IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

ANTONIO "TONY" M. DIAZ,
Defendant-Appellant.

OPINION

Filed: June 29, 2007

Cite as: 2007 Guam 3

Supreme Court Case No.: CRA05-003
Superior Court Case No.: CF0050-03

Appeal from the Superior Court of Guam
Argued and submitted on May 15, 2006
Hagåtña, Guam

Appearing for Defendant-Appellant:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook, P.C.
210 Archbishop Flores St.
Hagåtña, Guam 96910

Appearing for Plaintiff-Appellee:
William C. Bischoff
Marianne Woloschuck
Assistant Attorneys General
Office of the Attorney General
287 West O'Brien Dr.
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice[1]; ROBERT J. TORRES, JR., Associate Justice.

TORRES, J.:

[1] Defendant-Appellant, Antonio M. "Tony" Diaz was convicted on felony and misdemeanor charges of Theft of Property and misdemeanor charges of Official Misconduct and received a sentence which included five years of incarceration, three years of parole and 1,000 hours of community service. On appeal, Diaz alleges numerous errors arising from the charges of Official Misconduct; specifically, he challenges: (1) the amendment to the indictment which charged the Official Misconduct counts in the disjunctive rather than the conjunctive as in the original indictment; and (2) the sufficiency of the amended indictment with respect to the Official Misconduct charge. In addition, Diaz challenges the sufficiency of the evidence related to both the Official Misconduct charges and the Theft of Property charges. He contends that the crime of Official Misconduct is one continuing course of uninterrupted conduct rather than twenty-three (23) separate counts. Diaz argues that the trial court committed error when it punished him separately for official misconduct and theft instead of merging the two crimes and punishing him concurrently. Finally, he asserts that the Superior Court imposed a harsher sentence in order to punish him for exercising his right to a trial. We reject each of the arguments advanced by Diaz and affirm.

I.

[2] This case arises from Diaz's use, for personal purchases, of a Guam Mass Transit Authority ("GMTA") Bank of Guam MasterCard issued in his name. Diaz obtained the GMTA

[1] Associate Justice Frances Tydingco-Gatewood heard oral argument in this case. Prior to issuance of this Opinion, she was sworn in as Chief Judge of the U.S. District Court of Guam.

credit card while employed as the agency's Assistant General Manager. In July 2000, Diaz purchased three plane tickets using the GMTA credit card; two round-trip tickets for him and his wife and a one-way ticket for his daughter. The trip served two purposes: first, to accompany Diaz's daughter to college in California and second, to allow Diaz to attend training in Portland, Oregon for which he had received prior approval. While Diaz was on the mainland, he made numerous personal charges on the GMTA credit card at various restaurants, hotels, and stores. Shortly after his return to Guam, Diaz purchased a computer for his daughter using the credit card.

[3] After the initial personal charges were made, he was questioned about the charges. He acknowledged that the charges were personal in nature, but made no payments to GMTA to cover the personal charges. In January 2001, GMTA closed its account with the Bank of Guam, the issuer of the GMTA credit cards, including the one issued in Diaz's name. At the time that the account was closed, Diaz had not reimbursed GMTA for the personal charges made on the card.

[4] In May 2001, the Public Auditor's Office began an investigatory audit into the use of credit cards at GMTA. Shortly after the Public Auditor Doris Flores Brooks began examining the matter, then-Senator Felix P. Camacho's office began its own investigation after receiving an anonymous tip regarding potential abuse and called for a legislative oversight hearing regarding the use of credit cards at GMTA.

[5] On July 17, 2001, Diaz wrote two checks to GMTA for an amount covering all the personal charges he made on the GMTA card.[2]

[2] The two checks, in fact, amounted to more than the total personal charges that Diaz made on the credit card. However, GMTA issued Diaz a check for the amount that he overpaid, $1,317.66, on August 7, 2001. Transcript ("Tr."), pp. 20-21 (Jury Trial, Feb. 2, 2005).

[6] On February 5, 2003, Diaz was indicted by a Superior Court grand jury. The original indictment included the following: First Charge, three counts of Theft of Property (As a 2nd Degree Felony); Second Charge, three counts of Unauthorized Use of a Credit Card (As a 3rd Degree Felony); Third Charge, seventeen Counts of Theft of Property (As a Misdemeanor); Fourth Charge, four counts of Theft of Property (As a Petty Misdemeanor); Fifth Charge, twenty-one counts of Unauthorized Use of a Credit Card (As a Misdemeanor); and Sixth Charge, twenty-four counts of Official Misconduct (As a Misdemeanor). Appellant's Excerpts of Record ("ER"), p. 1 (Indictment, Feb. 5, 2003). The People later filed a motion requesting the dismissal of Count 17 of the Third Charge of Theft of Property (As a Misdemeanor), and Count 23 of the Sixth Charge of Official Misconduct (As a Misdemeanor), as well dismissal of both charges of the Unauthorized Use of a Credit Card. The trial court granted this motion.

[7] Subsequently, the People filed an application to amend the original indictment to expand the jurisdictional allegation in each charge. For the Theft of Property charges, the People moved to remove the phrase "to personally benefit himself and others" and to clarify that Diaz was accused of depriving the Government of Guam of the money, and not of the item purchased. For the Official Misconduct charges, the People moved to change the phrase to "with the intent to benefit himself and another person" in order to more closely track the language of the statute. Diaz objected to each of these changes, but failed to object to anything else contained in the original indictment. Over Diaz's objection, the Application to Amend was granted and an amended indictment was issued on January 25, 2005. The Amended Indictment included the following charges: First Charge, three counts of Theft of Property (As a 2nd Degree Felony); Second Charge, sixteen counts of Theft of Property (As a Misdemeanor); Third Charge, four

counts of Theft of Property (As a Petty Misdemeanor); Fourth Charge, twenty-three counts of Official Misconduct (As a Misdemeanor). Appellant's ER, pp. 37-52 (Amended Indictment).

[8] A jury found Diaz guilty of one count of Theft of Property (As a 2nd Degree Felony); one count of Theft of Property (As a Misdemeanor); and twenty-three counts of Official Misconduct (As a Misdemeanor). Appellant's ER, pp. 53-55 (Judgment). Diaz was sentenced to a total of five years of incarceration, a special parole for a term of three years, and 1,000 hours of community service. Diaz timely filed this appeal.

II.

[9] This court has jurisdiction over a final judgment of conviction. 48 U.S.C. § 1424-1(a) (West, Westlaw through Pub. L. 109-482 approved Jan. 15, 2007); 7 GCA § 3107(b) (2005) and 8 GCA § 130.15(a) (2005).

III.

[10] We review the amendment of an indictment *de novo*. *People v. Salas*, 2000 Guam 2 ¶ 10. When there has been no objection below, we review the sufficiency of an indictment for plain error. *People v. Chung*, 2004 Guam 2, ¶¶ 8-9; *People v. Jones*, 2006 Guam 13 ¶ 8. A claim of fatal variance will be treated as an attack on the sufficiency of the evidence. *People v. Campbell*, 2006 Guam 14; *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001). When reviewing the sufficiency of the evidence, this court must decide whether, from the evidence presented at trial, "any rational trier of fact could have found the essential elements" of each charge of conviction proven "beyond a reasonable doubt." *People v. Guerrero*, 2003 Guam 18 ¶ 13; *see also People v. Maysho*, 2005 Guam 4 ¶ 14. Whether or not an offense is defined as a continuing course of conduct involves issues of statutory interpretation. *People v. San Nicolas*, 2001 Guam 4 ¶¶ 23-26. Whether one offense "merges with another for purposes of punishment

is a question of statutory interpretation." *United States v. Cedar*, 437 F.2d 1033, 1036 (9th Cir. 1971). Issues of statutory interpretation, such as defining a continuing course of conduct and merger of offenses, are reviewed *de novo*. *People v. Flores*, 2004 Guam 18 ¶ 8 (quoting *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10). Finally, the trial court's imposition of a sentence is reviewed for an abuse of discretion. *People v. Super. Ct. (Chiguina)*, 2003 Guam 11 ¶ 12.

IV.

[11] In the instant appeal, Diaz challenges various aspects of the Amended Indictment, the evidence and the sentence. We examine each of the issues in turn.

A. The Indictment

[12] Diaz challenges numerous aspects of the Official Misconduct charges. He argues first, that the Official Misconduct charge should have been pled in the conjunctive rather than the disjunctive; and second, that the Amended Indictment failed to allege an essential element of the Official Misconduct charge.

1. Conjunctive or Disjunctive

[13] Diaz asserts that the Amended Indictment, which used the disjunctive, charged a new and different offense, permitted a non-unanimous determination by the jurors, and failed to protect him from being placed in double jeopardy.

[14] The People filed an application to amend the Indictment, which requested, among other changes, that the court amend all of the Official Misconduct charges to read "with intent to benefit himself ***or*** another person" in place of "with intent to benefit himself and another person." Appellee's ER, tab 1, p. 2 (Application to Amend Indictment). The People moved to amend the Indictment in order to track the language of 9 GCA § 49.90, the Official Misconduct

statute.[3] Over Diaz's objection, the trial court granted the motion to amend the indictment pursuant to 8 GCA § 55.20.[4]

[15] We review the amendment of the indictment *de novo*. *People v. Salas*, 2000 Guam 2 ¶ 10. Amendments to indictments are governed by 8 GCA § 55.20, which provides: "[t]he court may permit an indictment or information to be amended upon the application of the prosecuting attorney at any time before verdict or finding *if no additional [or] different offense is charged and if substantial rights of the defendant are not prejudiced*." 8 GCA § 55.20 (2005) (emphasis added). In *People v. Salas*, 2000 Guam 2, in examining an amendment to an indictment, we noted that this statute:

> [P]rovides the court with a flexible tool to allow parties to change easily small errors in their pleadings. Guam courts have followed this law verbatim. Unless a judge has been able to point to an added charge of which the defendant and his or her counsel had no knowledge or a substantial way in which a defendant has been prejudiced, judges have consistently allowed the prosecution to make this amendment.

Id. ¶ 13. Accordingly, we examine the amendment to ascertain whether the Amended Indictment charged a new or different offense and whether the amendment prejudiced the defendant. Section 55.20 limits the trial court's ability to allow amendments to those situations in which: 1) "no additional [or] different offense is charged"; and 2) the "substantial rights of the defendant are not prejudiced." 8 GCA § 55.20 (2005). We examine each of these requirements in turn.

[3] In the instant case, the indictment as originally drafted was sufficient and more artfully drawn than the amended one. However, although the amendment to this particular charge was unnecessary, it does not follow that it was not permissible. *See United States v. Blanchard*, 495 F.2d 1329, 1332-33 (1st Cir. 1974). Therefore, we address herein whether the amendment was permissible.

[4] Title 8 GCA § 55.20 is substantially similar to and is derived from Rule 7(e) of the Federal Rules of Criminal Procedure. 8 GCA § 55.20 cmt.; Fed. R. Crim. P. 7(e). Accordingly, federal cases interpreting Rule 7(e) are persuasive authority in the interpretation of section 55.20. *See Amerault v. Intelcom Support Serv., Inc.*, 2004 Guam 23 ¶ 16.

a. No additional or different offense

[16] The People's application to amend the indictment did not, on its face, attempt to charge Diaz either with a new or additional offense. Both the original and the Amended Indictment refer to the offense of Official Misconduct pursuant to 9 GCA § 49.90(a) (2005), which provides:

> **§ 49.90. Official Misconduct; Defined and Punished.**
>
> A public servant commits a misdemeanor if, with intent to benefit himself or another person or to harm another person or to deprive another person of a benefit:
>
> (a) he commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized, or
>
> (b) he knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

The Amended Indictment contains no factual allegations that are new or different from the original indictment. An amendment to an indictment which alleges no new facts and cites no new statutory citation has been held not to charge an additional or different offense. *United States v. Stone*, 954 F.2d 1187, 1191 (6th Cir. 1992). Here, the same statute is referenced and the same facts are alleged in both indictments. We find that the change of "and" to "or" was of one word to track the language of the statute and does not rise to the level of charging an additional or different offense. Therefore, under the first prong of the two-part analysis of 8 GCA § 55.20, Diaz has not shown the trial court erred in allowing the amendment.

b. Absence of prejudice to the defendant

[17] Having determined that no additional or different offense was charged, we must next examine whether the amendment prejudiced Diaz. This analysis is necessary even where an amendment does not charge an additional or new offense, as this type of amendment to an

indictment may prejudice a defendant in "a substantial way." *Salas*, 2000 Guam 2 ¶ 13. The Third Circuit articulated the standard for concluding if a defendant is prejudiced as follows:

> The test as to whether the defendant is prejudiced by an amendment to an indictment has been said to be whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other.

United States v. Fawcett, 115 F.2d 764, 767 (3rd Cir. 1940). Diaz fails to allege prejudice which would satisfy the test as expressed in *Fawcett*, nor do we find any. The amendment did not eliminate any defense available to Diaz or make any evidence inapplicable. In the instant case we find, as the Supreme Court of South Dakota has held, that "[u]se of 'or' rather than 'and' left appellant neither less nor more certain of the charge against him; and use of 'and' would have given him no additional practical benefit in the preparation of his defense." *State v. Strauser*, 63 N.W.2d 345, 348 (S.D. 1954). Finding no prejudice under the standard set forth by the Third Circuit, we turn to the other arguments advanced by Diaz.

[18] Instead of asserting prejudice concerning the preparation of his defense, Diaz alleges the amendment allowed the jury to reach a non-unanimous decision and insufficiently protected him from double jeopardy in the future. Diaz relies on the general rule that pleading in the conjunctive is preferred where a statute specifies several means by which a crime can be committed. *Heflin v. United States*, 223 F.2d 371, 373 (5th Cir. 1955).

[19] Title 9 GCA § 49.90 does, in fact, specify alternative means by which a person may commit the offense of Official Misconduct, stating that a person may either "commit[] an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized" as set forth in subsection (a), or may "knowingly refrain[] from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his

office" as set forth in subsection (b). There are multiple uses of the disjunctives in the statute: (1) those contained in the introductory paragraph dealing with intent, "to benefit himself or another person or to harm another person or to deprive another person of a benefit"; and (2) another which separates the means by which the crime of official misconduct may be committed, "committing an act" or "refraining from performing a duty." Section 49.90 contains multiple intents: to benefit himself or another person,[5] to harm another person, and to deprive another person of a benefit. It also contains alternative methods of committing the crime of Official Misconduct by either committing an act, or knowingly refraining from performing a duty. The Amended Indictment pleads neither multiple intents nor multiple means of committing the act in the disjunctive.

[20] However, Diaz's reliance on the general rule against disjunctive pleading is misplaced. *United States ex rel. Bradley v. Hartigan*, 612 F. Supp. 795 (C.D. Ill. 1985), addressed the sufficiency of an information which alleged various mental states using the disjunctive "or." *Id.* The court found the information to be sufficient stating:

> Bradley additionally argues that the information was void because it uses the disjunctive conjunction "or," thereby making it uncertain whether he was charged with committing the act with the intent to satisfy the desires of the victim or the desires of himself. Bradley, however, was charged at trial with but one act of lewd fondling. The use of the disjunctive conjunction "or" in setting apart the differing mental states did not render the charge uncertain in the indictment.
>
> As the information charged only one physical act, the petitioner's conviction serves as a double jeopardy bar despite the disjunctive pleading of the mental state element.

Id. at 805; *see also United States v. Scott*, 884 F.2d 1163, 1166 (9th Cir. 1989) (finding an

[5] Diaz argues that the elements requiring that he acted to benefit himself and to benefit another person are two separate and distinct intents outlined in the statute. It is not obvious to this court that the statute created two separate intents. However, we need not address this issue because even if they were separate intents, the conjunctive is not required.

indictment to be sufficient which, like the statute, disjunctively charged a defendant with intending to extort money or some other thing of value because the indictment specified the act that constituted the violation and a single method of committing the offense). Nearly all of the Official Misconduct counts contained in the Amended Indictment allege one discrete act by Diaz, namely, the single use of the GMTA credit card issued in his name. Counts 1 and 2 allege specific charges made to the GMTA credit card, namely, the purchase of airline tickets in Count 1 and hotel accommodations in Count 2. Appellant's ER, pp. 45-46 (Amended Indictment). The use of the disjunctive "or" in Counts 1 and 2 did not render the counts uncertain as both allege the purchase of specific items on the GMTA credit card. Just as in *Bradley*, 612 F. Supp. 795, the use of the disjunctive conjunction "or" in setting apart the differing mental states did not render the charge uncertain in the indictment. Because the counts charge only one physical act, Diaz's conviction serves as a double jeopardy bar despite the disjunctive pleading of the mental state. Accordingly, Diaz suffered no prejudice by the amendment.

[21] Finding that Diaz was not prejudiced is consistent with the purpose behind the general rule against disjunctive pleading. "The most substantial reason against disjunctive pleading relates to statutes where the use of either or any of two or more accusatory words creates uncertainty as to which of two or more offenses created by the one statute, is charged, and conviction had in event of conviction." *Strauser*, 63 N.W.2d at 347. Accordingly, we hold that the amendment allowed by the trial court did not prejudice Diaz.

2. Essential Element

[22] Diaz argues the Amended Indictment omits an essential element of the crime of Official Misconduct, specifically, knowledge that the act committed was unauthorized, which therefore renders the charging document constitutionally defective. Although he asserts that the Amended

Indictment should be reviewed *de novo*, Diaz failed to object to the Amended Indictment for failure to charge an offense during the trial court proceedings. Although the Application to Amend the Indictment did not include a request to rephrase, the amendment nonetheless occurred before trial, and Diaz had an opportunity to object to the Amended Indictment prior to trial. *See Gov't of Canal Zone v. Burjan*, 596 F.2d 690, 693 (5th Cir. 1979) (finding the defendant had waived his objections to the amendment of the indictment by his failure to object prior to trial).

[23] Generally, failure to object to an indictment prior to trial results in waiver. Title 8 GCA § 65.15 (2005) states:

> **§ 65.15. Motions Which Must be Made Prior to Trial.**
>
> Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following shall be raised prior to trial:
>
> (a) Defenses and objections based on defects in the institution of the prosecution;
>
> (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);
>
> (c) Motions to suppress evidence;
>
> (d) Requests for discovery pursuant to Chapter 70 (commencing with § 70.10); or
>
> (e) Requests for a severance of charges or defendants pursuant to § 65.35.

As set forth above, there are two exceptions to the general rule: lack of jurisdiction and failure to plead essential elements are objections which may be raised at any time. 8 GCA § 65.15(b). Diaz asserts that the amendment to the indictment removed an essential element of the crime; he does not allege that the court lacked jurisdiction.

[24] We review objections raised for the first time on appeal for plain error. *People v. Chung*, 2004 Guam 2 ¶ 9. In order to reverse for plain error, the defendant must demonstrate (1) there was error; (2) the error was clear or obvious under current law; (3) the error affected the defendant's substantial rights. *Id.* Furthermore, our discretion will be employed only "when necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Demapan*, 2004 Guam 24 ¶ 5.

[25] The charge of Official Misconduct in the original indictment asserted that "Diaz did . . . commit an act relating to his office but constituting an unauthorized exercise of his official function" by charging an item on his GMTA credit card "with knowledge that such use of the credit card was unauthorized, in violation of 9 GCA § 49.90(a)." Appellant's ER, pp. 24-34 (Indictment). The Amended Indictment, however, phrased the Official Misconduct charges differently, and alleged that "Diaz did . . . *knowingly* commit an act relating to his office but constituting an unauthorized exercise of his official function" by charging an item on his GMTA credit card "in violation of 9 GCA § 49.90(a)." Appellant's ER, pp. 45-52 (Amended Indictment) (emphasis added).

[26] Diaz asserts that when the indictment was amended, the People removed an essential element from the Official Misconduct charges, by not including the phrase "with knowledge that such use of the credit card was unauthorized." Appellant's ER, pp. 45-52 (Amended Indictment). The Amended Indictment did not include this phrase, but instead charged that Diaz did "knowingly commit an act relating to his office but constituting an unauthorized exercise of his function." Appellant's ER, pp. 45-52 (Amended Indictment).

a. Error

[27] The indictment, as originally drafted, clearly charged Diaz with knowing that the use of his GMTA card was unauthorized. The Amended Indictment did not. We find that there was error in failing to track the language of the statute, which sets forth the element of knowledge.

[28] However, we do not find the error was plain. Indictments will be broadly construed in favor of the government following a verdict. *United States v. Laverick*, 348 F.2d 708, 714 (3d Cir. 1965). Furthermore, "[t]the indictment should be read in its entirety, construed according to common sense." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985). "When sufficiency of an indictment is challenged after trial, it is only required that 'the necessary facts appear in *any form* or *by fair construction* can be found within the terms of the indictment.'" *United States v. James*, 980 F.2d 1314, 1317 (9th Cir. 1992) (quoting *Kaneshiro v. United States*, 445 F.2d 1266, 1269 (9th Cir. 1971)).

[29] The Amended Indictment charged that "Diaz did . . . *knowingly* commit an act relating to his office but constituting an unauthorized exercise of his function" by purchasing various items, including airline tickets, hotel accommodations, and items from retail clothing stores, "by charging . . . to [the GMTA] credit card . . . issued in his name as Assistant General Manager of the [GMTA], in violation of 9 GCA § 49.90(a)." Appellant's ER, pp. 45-52 (Amended Indictment). All of the counts contained in the Official Misconduct alleged violations of 9 GCA § 49.90 (a). Examining the statute, there is only one knowledge requirement: "knowing that such act is unauthorized." 9 GCA § 49.90(a). The Amended Indictment includes the element of knowledge, but alleges that Diaz "did . . . knowingly commit . . . an unauthorized exercise of his official function." Appellant's ER, pp. 45-52 (Amended Indictment). The original indictment, in contrast, alleged that Diaz had used the credit card "with knowledge that such use . . . was to

personally benefit himself and others." Appellant's ER at 1-34 (Indictment). The amendment moved the element of knowledge to the beginning of the allegation; it did not eliminate the element completely. The element of knowledge has been defined as follows: "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." 9 GCA § 4.30(b) (2005) (emphasis added). The Third Circuit Court of Appeals has held an indictment that charged a defendant with "knowingly selling stolen bonds" sufficiently informed him that he was charged with knowledge that the bonds were stolen. *United States v. Clemmons*, 892 F.2d 1153, 1158-59 (3rd Cir. 1989). Therefore, construing the Amended Indictment broadly, we find that "knowingly" refers to the act and its attendant circumstances, which in the instant case includes knowing that the act was unauthorized. A common sense reading of the Amended Indictment would necessarily include the element that Diaz knew that such acts were unauthorized. Accordingly, we find that this error was not clear or obvious under current law.

b. Affecting substantial rights or avoiding miscarriage of justice

[30] Because we find that the error was not clear or obvious, we need not address whether the error affected Diaz's substantial rights, or whether correction is necessary to avoid a miscarriage of justice or to preserve the integrity of the judicial system. Furthermore, Diaz does not allege that he was prejudiced in any way. The reference to the statute also adequately informed Diaz of the necessary information to prepare his defense. *See James*, 980 F.2d at 1317-18.

[31] This court addressed the same issue in *People v. Jones*, 2006 Guam 13, where the appellant challenged the indictment against him, arguing that it failed to charge, as an essential element of Money Laundering, that he knew the proceeds were derived from a violation of the Guam Uniform Controlled Substances Act. *Id.* ¶ 13. We rejected Jones' argument, and held that

an objective reader could understand that the Money Laundering charge included the allegation that Jones knew the proceeds were from a violation of the Act. *Id.* ¶ 18. We further held that, reading the indictment in its entirety with all other charges, the indictment implied that Jones knew the proceeds were derived from a violation of the controlled substances act. *Id.* ¶ 19. We acknowledged that despite poor draftsmanship of the indictment, there was no plain error because Jones had been adequately informed of the nature of the offense charged and he did not claim that he had been prejudiced. *Id.* ¶¶ 20-21.

[32] Similarly here, a common sense reading of the entire Amended Indictment reveals that the language contained in the Amended Indictment does not rise to the level of plain error. Diaz did not allege that he had been prejudiced, and the Official Misconduct charges contained a specific reference to this statutory provision, giving fair notice to Diaz of the nature of the crime charged. *Id.* ¶ 20.

B. Sufficiency of the Evidence

[33] Diaz argues that there was insufficient evidence to support either of his convictions. When reviewing the sufficiency of the evidence, we must decide whether, from the evidence presented at trial, any rational trier of fact could have found the essential elements of each charge of conviction proven beyond a reasonable doubt. *People v. Maysho*, 2005 Guam 4 ¶ 14.

1. Theft Charges

[34] Diaz advances that there was insufficient evidence to support the convictions on the charges of Theft. The jury found him guilty of Count 2 of Theft of Property (As a 2nd Degree Felony) and Count 16 of Theft of Property (As a Misdemeanor). Appellant's ER, p. 54 (Judgment). Diaz argues that the People failed to provide evidence that he obtained U.S. currency belonging to GMTA with the intent to deprive GMTA on the date alleged in the

Amended Indictment. He focuses on the evidence which demonstrates when GMTA made payments on the account, asserting that there was no deprivation until GMTA paid for the personal charges he had made. We review the evidence to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Maysho*, 2005 Guam 4 ¶ 14.

[35] The jury convicted Diaz on two charges of Theft of Property, alleging that he "did unlawfully take, obtain, and exercise unlawful control" over a particular amount of U.S. currency belonging to GMTA with the intent of depriving GMTA. Appellant's ER, pp. 2, 7 (Indictment). Diaz argues that the evidence was insufficient to support the convictions because GMTA failed to provide evidence that they paid for these particular charges on or around the date on which he used the credit card.[6] Although Diaz frames his argument as a sufficiency issue, the argument is more correctly analyzed as a variance problem.

[36] Assuming Diaz is correct that the theft occurred at the time GMTA paid for the personal charges he made on the GMTA credit card, we address whether the evidence presented at trial resulted in an impermissible variance.[7] A variance has been defined "in criminal procedure, [as] a difference between the allegations in a charging instrument and the proof actually introduced at trial." Black's Law Dictionary (8th ed. 2004).

[6] In his opening brief, Diaz states that the payments made towards the balance on the credit card account were made for some of the charges on the statement but not all. He points to certain payments being counted towards certain charges. It is unclear from the record provided how he arrives at this calculation. It is entirely possible that GMTA only made payments in the amount of charges that had already been approved by GMTA. However, neither that process nor any evidence indicating credit towards only certain charges was presented or included in the appeal.

[7] If the time of the theft actually occurred when Diaz used the card in an unauthorized manner, then the indictment was completely sufficient and there was absolutely no variance involved. For purposes of this opinion, we assume, without deciding, the theft occurred at the time GMTA paid the bill.

[37] "A claim of fatal variance is treated as an attack on the sufficiency of the evidence." *United States v. Hewlett*, 453 F.3d 876, 879 (7th Cir. 2006); *see also United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986); *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001). The inquiry when reviewing the sufficiency of the evidence is "whether the evidence in the record could reasonably support a finding of guilt[] beyond a reasonable doubt." *Maysho*, 2005 Guam 4 ¶ 8 (quoting *People v. Guerrero*, 2003 Guam 18 ¶ 13).

[38] Diaz raises the variance argument for the first time on appeal; at no time during the duration of the trial did Diaz object to a variance in the evidence presented by the People. Usually "[t]he objection of variance not taken at the trial cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below." *Phoenix Sec. Co. v. Dittmar*, 224 F. 892, 896 (9th Cir. 1915) (quoting *Roberts v. Graham*, 6 Wall. 578). Nevertheless, 8 GCA § 130.50 (2005) provides:

> **§ 130.50. *De Minimis* Rule: *Plain Error* Rule.**
>
> (a) Any error, defect, irregularity or *variance* which does not affect substantial rights shall be disregarded.
>
> (b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

(Emphasis added.) "[W]hile generally this court will not address issues raised for the first time on appeal, it may exercise its discretion to do so . . . when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process. . . ." *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30 (quotation marks omitted). Therefore, because Diaz failed to object at trial, we review for plain error. *United States v. Barragan*, 263 F.3d 919, 925 (9th Cir. 2001) (citing

Fed. R. Crim. P. 52(b) which is substantially similar to 8 GCA § 130.50(b));[8] *United States v. Dennis*, 237 F.3d 1295, 1300 (11th Cir. 2001). Under the plain error standard, one must prove that there was error, that the error was clear or obvious under current law, and that the error affected the substantial rights of the defendant. *Chung*, 2004 Guam 2 ¶ 9. Furthermore, plain error "will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Perez*, 1999 Guam 2 ¶ 21.

[39] "Where the variance is not 'material' and does not affect the substantial rights' of the accused, the Court held there is no violation of the Fifth Amendment." *United States v. Cina*, 699 F.2d 853, 857 (7th Cir. 1983) (quoting *Berger v. United States*, 295 U.S. 78, 82 (1935). The Supreme Court has articulated the standard:

> The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Berger v. United States, 295 U.S. 78, 82 (1935) (quoting 28 U.S.C. § 391).

[40] We have held that where time is not an element of a crime, "[p]roof of any date before the return of the indictment and within the statute of limitations is sufficient." *People v. Atoigue*, DCA No. CR91-95A, 1992 WL 245628, at *7 (D. Guam App. Div., Sept. 11, 1992) (quoting *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986)); *People v. Campbell*, 2006 Guam 14 ¶ 17. The date of a theft has been held not to be an essential element of the crime. *Stewart v.*

[8] Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." As this rule is similar to 8 GCA § 130.50(b), cases interpreting Rule 52(b) are persuasive authority in the interpretation of section 55.20. *See Amerault*, 2004 Guam 23 ¶ 16.

United States, 395 F.2d 484, 488 (8th Cir. 1968); *State v. Hersch*, 445 N.W.2d 626, 634 (N.D. 1989); *see also People v. Sanchez*, 95 P.2d 169, 173 (Cal. Dist. Ct. App. 1939). The Amended Indictment clearly outlines the dates on which Diaz used the GMTA credit card for personal purchases, during a period of time from July 24, 2000 to October 4, 2000. GMTA paid the remaining balance on the credit card at issue by early February 2001.[9] Therefore, even assuming that the theft did not occur until GMTA paid off the card, the theft occurred no later than February 2001. Diaz was originally indicted on February 5, 2003. Clearly, even using the date of the offense proffered by Diaz, the crime occurred before the date of the indictment. Furthermore, the proof provided at trial also fell within the period of the statute of limitations. Title 8 GCA § 10.20 provides that prosecutions for theft as a felony must be commenced within three years following the commission of a crime. Section 10.30 gives the prosecution one year to institute proceedings for a non-felony. However, section 10.40 outlines an exception for public officers, which allows the prosecutors to begin criminal proceedings against a public officer "at any time while such public officer or employee continues in public office or employment or within three (3) years thereafter." 8 GCA § 10.40 (2005). Diaz's use of the credit card for personal charges began in July of 2000, with payments were made over time and the final payment made on February 7, 2001; thus, all events occurred before the grand jury indicted Diaz and within the three-year statute of limitations. This entire period falls within the acceptable range as outlined in *Atoigue*, which found variances acceptable where the proof

[9] It appears that GMTA attempted to pay off the remainder of the balance of the GMTA cards issued by Bank of Guam on January 25, 2001. However, the accounts were not completely paid off until February 7, 2001, when GMTA made a payment of $5.00 to the bank for the remaining charges on the account. Tr. pp. 141-46 (Jury Trial, Feb. 2, 2005).

produced at trial occurred both before the issuance of the indictment and within the period of statute of limitations.

[41] Furthermore, Diaz does not assert he was prejudiced in any way by the variance between the indictment and the proof presented at trial. We also fail to see how the variance affected his substantial rights. When time is not an essential element, "the variance between proof is irrelevant so long as the defendants were afforded adequate notice of the charges against them." *United States v. Laykin*, 886 F.2d 1534, 1543 (9th Cir. 1989). The Amended Indictment in the instant case clearly provided Diaz with adequate notice. Each charge contained the date, the amount of the personal charge, and the location at which the GMTA card was used. In fact, the allegations contained in the Amended Indictment provided Diaz more notice, as compared to the notice provided through the indictment which alleged the date of the theft as the day on which GMTA paid the charges. There is no evidence that Diaz was surprised by the evidence at trial or inadequately protected against being placed in jeopardy again for the same offense.

[42] Accordingly, Diaz's argument with regard to the sufficiency of the evidence on the theft charges is without merit. Assuming that no theft occurred until the credit card was paid by GMTA, the result is a permissible variance. There was no error. For the foregoing reasons, we affirm convictions on the Theft of Property charges.

2. Official Misconduct Charges

[43] Diaz asserts that, as a matter of law, he is not guilty of Official Misconduct due to the Government's alleged failure to prove that he knew that the use of the credit card was unauthorized. This argument is actually two-fold.

[44] First, Diaz argues that the testimony of Rodney Priest, a former member of the board of GMTA, consisted of inadmissible hearsay. Appellant's Brief, p. 12 (Oct. 26, 2005). Diaz

objected at the time that Priest's testimony was offered during the trial. After considering the objection, the court allowed Priest to testify regarding the content of the board meetings. The admission of Priest's testimony, as it was an evidentiary ruling, will be reviewed for an abuse of discretion. *People v. Hall*, 2004 Guam 12 ¶ 34.

[45] Diaz next raises a sufficiency of the evidence issue. Without the alleged inadmissible testimony, he argues that the People did not provide any evidence to establish that his use of the credit card was unauthorized. As discussed above, "[t]here is sufficient evidence to support a conviction if viewing the evidence 'in the light most favorable to the prosecution . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Maysho*, 2005 Guam 4 ¶ 8 (quoting *People v. Guerrero*, 2003 Guam 18 ¶ 13). We address the sufficiency argument first.

a. Sufficiency of the evidence

[46] Diaz argues that testimony of Priest was inadmissible, and that without his testimony, there was insufficient evidence that the use of the credit card was unauthorized and that Diaz knew that the use was unauthorized. Diaz, however, overlooks evidence which could tend to prove both of these elements.

[47] At trial, testimony was presented regarding both the fact that the personal charges were not authorized and the fact that Diaz knew that personal charges were unauthorized. First, there is the testimony of Myra Abaya, former personnel officer at GMTA. She testified about the procedure one would go through in order to have a trip authorized and paid for by GMTA. In addition, Abaya provided testimony with regard to the procedure for acquiring both a travel authorization and a per diem allowance while on an authorized trip. The People also presented the testimony of Emiline Pereira, former GMTA Board secretary, who testified that the scope of

the authorization for use of the credit card was limited to charges made "on behalf of the authority." Transcript ("Tr."), pp. 67-68 (Jury Trial, Feb.2, 2005). Jane Flores, former GMTA Accountant, also testified that there was a procedure for justifying additional charges made, those which exceeded the per diem allowance; one may be reimbursed by the Government of Guam should the additional charges be justified. Furthermore, the People presented evidence that Diaz signed a paper certifying these personal charges made on the GMTA credit card. Flores testified that although her normal duties included writing checks to make payments on the Bank of Guam credit accounts, the checks which were issued by the agency to the bank to pay for the personal charges made on the card were not signed by her and were instead signed by someone else. She testified that she stopped issuing checks for payment of the credit card to the Bank of Guam in November of 2000 because she "was very uncomfortable . . . to cut a check for charges that [she] knew were not relevant to government activity." Tr., pp. 136-38 (Jury Trial, Feb.2, 2005). The People presented evidence which showed that Diaz and GMTA Director Martinez signed the final three checks written to the Bank of Guam for the remaining balance on the credit card. In addition, there is evidence that Diaz never made a single payment on any of the personal charges for about a year. Finally, there is ample evidence in the record that Diaz may have been motivated to make payments on the personal charges by an impending public scandal.

[48] When viewed in a light most favorable to the government, the evidence is more than sufficient. It is clear that a rational trier of fact could find beyond a reasonable doubt that the charges were unauthorized and that Diaz knew so at the time he made them.

b. Admissibility of testimony

[49] Diaz argues that the testimony offered by Priest was inadmissible hearsay. However, as we find that there was sufficient evidence that Diaz knew the charges were unauthorized, even in the absence of Priest's testimony, we need not address the hearsay issue.

C. Punishment

[50] Diaz raises a number of issues with regard to the punishment he received. Diaz asserts that the Official Misconduct charges were more accurately a continuing course of conduct rather than twenty-three separate violations. He also contends that the Theft of Property charges merge into the Official Misconduct. Finally, he argues that the sentence imposed on him by the trial judge punished him for exercising his right to proceed to trial. We address each issue separately.

1. Single count or continuing course of conduct

[51] Whether or not the twenty-three counts of Official Misconduct should have been charged as a single count, rather than separately is raised for the first time on appeal. As stated above, only certain objections to an indictment may be made for the first time on appeal. Those are the limited exceptions, such as when there is an objection to jurisdiction or an assertion that the indictment failed to allege a crime. 8 GCA § 65.15(b). Failure to comply with the timeliness requirements set forth in section 65.15 generally results in a waiver of those objections, unless the defendant can show good cause. 8 GCA § 65.45 (2005); *People v. White*, 2005 Guam 20 ¶ 14. Diaz has not made a showing of good cause in the instant case. This court has held "that failure to raise objections to defects in the indictment or institution of the prosecution in a timely fashion, without good cause, precludes appellate review." *White*, 2005 Guam 20 ¶ 16.

[52] There is a separate statutory provision which allows this court to review a conviction on multiple counts. Title 9 GCA § 1.22 (e) (2005) states:

> **§ 1.22. Prosecution for Conduct Which Constitutes More Than One Offense.**
>
> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> . . .
>
> (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 1.22 is modeled and based upon the Model Penal Code § 1.07 (1). 9 GCA § 1.22 cmt. The Compiler's Comment to this section goes on to state that "this [s]ection cannot be used as a basis to strike counts of indictments or information before trial and conviction." *Id.* When analyzing whether 9 GCA § 1.22(e) applies, this court must look to the statute. *San Nicolas*, 2001 Guam 4 ¶ 24. Issues of statutory interpretation are reviewed *de novo*. *People v. Gutierrez*, 2005 Guam 19 ¶ 13.

[53] All of the counts contained in the charge of Official Misconduct are alleged violations of 9 GCA § 49.90 (a). The test is whether the statute prohibits individual acts, or instead, prohibits the course of action which they constitute. *San Nicolas*, 2001 Guam 4 ¶ 24. "If the statute prohibits continuous conduct, only one offense is committed even though the course of conduct persists over a long period of time." *United States v. Johnson*, 612 F.2d 843, 845 (4th Cir. 1979). In *Johnson*, court also cited several examples of both continuous conduct crimes, such as violations of Fair Labor Standards Act and illegal cohabitation, and single act crimes, such as drug sales and multiple mailings in violation of the Mail Fraud Act. *Id.* When examining the statute, the legislative intent appears to attempt to punish a public servant whenever he or she commits "an act" which is unauthorized and which he or she knows is unauthorized. Diaz argues that the real issue at hand is the use of the credit card, and not each individual act. We

disagree. As the People point out, the unauthorized acts occurred over a period of months and the acts were committed before, during, and after Diaz's trip to California.

[54] After analyzing the language of the statute, the clear intent of the statute is to punish a public servant for each individual act of Official Misconduct.

2. Merger

[55] Whether one offense merges with another is a question of statutory interpretation. *Cedar*, 437 F.2d at 1036. Issues of statutory interpretation are reviewed *de novo*. *Gutierrez*, 2005 Guam 19 ¶ 13. Diaz argues that the offense of Theft of Property should merge into the offense of Official Misconduct. In support of his argument, he cites to 9 GCA § 1.22 (d) (2005), which states:

> **§ 1.22. Prosecution for Conduct Which Constitutes More Than One Offense.**
>
> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> . . .
>
> (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

Section 1.22(d) seems completely inapplicable here, despite Diaz's assertion. The Theft of Property statute undisputably "prohibit[s] a specific instance" of conduct. Diaz argues that merger is proper because section 1.22(d) may be interpreted to mean that the Official Misconduct statute is "defined to prohibit" Theft of Property offenses in general. The Official Misconduct statute and the Theft of Property statute, however, do not have any relationship that appears obvious on their face. Either offense may be committed independently of the other. Moreover, these statutes do not fit into the general/specific category which Diaz suggests.

[56] Diaz cites one case in support of his position that the Theft of Property charges should merge into the Official Misconduct charges, relying on *State v. Malone*, 635 A.2d 596 (N.J. Super. A.D. 1993). *Malone* deals mainly with a well-recognized example of when merger of offenses is proper, and that an inchoate crime should merge with the substantive crime if one is convicted of both. *Id.* Diaz cites no other authority for his argument that the two offenses should merge.

[57] On the other hand, the Ninth Circuit has held that "offenses merge only when proof of the elements of one necessarily establishes all of the elements" of the other offense. *Cedar*, 437 F.2d at 1036; *see also State v. Freeman*, 774 P.2d 888 (Haw. 1989) (holding that charges of theft did not merge with charges of fraudulent use of a credit card). In *Cedar*, the defendant was convicted of "steal[ing], purloin[ing] and knowingly convert[ing] to his own use" government property, as well as the separate crime of cutting and destroying trees on government property. *Cedar*, 437 F.2d at 134. The Ninth Circuit found that there was no merger because "the elements of the two offenses differ markedly, each requiring proof that the other does not." *Cedar*, 437 F.2d at 1036. "Merger does not result simply because the same evidence is offered to prove both offenses." *Id.* at 1036 n.3 (citing *Harris v. United States*, 359 U.S. 19, 23 (1959).

[58] The elements of the Theft of Property charge are completely different from the elements of the Official Misconduct charge. Under 9 GCA § 43.30(a) (2005), "[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." (Emphasis added.) Title 9 GCA § 49.90(a) provides in relevant part that "[a] public servant commits a misdemeanor if, with intent to benefit himself or another person . . . he commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized." As the Ninth Circuit

recognized in *Cedar*, certain factors that "point to a construction of the two statutes as creating separately punishable offenses," such as the lack of "language, history, or purpose to suggest that they were merely variant formulations of the same wrong designed to afford prosecutors alternative approaches or to reach different classes of offenders." *Cedar*, 437 F.2d at 1036. The Official Misconduct and Theft of Property offenses do not even contain a single common element. Diaz has not shown that these crimes are different formulations to reach similar conduct. We hold, therefore, that the charge of Theft of Property does not merge into the charge of Official Misconduct.

3. Sentence

[59] We review the trial court's imposition of a sentence for abuse of discretion. *Chiguina*, 2003 Guam 11 ¶ 12.[10] Diaz contends that the trial court punished him for exercising his constitutional right to a trial. In support of his claim, Diaz directs this court's attention to three Superior Court cases in which the defendants received significantly shorter sentences: *People v. Martinez*, Criminal Case No. CF0107-03, *People v. Robles*, Criminal Case No. CF0355-03, and *People v. Millard*, Criminal Case No. CF431-03. The three defendants in the aforementioned cases were sentenced by the same Superior Court judge who sentenced Diaz, and Diaz argues that he and the defendants were similarly situated, with the fundamental difference being that while three defendants pleaded guilty, Diaz exercised his right to trial. Diaz requests this court take judicial notice of the three pertinent cases. Appellant's Brief, p. 22 n.7. Although he

[10] Diaz failed to object to his sentence during the sentencing hearing. This court has not yet addressed whether or not a failure to object to a sentence changes the standard of review on appeal. We find it unnecessary to decide this issue because the judge's imposition of the instant sentence does not even amount to an abuse of discretion, the most deferential standard of review.

requests taking judicial notice of the cases in general, we recognize that Diaz focuses upon the sentences imposed on each of the defendants in these other cases.

[60] Rule 201 of the Guam Rules of Evidence[11] governs the admission of evidence through judicial notice of adjudicative facts. Rule 201 delineates two categories of facts which may be properly admitted through judicial notice and outlines when judicial notice is discretionary and when it is mandatory.

[61] We must first determine whether or not the kinds of facts Diaz would like this court to take judicial notice of are appropriate under Rule 201. The length of the sentences imposed and the circumstances surrounding each of the crimes involved are not facts which could be considered "generally known within the territorial jurisdiction." Guam R. of Evid. 201(b)(1). The sentences imposed in those cases, however, may be found by looking at the court records and thus, are facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b)(2). This court has held that "[i]t is proper to take judicial notice of court files but that a court may only take judicial "notice of *the truth of facts* in certain documents, including past court orders, findings of fact and conclusions of law, and judgments. *In re N.A.*, 2001 Guam 7 ¶ 58. Accordingly, the sentences imposed upon

[11] Rule 201, based on Federal Rules of Evidence 201, reads in relevant part:

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS.

(a) **Scope of Rule.** This Rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory**. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Guam R. Evid. 201.

each of the defendants, which are contained within the Superior Court case files referred to by Diaz, are facts which this court may notice as to their truth and existence.

[62] We now must decide whether it is mandatory or discretionary to take judicial notice of the sentences imposed in the other cases. Subsections (c) and (d) of Rule 201 of the Guam Rules of Evidence outline the circumstances where judicial notice is mandatory or within the discretion of the court. Subsection (d) mandates that a court "*shall* take judicial notice if requested by a party and supplied with the necessary information." Guam R. of Evid. 201(d) (emphasis added). Rule 201 does not define "necessary information." The vast majority of courts have held that the necessary information provision in Rule 201(d) commands that the court be provided with copies of the source of the facts in order for the court to be required to take judicial notice. *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 210 (Tex. App. 1995); *Salinero v. Pon*, 177 Cal. Rptr. 204, 210-11 (App. 1981); *Surgitek, Inc. v. Adams*, 955 S.W.2d 884, 889 n.4 (Tex. App. 1997). In interpreting its equivalent to Rule 201 (which is identical to Guam's rule), the Wyoming Supreme Court set forth the following test for an appellate court:

> [W]e now establish two requirements for judicial notice of prior court proceedings in order to insure a proper record for appellate review. First, written notice must be given to the trial court so that it is clear what matters the trial court had the opportunity to consider; and second, judicially noticed documents must be physically included as part of the record filed on appeal, or must be on file at the Supreme Court as the result of a different proceeding.

Cockreham v. Wyo. Prod. Credit Ass'n, 743 P.2d 869, 872-73 (Wyo. 1987).

[63] Although Diaz provided this court with the names of the defendants and the Superior Court case numbers for the relevant cases, he failed to supply any court documents. He did not attach copies, certified or otherwise, of the judgments in those cases. Furthermore, Diaz neglected to direct this court's attention to any particular facts within the file. Diaz failed to

provide this court with the necessary information required by Rule 201(d); therefore, taking judicial notice of the sentences imposed in the other cases is not mandatory.

[64] Pursuant to Rule 201(c), however, this court may still exercise its discretion to take judicial notice of the lengths of the sentence imposed. Diaz argues that he received a longer sentence because he exercised his right to trial. The Supreme Court of Connecticut has held that inquiries such as these should be based on the totality of the circumstances and that the burden of proof lies with the defendant. *State v. Kelly*, 770 A.2d 908, 947 (Conn. 2001); *see also State v. Candito*, 493 A.2d 250 (Conn. App. Ct. 1985). Although the rule articulated above concerns the proof of claim rather than the court's discretion to take judicial notice, it informs our decision nonetheless. Diaz failed to provide this court with information which would demonstrate that the individual defendants in the relevant Superior Court cases are indeed similarly situated; Diaz did not indicate the statutory provisions to which the defendants pled guilty or under which the defendants were convicted. Furthermore, as previously noted, Diaz's request that this court take judicial notice of the files fails to direct this court's attention to the particular documents contained in the Superior Court case files.

[65] Rule 201 does not expressly prohibit taking judicial notice of another court's records, yet neither does the rule expressly allow it. *Cf.* Cal. Evid. Code § 452(d) (West, Westlaw through chap. 1 of 2007 Reg. Sess. urgency legislation) ("Judicial notice may be taken of . . . [r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.").

[66] We have never articulated the standard for determining when we may take judicial notice of matters that were not presented to the trial court. Courts generally have been reluctant to take judicial notice of proceedings in other cases and in other courts. "An appellate court cannot take

judicial notice of records in other courts." *Manley v. Brown*, 989 P.2d 448, 458 n.45 (Okla. 1999); *see also M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it."). In fact, *In re N.A.*, 2001 Guam 7 ¶ 58-59, we stated that it may be inappropriate to take judicial notice of entire case files, proposing instead that a court may only take judicial notice of the truth of facts contained in certain documents. Our holding in *In re N.A.*, however, does not appear to warrant such a narrow interpretation that limits judicial notice to only the trial court record of the proceeding before the court. *Cf. Occidental Permian Ltd. v. Railroad Comm'n of Texas*, 47 S.W.3d 801, 811 (Tex. Ct. App. 2001) (stating that a prior case interpreting Rule 201 "does not compel a court to take judicial notice of an agency order in a case other than the one then on appeal before the court."). There is no clear consensus on this issue, and other courts have declined to apply such a narrow interpretation.[12] Based on the

[12] These courts choose to examine the circumstances of the case to determine whether to exercise its discretion to take judicial notice. "Although courts do not ordinarily notice judicially the record and facts in one action in deciding another and different one, they can and should do so when justice requires. And there may be cases so closely interwoven, or so clearly interdependent as to invoke a rule of judicial notice in one suit of the proceedings in another suit." *C.A.W. v. Weston*, 58 S.W.3d 909, 914 (Mo. Ct. App. 2001) (citations and quotation marks omitted); *Sapp v. Wong*, 654 P.2d 883, 886 n.3 (Haw. App. 1982) ("Courts have generally recognized that they may, in appropriate circumstances, take notice of proceedings in other courts, both within and without their judicial system if those proceedings have a direct relation to the matter at issue.").

Other courts have broadly interpreted taking judicial notice of other proceedings. The Connecticut Supreme Court has liberally interpreted its rule, stating: "There is no question concerning the trial court's power to take judicial notice of a file in a proper case in the same court, whether or not between the same parties. We also may take judicial notice of files of the Superior Court in the same or other cases." *State v. Lenihan*, 200 A.2d 476, 478 (Conn. 1964) (citations omitted). Other courts have allowed taking judicial notice. *Kirshner v. Shinaberry*, 582 N.E.2d 22, 24 (Ohio Ct. App. 1989) (stating that "a court may take judicial notice of a court's finding in another case"); *May Dep't Stores Co. v. Teamsters Union Local No. 743*, 355 N.E.2d 7, 9 (Ill. 1976) (stating that where the party had appended letters of determination from the National Labor Relations Board to its appellate brief, then "the contents of these letters [are] matters which may be judicially noticed. In an instance such as this no sound reason exists to deny judicial notice of public documents which are included in the records of other courts and administrative tribunals.").

record before this court, we decline to exercise our discretion to review the case files in their entirety.

[67] Moreover, even if this court chose to exercise its discretion to take judicial notice of the sentences in the other cases or of the disparity in the sentences based on particular documents contained in the Superior Court case files, the outcome in the instant case would not be affected. "There is no constitutional requirement that identical punishment be meted out for like crimes." *Jackson v. United States*, 338 F. Supp. 7, 15-16 (D.C.N.J. 1971) (citing *Williams v. Okla.*, 358 U.S. 576 (1959)). "Mere disparity in sentences is insufficient to show that the sentencing court penalized [defendants] for going to trial." *United States v. Frost*, 914 F.2d 756, 774 (6th Cir. 1990). Assuming that the case files cited by Diaz would demonstrate disparity, that alone is not enough. "Disparate sentences between those of equal culpability, for instance when one defendant plea bargains for a lesser punishment while the other goes to trial, are not per se indicative that the harsher sentence is an impermissible punishment for exercising the right to trial." *City of Daytona Beach v. Del Percio*, 476 So.2d 197, 205-06 (Fla. 1985). "It is axiomatic that the imposition of sentences within the statutory limits lies almost entirely within the discretion of the trial judge." *United States v. Stull*, 743 F.2d 439, 448 (6th Cir. 1984); *see also United States v. Endicott*, 803 F.2d 506, 510 (9th Cir. 1986) ("It is within the discretion of the trial court to impose disparate sentences upon codefendants.").

[68] The court was not required to take the other defendants' sentences into consideration when sentencing Diaz. In addition, the trial court articulated numerous reasons for imposing the sentence against Diaz. The transcript of the sentencing hearing is replete with information regarding the factors the trial judge considered in sentencing Diaz. The court laid out numerous aggravating factors during the hearing, which included the seriousness of the offenses, the abuse

of a position of trust, the vulnerability of the victim, the harm caused, and the court's perception that Diaz failed to accept responsibility for his actions. Here, Diaz points to nothing more than the disparity to support his argument that he was punished for asserting his right to go to trial. Diaz fails to point to any evidence, nor do we find any, that the trial court was motivated by any other factor than the crimes for which Diaz had been found guilty.

[69] Therefore, we affirm the imposition of the sentence as determined by the trial court.

V.

[70] We hold that the trial court did not err in requiring the prosecution to use or elect the conjunctive in the Official Misconduct charge. Furthermore, we find that the Official Misconduct charges, as contained in the Amended Indictment, are sufficient. We hold that there was sufficient evidence to sustain the convictions of Theft of Property. Even if the trial court committed error by admitting the testimony of witness Rodney Priest, we find that there was sufficient evidence to sustain the convictions for Official Misconduct. We find that the crime of Official Misconduct is not a crime of a continuing course of conduct, and hold that Diaz was properly convicted of twenty-three (23) counts. In addition, we hold that the charge of Theft of Property does not merge into the charge of Official Misconduct. Finally, we hold that the trial court did not abuse its discretion in sentencing Diaz. Accordingly, we **AFFIRM**.