knowledge that the proceeds were derived from a violation of the Act. We find that an objective reader of charge three, which charged that the defendant did "knowingly receive or acquire proceeds from transactions that were in violation of the Uniform Controlled Substances Act of Guam, in violation of 9 GCA § 67.410(a)," would understand that the charge included the allegation that Jones knew the proceeds came from a violation of the Act. Appellant's ER, Tab 1, at 2 (Superseding Indictment).

[19] In addition, the superseding indictment as a whole charged Jones with numerous counts of money laundering, along with continuing criminal enterprise, importation of a controlled substance and conspiracy to import a controlled substance. The allegation that Jones knew that the proceeds were derived from a violation of the Act can necessarily be implied when reading the whole indictment broadly. A review of the superseding indictment, shows that Jones was charged with the importation and conspiracy to import, in the first and second charges, with the manufacture or distribution of marijuana with the intent to import in the sixth and seventh charges, and money laundering in the third, fourth, and fifth charges. In addition, Jones was charged with engaging in a CCE in the eighth charge. Reading the indictment as a whole, it is clear that the indictment implied that Jones knew the proceeds were derived from a violation of the Act. The superseding indictment informed the defendant that the Government was charging him in all aspects of the importation and sale of marijuana. Furthermore, the third charge

included a reference to the statutory provision that was alleged to have been violated. With the other counts included in the indictment and the statutory reference, the indictment adequately informed Jones of the charges against him.

[20] Obviously the drafting of the indictment could have been clearer. The Legislature saw fit to clearly delineate two scienter requirements in the statute, and a well drafted indictment would clearly lay out all of the elements of the crime. Notwithstanding the poor draftsmanship of the indictment, we find that the omission does not rise to the level of plain error because there can be no doubt that the defendant was fairly informed of the nature of the crime with which he was charged. *See Wallace*, 578 F.2d at 741 ("We agree both with the trial judge's observation that the draftsmanship of Count I 'may leave something to be desired' and with his conclusion that it nevertheless makes a sufficient allegation to serve as fair notice to defendant.").

[21] Furthermore, the defendant does not claim that he was prejudiced in any way. Even if this court were to find clear or obvious error with the indictment, the third condition necessary under plain error analysis is not met in the instant case. As the indictment included a specific reference to the statutory provision, it placed the defendant on notice with regard to the charge against him and the knowledge required to support a conviction. *See Leos-Maldonado*, 302 F.3d at 1061, 64 (citing *United States v. Velasco-Medina*, 305 F.3d 839, 846-47 (9th Cir. 2002)).

b. Violation of the Uniformed Controlled Substances Act of Guam

[22] Jones second argument alleges that the indictment failed to charge him with a crime because the indictment does not specifically identify the violation from which the proceeds were derived. As discussed *supra*, we read indictments broadly and as a whole when reviewing for the first time on appeal. Objections to the indictment, other than an objection to jurisdiction or failure to charge a crime, should be made prior to trial as failure to timely object constitutes a waiver in the absence of a showing by the defendant of good cause. *White*, 2005 Guam 20 ¶ 14 (citing 8 GCA §§ 65.15, 65.45 (2005)). Jones argues that the indictment is insufficient because an element of the offense is missing. Specifically, the indictment does not identify the particular violation from which the proceeds were derived.

[23] Generally, an indictment which tracks the words of the statute charging the offense is sufficient as long the words unambiguously set forth all the elements of the offense. *See United*

States v. Givens, 767 F.2d 574, 584 (9th Cir. 1985). The third charge, with respect to this particular element of the crime, tracks the language of the statute. In addition, courts have held that specification of the predicate offense in a money laundering charge is not required in the indictment. *United States v. McGauley*, 279 F.3d 62, 70 (1st Cir. 2002); *see also United States v. Mankarious*, 151 F.3d 694, 703 (7th Cir. 1998). In *Mankarious*, the Seventh Circuit held that a money laundering indictment which did not specify the predicate offense, and instead referred generally to mail fraud, was sufficient. *Id.* Appellant Jones cites *United States v. Joyner*, 313 F.3d 40 (2d Cir. 2002), in support of his argument that the indictment must identify the underlying offense with specificity. Appellant's Brief, at 7 (Apr. 5, 2005). However, *Joyner* concerns the submission of the elements of a Continuing Criminal Enterprise charge in jury instructions. Its holding is irrelevant in the discussion of the indictment relative to the specific identification of the underlying violation of the Act. Therefore, we find that the indictment sufficient with regard to the element that the proceeds were derived from a violation of the Act.

2. Jury Instructions

[24] Jones asserts that the trial court failed to instruct the jury on two of the essential elements of the Money Laundering charge: (1) that the defendant knew the proceeds were derived from a violation of the act and (2) that the specific violation of the act had to be agreed upon unanimously by the jury. Since no objection was made at trial, we review the instructions for plain error and 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) a miscarriage of justice would otherwise occur. *Jung*, 2001 Guam 15 ¶ 50.

a. Knowledge that the proceeds were derived from a violation

[25] The trial court gave the following instructions with respect to the Money Laundering charge:

> The People must prove beyond a reasonable doubt that the defendant, Edward Bonham Stover Jones, II, did:
>
> knowingly;
> receive or acquire;
> proceeds from transactions;
> that were in violation of the Uniform Controlled Substance Act of Guam;
> on or about the period between August 12, 2000 and August 12, 2003.

Appellant's ER, at 10 (Transcript at 154, Nov. 18, 2003). Obviously, the trial court committed error in this instruction. The error was the failure of the trial court to instruct on the mental state required with respect to the nature of the proceeds.

[26] The indictment charged the defendant with a violation of Title 9 GCA § 67.410 (a) (2005), which clearly delineates two mental state elements: "a [p]erson shall not *knowingly or intentionally* receive or acquire proceeds, or engage in transactions involving proceeds, *known* to be derived from a violation of this Act." 9 GCA § 67.410(a) (emphasis added). The trial court committed error by failing to include in the jury instructions the second mental state element which requires that the defendant knew the proceeds were derived from a violation of the Act. Based on the statutory language of 9 GCA § 67.410(a), it is clear or obvious that the trial court erred in failing to include both mental states in its jury instructions.

[27] The third step under our plain error analysis is to determine whether or not the error has affected the substantial rights of the defendant. The Supreme Court of the United States has articulated the test for reviewing jury instructions for plain error as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Jones v. United States*, 527 U.S. 373, 390 (1999) (quotation omitted). It is the defendant who bears the burden of demonstrating substantial prejudice. *United States v. Olano*, 507 U.S. 725, 734 (1993).

[28] As with indictments, a single jury instruction should not be judged in artificial isolation. *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000). Instead, instructions should be considered and reviewed as a whole. *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985). In discussing the instructions in *Jones*, 527 U.S. 373, the Court noted that "instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions." *Jones*, 527 U.S. at 391(citations omitted).

[29] Here, Jones argues that the jury did not understand that the elements of the money laundering charge included knowledge that the proceeds were derived from a violation of the Act. Therefore, he asserts that the jury could have convicted him for mere receipt of proceeds.

[30] In the instant case, the trial court gave numerous additional instructions to the jury. Among these was an instruction regarding the definition of "knowingly":

> A person acts knowingly, or with knowledge, with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

Transcript ("Tr"), at 157 (Jury Trial, Nov. 18 2003); 9 GCA § 4.30(b) (2005). Furthermore, a large portion of the evidence presented during trial focused on whether or not Jones knew the proceeds were derived from violations of the Act.

[31] The evidence presented at trial concerning the money laundering charge consisted mainly of the testimony of Sean McCauley and the defendant. McCauley testified that he and Jones were involved in a narcotics operation in which McCauley would sell marijuana and send a portion of the proceeds to Jones. Jones testified that the money he received from McCauley was for the sale of the remaining materials, tools and equipment following the close of Jones' business, Island Fence Company. The outcome of the trial basically turned on whether the jury believed McCauley or Jones. Given the instruction on knowledge and the evidence provided at trial, we find that Jones has not met his burden of proving that there was a reasonable likelihood that the jury found him guilty for mere receipt.

[32] Following the return of the verdict, Jones filed a Motion for Judgment of Acquittal and New Trial. Arguing in support of the motion, Jones reasoned that the verdicts demonstrated the jury's lack of understanding with regard to the knowledge requirement. The jury returned a guilty verdict for only one of the three money laundering charges in the indictment, charge three. At that time, Jones asserted that the jury instructions given with regard to the different money laundering charges resulted in the verdicts he believed to be inconsistent.[2] After hearing the arguments advanced by Jones, the trial court judge believed that there was no reasonable likelihood that the jury interpreted the instructions to allow conviction in the absence of knowledge that the proceeds were derived from a violation of the Act. We agree.

[33] Finding that the error made by the trial court did not affect the substantial rights of the defendant, we need not address whether correction is necessary to avoid manifest injustice. The

[2] Although the instructions given for charge five did explicitly outline two scienter elements, the instructions for charge four did not. In fact, the instructions for charge four outlined the elements of that charge in a manner that was substantially similar to those set forth in charge three.

trial court's failure to outline two scienter requirements does not amount to plain error in the instant case. However, judges must be diligent in preparing thorough and comprehensive jury instructions which track the requisite statutory elements. A comprehensive formulation of jury instructions will reduce the likelihood of error and thereby conserve judicial resources.

b. Violation of the Uniform Controlled Substances Act of Guam

[34] Jones alleges that the trial court erred by not including either an identification of the particular violation of the Act from which the proceeds were derived or an instruction that the jury must unanimously agree on the particular violation.

[35] Reviewing the instructions, we find that there was no error with regards to the instructions on the violation element of the money laundering charge. Generally, the trial court has wide discretion in its formulation of the jury instructions so long as it covers fairly and adequately the issues involved in the case. *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000). In the instant case, the jury instructions adequately covered all the issues involved. The jury instructions, as a whole, included violations of the Act which could act as the source of the proceeds. Furthermore, the instructions given by the trial court judge included a general unanimity instruction. Generally, it is sufficient to give a jury a single jury instruction that their verdict has to be unanimous even where there are multiple counts or schemes. *Echeverry*, 719 F.2d at 974; *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). However, if there is a genuine issue that there might be confusion or that a conviction might occur as a result of the jury concluding the defendant committed different acts, a trial court should augment the general unanimity instruction. *Echeverry*, 719 F.2d at 975 (citing a case which involved multiple schemes to defraud as an example of a case which might require an additional instruction). In the instant case, there was not a risk of confusion as the charge did not consist of multiple conspiracies or complicated fact patterns.

[36] In sum, we find that there was no error in the instruction with regards to this particular element of the money laundering charge.

B. Continuing Criminal Enterprise Charge

1. Indictment

[37] Similar to his arguments with respect to the third charge of the indictment, Jones asserts that the eighth charge failed to allege two essential elements of the crime of CCE. The eighth charge of the superseding indictment charged the following:

> On or about the period between July 14, 2000 and July 14, 2003, inclusive, in Guam, [the defendant] did knowingly engage in a continuing criminal enterprise on Guam relative to a controlled substance by:
>
> (1. Committing a felony offense under any provision of the Uniform Controlled Substances Act of Guam;
>
> (2. Which is a part of a series of offenses undertaken by Edward Jones in concert with two (2) or more other persons with respect to whom Edward Jones occupies a position of organizer, a supervisory position or any other position of management; and
>
> (3. from which such persons obtained substantial income or resources in violation of 9 GCA § 67.409.

Appellant's ER, at 3-4 (Superseding Indictment). The language in the indictment substantially tracks the language of 9 GCA § 67.409 (2005). Generally, an indictment which tracks the language of the statute will be sufficient. In the instant case, the defendant asserts that two essential elements were missing, the specific identification of the felony and the specific identification of the continuing series of offenses.

a. Specific identification of the felony

[38] As noted in our discussion of the third charge, we read the indictment very broadly when challenged for the first time on appeal. Citing to *Joyner*, Jones argues that the felony must be identified with specificity. However, Jones' reliance on *Joyner* is misplaced; that case dealt with an indictment which contained only two charges, a CCE charge and a conspiracy charge. *Joyner*, 313 F.3d 40, 47-48. Therefore, the indictment charged no other offenses which could have comprised the series of offenses required under the statue. In addition, identification of the felonies comprising the series of offenses necessary has been found to be unnecessary by the Second Circuit, the same court that decided *Joyner*. *United States v. Flaharty*, 295 F.3d 182 (2d Cir. 2002). In *Flaharty*, the court stated, "[a]lthough [precedent] requires that the jury be unanimous on each of the constituent felonies, we have held that an indictment that does not identify which of many alleged felonies constituted the series is not thereby defective." *Id.* at

197(citing *Richardson v. United States*, 526 U.S. 813 (1999)). In the instant case, the indictment contained seven other charges, which could have constituted the series of offenses. We agree with the Second Circuit and reject "the contention that the lack of specificity meant that the CCE count failed to charge an offense." *Id.*

b. Specific identification of the continuing series of offenses

[39] Jones contends that the indictment was deficient because it failed to specifically identify the violations that constituted the "series" of offenses under the charge of CCE. Again citing to *Joyner*, Jones argues that the series must be identified with specificity. Failure to specifically identify the offenses which comprise the series in the indictment does not necessarily constitute a failure to allege a crime. Therefore, we find no error in the eighth charge of the superseding indictment.

[40] In the absence of plain error, we hold the CCE charge as contained in the superseding indictment to be sufficient. Thus, the CCE charge stands.

2. Jury instructions

[41] Jones cites to numerous errors contained in the jury instructions for charge eight, the CCE charge. As with charge three, Jones argues the trial court erred by failing to instruct on the essential elements of CCE and failing to give a unanimity instruction. Again, we review for plain error.

a. Failure to instruct on essential elements

[42] The trial court gave the following jury instruction for the eighth charge:

> The People must prove beyond a reasonable doubt that the defendant, Edward Bonham Stover Jones, II:
>
> knowingly;
> engaged in continuing criminal enterprise;
> on Guam;
> Relative to a controlled substance;
> by committing a felony offense under any provision of the Uniform Controlled Substance Act of Guam;
> and from which such persons obtained substantial income or resources;
> on or about the period July 14, 2000 and July 14, 2003.

Tr. at 157-158 (Jury Trial, Nov. 18, 2003). Jones asserts that trial court failed to instruct on six elements of the offense. In order to determine whether there was error, we turn to the statutory language which defines the crime. Title 9 GCA § 67.409(a) (2005) states:

> It shall be unlawful for any person knowingly or intentionally to engage in a continuing criminal enterprise relative to a controlled substance. A person is engaged in a continuing enterprise relative to a controlled substance if:
>
> (1) he commits an offense under any provision of this Act and the offense is a felony; and
>
> (2) *such offense is part of a continuing series of offenses pursuant to this Act*:
>
> (i) *which are undertaken by such person in concert with two (2) or more other persons with respect to whom such person occupies a position of organizer, a supervisory position or any other position of management*; and
>
> (ii) from which such persons obtain substantial income or resources.

(Emphasis added). The court erred in failing to include numerous elements in the instruction which are contained in the statutory language.

[43] Having determined there was error, the standard under the second step of the analysis is whether or not the error is clear or obvious under current law. *Johnson*, 520 U.S. at 467. Among the elements that the instruction omitted was the requirement that the prosecution must prove the defendant occupied a position of organizer, supervisor or manager. This has been held to be an essential element of continuing criminal enterprise. *United States v. Vega-Figueroa*, 234 F.3d 744, 757 (1st Cir. 2000) (outlining the essential elements of 21 U.S.C. § 848 which is substantially similar to 9 GCA § 67.409(a)). In addition, the instruction fails to require that the felony must be a part of a series of offenses which is another essential element. *Hughey v. State*, 840 S.W.2d 183, 184 (Ark. 1992); *see also Joyner*, 313 F.3d at 48. Furthermore, the trial court failed to instruct the jury that the offenses must have been undertaken in concert with two or more persons.

[44] In the absence of direct instruction of these particular elements, we look to the jury instructions as a whole in order to determine if these elements were established elsewhere in the instructions. The missing elements were not adequately covered by the trial court elsewhere and

the People fail to point us to anything which covered those missing elements.[3] Therefore, the error committed by the trial court was plain and obvious under current law.

[45] Under our plain error analysis, the error must still have had a prejudicial effect on the outcome of the proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also Jung*, 2001 Guam 15 ¶ 50. In the instant case, the prejudicial effect on the outcome is evident. Due to the trial court's failure to properly inform the jury of the essential elements of the crime of continuing criminal enterprise, the jury was effectively deprived of their fact finding duties. *See United States v. Fuchs*, 218 F.3d 957, 962 (9th Cir. 2000) (finding the omission of a particular jury instruction affected the defendant's substantial rights as the absence of the particular instruction created a genuine possibility that the jury convicted on a legally inadequate ground); *United States v. Sayetsitty*, 107 F.3d 1405, 1413 (9th Cir. 1997) (finding that a case where a jury was permitted to find the defendant guilty without finding an essential element, due to the failure to include the element in the jury instructions "would be a significant miscarriage of justice").

[46] Applying the test of whether there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner, we find the possibility of such an application to be inordinately high in the instant case. As the instructions were deficient with regard to numerous elements, the likelihood that the jury found Jones guilty without finding each of these elements is considerable. At no point during the instructions was the jury informed that the defendant had to occupy a position of organizer, supervisor, or manager; nor were they informed that Jones must have acted in concert with two or more persons. At oral argument, the People argued that the conspiracy instruction was sufficient to cover the element in this instruction. The relevant portion of the conspiracy instruction given by the trial court alleged that the defendant did "agree with; one or more persons, to wit: each other and a person known to the grand jury." Tr. at 153 (Jury Trial, Nov. 18, 2003). The People's argument must fail because the conspiracy instruction required only that the jury find beyond a reasonable doubt that the defendant acted in concert with one or more persons whereas the CCE charge requires proof that the defendant acted in concert with two or more persons. Though we will read instructions broadly and construe them

[3] In their brief, the People asserted that all of the arguments advanced by the defendant related to the jury instructions for the CCE charge were moot, and therefore, did not address the flaws in the instructions given by the judge.

liberally, neither the conspiracy instruction, nor any other instruction given by the trial court sufficiently or adequately covered the missing elements. Therefore, the error did affect the defendant's substantial rights.

[47] With the first three prongs of our plain error analysis satisfied, we turn now to the final step. As previously discussed, this court's power to review plain error is discretionary and should only be exercised in order to prevent a miscarriage of justice. *Jung*, 2001 Guam 15 ¶ 50.

[48] Reversal under plain error review is rare. At least one court has held that "[p]lain error will not be found unless [the defendant] establishes that the outcome of his trial would have been otherwise except for the trial court's alleged improper action." *State v. Conway*, 842 N.E.2d 996, 1023 (Ohio 2006). However, most courts have interpreted the standard necessary to reverse as demanding something short of a showing of innocence. *See Murray v. Carrie*, 477 U.S. 478, 493-94 (1986) (finding the showing of prejudice required by a habeas petition, that requires a showing is significantly higher than what one must demonstrate under plain error). In *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006), the Ninth Circuit reversed a conviction because the trial court failed to instruct the jury on the defendant's affirmative defense. Previously, convictions have been upheld where the erroneous instruction pertained to a fact that was either uncontroverted or supported by overwhelming evidence. *Id.* at 570 (citing *Johnson*, 520 U.S. at 470). One court has held that "[a]llowing the defendant's conviction to stand, given the likelihood that the jury may not have convicted had they been properly instructed, would be a 'miscarriage of justice.'" *United States v. Fuchs*, 218 F.3d 957, 963 (9th Cir. 2000).

[49] In the instant case, the evidence at trial was not overwhelming nor were the facts essentially uncontroverted. At trial, there was physical evidence which connected McCauley to the drugs. However, the evidence against Jones consisted primarily of the Jones' testimony and McCauley's testimony. Jones asserts that the money he received from McCauley was for the sale of equipment Jones left in McCauley's care. McCauley asserts the money sent to Jones consisted of proceeds from the sale of marijuana. Though there is no precise definition of what would amount to a miscarriage of justice, we find that the result in this case meets that standard. Here, there is a reasonable probability that the jury convicted Jones without finding each element of the offense beyond a reasonable doubt. It is the duty of the prosecution to prove each element

beyond a reasonable doubt. *People v. Root*, 2005 Guam 16 ¶ 13. It is evident to this court that to allow the conviction to stand would relieve the prosecution of this burden. The elimination of this burden on the prosecution would certainly "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Dobson*, 419 F.3d 231, 241 (3d Cir. 2005). "[T]he omission of an essential element of an offense [in a jury instruction] *ordinarily* constitutes plain error. [This] is consistent with the Supreme Court's instruction that due process requires 'proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *United States v.* Haywood, 363 F.3d 200 (3d Cir. 2004)(citations omitted)(internal quotes omitted)(quoting *United States v. Xavier*, 2 F.3d 1281, 1287 (3d Cir.1993) and *In re Winship*, 397 U.S. 358, 364(1970)).

[50] Therefore, all four prongs of the plain error analysis have been met. Consequently, the defendant's conviction for continuing criminal enterprise must be reversed.

b. Unanimity instruction

[51] Since the reversal of the conviction is necessary for failure to instruct on essential elements, we need not address the unanimity instruction issue raised by Jones. However, as previously indicated on page 15 , a trial court should augment the general unanimity instruction if there is a genuine possibility that a conviction might occur as a result of the jury concluding the defendant committed different acts. *See Ferris*, 719 F.2d at 1407.

c. Sentencing on a lesser included offense

[52] The People argue in their opening brief that Jones's substantial rights were not affected because he was ultimately sentenced for a lesser included charge, making his appeal with respect to charge eight moot. We disagree. Jones was found guilty of the CCE charge. His plea for leniency in sentencing cannot be interpreted as a relinquishment of any rights. The trial court sentenced Jones pursuant to 9 GCA § 80.22 (2005) which reads:

> If, when a person has been convicted of an offense, the court, having regard to the nature and circumstances of the offense and to the history and character of the offender, is of the view that it would be unduly harsh to sentence the offender in accordance with the code, the court may enter judgment for a lesser included offense and impose sentence accordingly.

Therefore, the trial court's power to sentence Jones for the lesser included offense was predicated on the CCE conviction. Accordingly, we must vacate the sentence imposed pursuant

to section 80.22 as we reverse the CCE conviction. Without the conviction, the trial court would have been without the power to impose the sentence in the first instance.

[53] Accordingly, because we reverse the CCE conviction and vacate the sentence imposed under section 80.22, we now remand the case for further proceedings to ascertain whether the People will proceed against the defendant on the CCE charge. Should the People choose to proceed against the defendant once more on the CCE charge alone, the People will not have the benefit of the other charges in the indictment which were helpful in the instant case with providing the defendant with notice of the charges against him. Although we hold the indictment sufficient under plain error review, had there been a timely objection, our decision today might be different.

V.

[54] We hold the indictment was sufficient with respect to both the third and eight charges, money laundering and continuing criminal enterprise. Furthermore, the instructions given to the jury for the money laundering charge do not amount to plain error. Accordingly, we **AFFIRM** the conviction for money laundering on charge three. However, the instructions for charge eight, continuing criminal enterprise, do amount to plain error, and correction is necessary to avoid a miscarriage of justice. Therefore, we **REVERSE** the conviction for continuing criminal enterprise on charge eight, we **VACATE** the sentence imposed, and **REMAND** for further proceedings to ascertain whether the People will still pursue the continuing criminal enterprise charge against the defendant.