IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

DOYLE LAMONT PERRY,
Defendant-Appellant.

AMENDED OPINION

Cite as: 2009 Guam 4

Supreme Court Case No.: CRA07-006
Superior Court Case No.: CF0230-06

Appeal from the Superior Court of Guam
Argued and submitted, May 13, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] This court issued an earlier opinion in *People v. Perry*, 2008 Guam 24. The opinion did not consider the vast majority of the transcripts, which were ordered by the defendant's attorney but never delivered to this court. On rehearing, we determined that this court should have considered the transcripts, which were part of the record, in rendering our opinion. As a result, we now issue this Amended Opinion to supersede our earlier opinion in *People v. Perry*, 2008 Guam 24.

[2] Plaintiff-Appellant Doyle Lamont Perry appeals from convictions of assault, terrorizing, and multiple counts of criminal sexual conduct in various degrees. He argues that the court committed error in its final jury instructions in reciting the allegations of the indictment, on one hand, and instructing that the government needed to prove at least one act for each charge, on the other hand. Perry concludes that the effect of the jury instructions was failure to clearly instruct that all essential elements of the crime must be proven beyond a reasonable doubt. Although we agree that the jury instructions were flawed, the error did not amount to plain error and the verdict must be affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Perry was indicted on six charges: (1) three counts of First Degree Criminal Sexual Conduct ("CSC"); (2) three counts of Second Degree CSC; (3) three counts of Third Degree CSC; (4) Assault with Intent to Commit CSC; (5) Aggravated Assault, and (6) Terrorizing.[1] For

[1] 9 GCA §§ 25.15(a)(6) and (b) (2005) (1st degree CSC); 9 GCA §§ 25.20(a)(6) and (b) (2005) (2d degree CSC); 9 GCA §§ 25.25(a)(2) and (b) (2005) (3d degree CSC); 9 GCA § 25.35 (2005) (assault with intent to commit CSC); 9 GCA §§ 19.20(a)(1) and (b) (2005) (aggravated assault); 9 GCA §§ 19.60(a) and (b) (2005) (terrorizing).

each CSC charged, the first count alleged vaginal contact or penetration, the second count alleged rectal contact or penetration, and the third count alleged oral contact or penetration. At trial, the jury returned verdicts of guilty on all charges and counts.

[4] The trial court instructed the jury as to the essential elements of each charge and count. Because the instructions are nearly identical, a representative instruction from the transcript suffices to demonstrate the trial court's method. For example, as to the first count of First Degree CSC, the court instructed the jury:

> Ladies and gentlemen, now the essential elements of First Degree Criminal Sexual Conduct, as a First Degree Felony, Count One, okay.
>
> It is alleged here that on or about May 27, 2006, in Guam, Defendant, Doyle Lamont Perry, did intentionally engage in sexual penetration with another, to wit, Defendant caused his penis to enter the vaginal area of Su Young Thompkins, and used force and coercion to accomplish the sexual penetration, causing personal injury to Su Young Thompkins.

Appellant's Excerpts of Record ("ER") at 48 (Amended Transcript, Feb. 1, 2008). The jury also took a written version of this jury instruction into the deliberation room. The written jury instructions more clearly enumerated the individual elements for the crimes, for example:

JURY INSTRUCTION NO. 7A
ESSENTIAL ELEMENTS OF
FIRST DEGREE CRIMINAL SEXUAL CONDUCT
(As a First Degree Felony)
(Count 1)

1. ON OR ABOUT MAY 27, 2006;
2. IN GUAM
3. DEFENDANT, DOYLE LAMONT PERRY,
4. DID INTENTIONALLY ENGAGE IN SEXUAL PENETRATION WITH ANOTHER, TO WIT: DEFENDANT CAUSED HIS PENIS TO ENTER THE VAGINAL AREA OF SU YOUNG TOMPKINS,
5. AND USED FORCE AND COERCION TO ACCOMPLISH THE SEXUAL PENETRATION
6. CAUSING PERSONAL INJURY TO SU YOUNG TOMPKINS.

Supplemental Excerpts of Record ("SER") at 63 (Jury Instruction No. 7A, Mar. 13, 2008). Just before reciting the elements of the second count of first degree CSC, the court also made the following comment: "keep in mind, with these essential elements it goes without saying that the Government must meet the burden of proof beyond a reasonable doubt that the defendant . . . ." ER at 34 (Transcript, Apr. 23, 2007). Nowhere, however, was the jury instructed that it must find that each and every element of the crime was proven beyond a reasonable doubt.

[5] Perry requested a unanimity instruction, which was given as follows:

> The defendant is charged with FIRST DEGREE CRIMINAL SEXUAL CONDUCT (as a 1st Degree Felony) (3 counts); SECOND DEGREE CRIMINAL SEXUAL CONDUCT (as a 1st Degree Felony) (3 Counts); THIRD DEGREE CRIMINAL SEXUAL CONDUCT (as a 2nd Degree Felony) (3 Counts); ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT (as a 3rd Degree Felony); AGGRAVATED ASSAULT (as a 2nd Degree Felony); and TERRORIZING (as a 3rd Degree Felony) sometime during the period of May 27, 2006.
>
> The People have presented evidence of more than one act to prove that the defendant committed each offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the acts for each charge and you all agree on which act he committed for each charge.

Id. at 45. No objection was made to the unanimity instruction at trial.

[6] Finally, the court gave an instruction on the sufficiency of the circumstantial evidence:

> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be . . . proven beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Id. at 19; *accord* SER at 29 (Jury Instruction No. 3I).

[7] Judgment was entered on November 14, 2007 and Perry timely filed a notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

[8] This court has jurisdiction over this appeal from a final judgment of conviction pursuant to 48 U.S.C. § 1424-1(a)(2) (2007); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

[9] Because no objection to the jury instructions was made at trial, the plain error standard of review applies and the defendant has the burden of showing "(1) that there has been a violation of a legal rule, not waived by [the defendant], during court proceedings; (2) the error must be plain in that it is 'clear' or 'obvious' under current law; and (3) the plain error must have affected [defendant's] substantial rights." *People v. Van Bui*, 2008 Guam 8 ¶ 10. Once a defendant has shown that there was a clear error affecting the defendant's substantial rights, this court may, within its sound discretion, find that plain error has occurred. *United States v. Olano*, 507 U.S. 725, 732 (1993). However, "[s]uch error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Campbell*, 2006 Guam 14 ¶ 34 (quoting *People v. Perez*, 1999 Guam 2 ¶ 21).

III. DISCUSSION

A. The Constitutional Requirement that Each and Every Element be Proved

[10] Under Guam law, "[n]o person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." 8 GCA § 90.21(a) (2005). Section 90.21 was first adopted by the Guam Legislature in 1977. *See* Guam Crim. Proc. Code § 90.21(a) (1977). The language is nearly identical to section 1.12 of the Model Penal Code, although the Model Code contains the additional sentence: "In the absence of such proof, the innocence of the defendant is assumed." Model Penal Code § 1.12 (1985). According to the explanatory note to the Model Penal Code:

> [Section 1.12's] basic premise . . . is that the state must establish every element of the offense . . . beyond a reasonable doubt. *This requirement is now constitutionally mandated*, though the [United States] Supreme Court's definition of "element," which is still evolving, appears to be substantially narrower than that of the [Model Penal] Code.

Id., EXPLANATORY NOTE (emphasis added).

[11] Indeed, the United States Supreme Court has used language substantially similar to section 1.12 of the Model Penal Code in the context of a defendant's due process rights under the federal constitution:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction *except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.*

In re Winship, 397 U.S. 358, 364 (1970) (emphasis added); *accord United States v. Booker*, 543 U.S. 220, 230 (2005). The Due Process Clause of both the Fifth and Fourteenth Amendments to the United States Constitution apply equally to Guam defendants by virtue of the Organic Act. 48 U.S.C. § 1421b(u) (Westlaw 2008).[2] We are therefore required to interpret 8 GCA § 90.21(a) in such a way as to provide defendants with at least the minimum due process they would enjoy under the federal constitution. *See People v. Guerrero*, 290 F.3d 2010, 1217 (9th Cir. 2002) ("Not even a sovereign [s]tate may interpret a federal statute or constitutional provision in a way contrary to the interpretation given it by the U.S. Supreme Court."); *People v. Root*, 2005 Guam 16 ¶ 13 (relying on United States Supreme Court precedent for the proposition that a jury must determine that the defendant is guilty of every element of the crime with which a defendant is charged).

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[2] *See also id.* § 1421b(e) ("No person shall be deprived of life, liberty, or property without due process of law."); *People v. Angoco*, 2006 Guam 18 ¶ 1 n.2; *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992).

[12] The Court has made clear that due process requires the jury to use the correct standard of proof. "The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993) (citations omitted). Thus, in a jury trial, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). Although it is clear that a jury must determine guilt of every element of a crime beyond a reasonable doubt, *id.*, the Court has not reached the question of whether that instruction need be given explicitly, or whether the instructions "considered and reviewed as a whole" can convey the required standard of proof implicitly. *People v. Jones*, 2006, Guam 13 ¶ 28.

[13] Federal case law offers little guidance in answering this question, possibly because the federal courts typically give an each-and-every-element instruction as a matter of course. *See* 1A Fed. Jury Prac. & Instr. § 10:01 (5th ed.) ("The burden or obligation, as you will be told many times during the course of this trial, is always on the government to prove each and every element of the offense[s] charged beyond reasonable doubt."). However, the Eighth Circuit did consider a somewhat analogous situation in *United States v. Ali*, 63 F.3d 710 (8th Cir. 1995). There, the trial court neglected to instruct the jury "that the government had to prove each and every element beyond a reasonable doubt." *Id.* at 714. However, the court did provide the instruction during deliberation after receiving an unrelated question from a juror. *Id.* In dicta, the court declared that had the each-and-every-element instruction not been given, the result would have been clear error under the plain error test. *Id.* at 715. Nevertheless, because the instruction was eventually given, the court determined that no plain error had occurred. *Id.*

[14] For further guidance, we look to state due process requirements, mindful that some state courts may give greater due process rights to defendants under state constitutional law than required under the federal constitution. As the Supreme Court of Utah observed:

> This court, not the United States Supreme Court, has the authority and obligation to interpret Utah's constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language. Furthermore, it is part of the inherent logic of federalism that state law be interpreted independently and prior to consideration of federal questions. This is so because the State cannot, conceptually, deny rights guaranteed by the federal constitution if the state action complained of is unlawful as a matter of state law. Thus, if state statutes, rules, or constitutional principles preclude the state action in question, there is no need to assess the federal constitutionality of that action. . . . We have, however, historically relied on other approaches, usually because of the way in which such issues have been framed by the parties . . . .
>
> . . . .
>
> The federal law on this question will serve only as a contingent rule in Utah until this court has settled the primary question of state law, and all parties, including the State, are well-advised to assist this court in its obligations to interpret that law.

State v. Teidemann, 2007 UT 49, ¶¶ 33, 38, 162 P.3d 1106 (citations omitted). Even so, federal "[c]onstitutional law is not the exclusive province of the federal courts . . . ." *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994). To the extent that states court interpretations of constitutional issues are dominated by "[f]ederal constitutional discourse and vocabulary," *Teidemann*, 2007 UT 49, ¶ 34, and purport to rely on federal constitutional law, they are helpful in filling in the gaps in existing United States Supreme Court precedent. *See id.* ¶¶ 42-43 (relying on both state and federal interpretations of due process in determining when dismissal is required after evidence is destroyed). We do not reach the issue of whether this court may interpret 8 GCA 90.21(a) to give greater due process right to defendants than they would enjoy under the federal constitution. Instead, we conclude that the instructions given in the present case do not meet even the

minimum requirements to the federal Due Process Clause as incorporated in Guam by the Organic Act.

[15] We begin by examining the two substantive cases cited by the People, *City of Billings v. Briner* and *Duke v. State*. In *City of Billings v. Briner* a defendant was convicted of driving fifty miles per hour where the posted speed limit was twenty-five miles per hour. 744 P.2d 877, 878 (Mont. 1987). In its jury instructions, the trial court simply defined the reasonable doubt standard and described the violation of speeding based on the wording of the relevant statute. *Id.* The defendant argued that he was not given an instruction that the jury was required to prove each and every element of the offense. *Id.* The Montana Supreme Court responded simply that "[t]aken together[, the] instruction[s] properly apprise[] the jury of the prosecutor's burden and the elements of the offense of speeding." *Id.* The conviction was affirmed. *Id.* at 879.

[16] We find the holding of *City of Billings* to be less than persuasive for a number of reasons. First, ordinance violations may not trigger the same full spectrum of procedural rights as a felony conviction. *See, e.g.*, 8 GCA § 130.10 (2005) (no right of appeal for violations). Second, in Montana, Sixth Amendment protections may not apply at all to such a relatively minor violation of the traffic laws. *See* Mont. Code Ann. 61-8-725(2) (2007) (stating that speeding is not a criminal offense for certain purposes). "Not surprisingly, there is little law on this subject." *City of Billings*, 744 P.2d at 879.

[17] The second case cited by the People, *Duke v. State*, involved an appeal of a first degree murder conviction. 2004 WY 120, ¶¶ 6-9, 99 P.3d 928, 934 (Wyo. 2004). In *Duke* the defendant objected to a jury instruction that enumerated the elements of first degree murder then followed with the statement that "[i]f you find from your consideration of all the evidence that *any* of these elements has been proved beyond a reasonable doubt, then you should find the

defendant guilty." *Id.* ¶ 92, 99 P.3d at 955 (emphasis added). However, the paragraph immediately following this incorrect instruction *did* correctly state the law as follows:

> If, on the other hand, you find from your consideration of all the evidence that each of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Id. The court read the instructions as a whole and found that the second correct statement cured the first incorrect one. *Id.* ¶ 95, 99 P.3d at 955. Thus, the mistake did not rise to the level of a plain error requiring a new trial. *Id.* ¶ 98, 99 P.3d at 956. As Perry points out, the present case involves not a defective each-and-every-element instruction, but the absence of any such instruction at all. For this reason, *Duke* is inapposite.

[18] Perry does not cite to any analogous cases, although he might have found it useful to consult California law, because many of our statutes and jury instructions derive from there. For example, the definition of "reasonable doubt" used by the trial court was taken directly from 8 GCA § 90.23:

> Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge.

8 GCA § 90.23(a) (2005); *accord* ER at 11 (Transcript). This definition was at one time identical to that found in section 1096 of the California Penal Code. *See* Cal. Penal Code § 1096, 1995 Amendment (Westlaw 2008). California's current version lacks the archaic phrases "depending on moral evidence" and "to a moral certainty". *Compare* 8 GCA § 90.23 *with* Cal. Penal Code § 1096. The 1995 Amendment removing these phrases was probably in response to criticism from the United States Supreme Court, which reviewed this particular jury instruction

in *Victor v. Nebraska*, 511 U.S. 1, 16 (1994) (finding constitutionally sufficient, but not condoning the phrase "moral certainty"). *Cf.* 1995 Cal. Stat., c. 46, § 1.

[19] Although *Victor* begins with the phrase "[t]he government must prove beyond a reasonable doubt every element of a charged offense," 511 U.S. at 5, the substance of the opinion concerns the specific language of the reasonable doubt instruction itself. *Id.* at 5-18. Nowhere does the Court consider the question of whether the instructions as a whole properly indicate that each and every element of the crimes alleged must be proved beyond a reasonable doubt. However, the California courts have had occasion to address this very issue. *See People v. Reed*, 240 P.2d 590, 595 (Cal. 1952); *People v. Orchard*, 95 Cal. Rptr. 66, 71 (Ct. App. 1971).

[20] In *People v. Reed*, the defendant objected that the jury was not given instructions that each element must be proved beyond a reasonable doubt. 240 P.2d at 595. The court's only response was that the law expressly allows the court to read the reasonable doubt instruction from section 1096 of the California Probate Code, and that "[c]onsidering all of the instructions, it appears that the jury was fully and fairly instructed as to all of the rules of law applicable to the evidence." *Id.* The court in *People v. Orchard* made a similar attempt to view the instructions as a whole:

> The court did instruct upon the presumption of innocence and reasonable doubt as defined in Penal Code, section 1096, compared the standards of proof in civil and criminal cases, and defined all essential terms of the crime charged. In these circumstances *an instruction respecting proof of each element beyond a reasonable doubt need not have been given.*

95 Cal. Rptr. at 71 (emphasis added) (citations omitted). However, *Orchard* was issued only a year after *In re Winship* and makes no reference to the United States Supreme Court's adoption of the each-and-every-element requirement. *See In re Winship*, 397 U.S. at 364; Model Penal Code § 1.12, EXPLANATORY NOTE. In the years since, the California Supreme Court has not

had occasion to decide whether omission of an explicit each-and-every-element instruction is constitutional error.

[21] Looking beyond California, it appears that a significant number of states and the federal government include a standard instruction that each and every element of a crime be proved beyond a reasonable doubt.[3] In cases where trial courts neglected to include an each-and-every-element instruction, many states have reversed the resulting convictions.[4] For example, in *Commonwealth v. Shoats*, a trial court neglected to instruct a jury that the government has the burden of proving each and every element beyond a reasonable doubt. 443 A.2d 814, 815 (Pa. Super. Ct. 1982). The court rejected the dissent's view that the trial court could satisfy Pennsylvania law by instructing on the elements of each charge and on reasonable doubt generally. *Id.* at 816 n.2. Instead, the court reasoned that "[i]t has never been the law in Pennsylvania that a court may satisfy its duty to correctly charge the jury on reasonable doubt based on implication." *Id.* The right to an each-and-every element instruction, it reasoned, was

[3] 1A Fed. Jury Prac. & Instr. § 10:01 (5th ed.) ("The burden or obligation, as you will be told many times during the course of this trial, is always on the government to prove each and every element of the offense[s] charged beyond reasonable doubt."); Colo. Jury Instr., Crim. 3:04 ("If you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty."); Mass. Super. Ct. Crim. Prac. Jury Instr. § 1.2 ("The defendant is presumed to be innocent until and unless you the jury decide unanimously that the Commonwealth has proved the defendant guilty of each and every element of each charged offense beyond a reasonable doubt."); 4 Ohio Jury Instr. 409.67 (2006) ("The prosecution must prove each and every element of the charged offense beyond a reasonable doubt."); Texas Crim. Jury Charges § 1:440 (2006) ("The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and, if it fails to do so, you must acquit the defendant."); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (2d ed.) ("The plea of not guilty means that you, the jury, must decide whether the [State] [City] [County] has proved every element of [the] [each] crime charged.").

[4] *See, e.g., State v. McArthur*, 651 S.E.2d 256, 258 (N.C. Ct. App. 2007) ("In light of controlling [North Carolina] Supreme Court precedent, we are required to award defendant a new trial because of the trial court's failure to include a specific instruction directing the jury to enter a verdict of not guilty if it found that the State had failed to prove any of the elements of the charged crimes beyond a reasonable doubt."); *Commonwealth v. Bishop*, 372 A.2d 794, 796 (Pa. 1977) ("The defense had an absolute right to have the jury instructed not only as to the quantum of proof required to establish guilt but also that the requirement extended to each of the material elements of the offense."); *State v. Castle*, 935 P.2d 656, 657 (Wash. App. Div. 1997) ("In a criminal case, the jury must be instructed that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. It is reversible error if the instructions relieve the State of that burden.").

"an absolute right." *Id.* at 817 (quoting *Commonwealth v. Bishop*, 372 A.2d 794, 796 (Pa. 1977)).

[22] We do not find it necessary to decide the issue of whether an *explicit* each-and-every-element instruction is constitutionally required. Even assuming, *arguendo*, that an implied instruction would be constitutionally sufficient, we find that the instructions given in the present case did not, even implicitly, convey the required information regarding the prosecution's burden of proving each and every element beyond a reasonable doubt.[5]

B. The Instructions Do Not Explain that the Correct Standard of Proof Applies to Each Element.

1. The Sufficiency of the Circumstantial Evidence Instruction

[23] A few of the instructions given in the trial court came tantalizingly close to conveying the required information. For example, the jury was instructed that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." SER at 29 (Jury Instruction No. 3I), *accord* ER at 19 (Transcript). In addition, the court instructed that "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." *Id.* However, the instruction is titled "Sufficiency of the Circumstantial Evidence Generally", *id.*, and might be interpreted in context as applying only to circumstantial evidence or inferences. There is no explicit instruction that such a burden of proof would apply to direct evidence.

[5] Although we do not reach the issue of whether implied instructions can ever pass constitutional muster, we expect that today's opinion will strongly encourage our Superior Court colleagues to make such instructions explicit in the future.

[24] More importantly, the instruction only refers to "a set of circumstances necessary to establish the defendant's guilt" and "an inference essential to establish guilt." *Id.* Neither of these phrases explains *which* circumstances or inferences are necessary to establish guilt. Even if a juror were savvy enough to equate circumstance or inference with an individual element of a crime, that juror may still be confused as to which *elements* need be proved beyond a reasonable doubt. As written, the instruction appears to be saying only that if an element of the crime requires multiple facts to establish (e.g. Perry is the owner of a car, a witness identifies the car at the crime scene, therefore Perry was at the scene), then each one of those *facts* must be proved beyond a reasonable doubt. It makes no statement as to how many *elements* of the crime need be proved beyond a reasonable doubt. The correct answer, of course, is all of them.

2. The "Essential Elements" Instructions

[25] The People contend that "instructions should be considered and reviewed as a whole ...." Appellee's Br. at 5 (quoting *Jones*, 2006 Guam 13 ¶ 28). The People also argue that use of the phrase "essential elements" before the description of each offense conveyed the meaning that each and every element of the offense was essential to a guilty conviction. The People point to the dictionary definitions of "of the utmost importance," "indispensable," and "necessary" to suggest the meaning conveyed. *Id.* at 11.

[26] The People have a valid argument that a reasonable person would assume that because the elements are essential, there must be a "finding" of that element. However, one can argue that merely indicating that the elements of a charge are "essential elements" does not establish the burden of proof for each of those elements. A juror might find that one element of the crime was proven by preponderance of the evidence, but mistakenly assume that because his doubt extended only to one element (out of several) his overall doubt was no longer reasonable with

respect to that entire charge. Specifically, the jury may have had no doubt that vaginal, rectal, or oral penetration occurred, but may have harbored reasonable doubts as to the aggravating factors such as causing personal injury or use of force and coercion. Thus, a reasonable juror could "find" all of the "essential elements" by at least preponderance of the evidence and still incorrectly assume that the prosecution has proved the overall crime beyond a reasonable doubt.

3. The Unanimity Instruction

[27] Perry suggests that the wording of the unanimity instruction compounds the error of not specifically mentioning that the prosecution has the burden of proving each and every element of each charge and count beyond a reasonable doubt. The relevant portion of the unanimity instruction reads as follows:

> The People have presented evidence of more than one act to prove that the defendant committed each offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the acts for each charge and you all agree on which act he committed for each charge.

ER at 45 (Transcript). He argues that "[b]y giving two different and conflicting jury instructions—the recitation of the allegations of the indictment on the one hand—and an instruction that the government need prove at least one act for each charge on the other hand—the Superior Court effectively omitted essential elements of the offenses as surely as if it had failed to mention the elements altogether." Appellant's Br. at 12 (Feb. 12, 2008).

[28] In order to determine how a jury might have interpreted an instruction, one must focus on the plain meaning of the language in the instruction. *See People v. Davis*, 896 P.2d 119, 150 n.18 (Cal. 1995); *cf. Francis v. Franklin*, 471 U.S. 307, 323 n.9 (1985) ("The Court presumes that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case . . . ."). The words "acts" and "elements" are not synonymous, and under a plain reading

they would not have been mistaken as referring to the same idea. On the other hand, if the jury instructions contain no explanation of what an "element" is and how the elements relate to the government's burden of proof, a juror might look to the language of the unanimity instruction to fill in the gaps in his or her knowledge. This is essentially Perry's argument that the unanimity instruction and the listing of the essential elements of each charge, taken together, led the jury to believe that only a single act need be proved for each charge.

[29] Indeed, one could envision a hypothetical situation where a juror disagreed that force or coercion had been proved beyond a reasonable doubt, but had no reasonable doubt as to the act of vaginal penetration.[6] *See* 9 GCA § 25.15(a)(3) (2005). Here, the juror determined that "at least one of the acts" for the charge of first degree CSC occurred, and that juror might mistakenly assume that she may now find Perry guilty of that charge. ER at 45 (Transcript). This is particularly true if the rest of the jury instructions are silent on the requirement that the prosecution must prove each and every element of the charge—including intent and aggravating factors—beyond a reasonable doubt.

[30] We agree with Perry that the unanimity instruction comes dangerously close to suggesting that only proof of an act is sufficient to find the defendant guilty of a crime. Lack of an explicit instruction to the contrary, such as an each-and-every-element instruction, only serves to compound the problem. Thus, there is merit to Perry's argument that the instructions were defective, and the only remaining question is whether the defect in the jury instructions rises to the level of plain error.

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[6] One cannot say what actually happened in the present case because the verdict forms only allowed the jurors to report their decisions on each charge and count, not the individual elements thereof. ER at 55-71 (Verdict Forms).

C. Whether the Errors amount to Plain Error

[31] Under the plain error analysis, this court must determine whether there was error, whether the error was clear, and whether the error affected Perry's substantial rights. *People v. Van Bui*, 2008 Guam 8 ¶ 10. If so, we may exercise our sound discretion and order a new trial when necessary "to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Campbell*, 2006 Guam 14 ¶ 34 (quoting *People v. Perez*, 1999 Guam 2 ¶ 21).

1. Clear Error

[32] The first inquiry is whether the jury instructions are clearly and obviously defective under current law. Although no United States Supreme Court case has addressed jury instructions similar to those at issue in the present case, a determination of whether an error is "clear" for purposes of the plain error analysis does not require the existence of precedent exactly on point. As the Second Circuit Court of Appeals observed: "[T]he 'plainness' of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking." *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003). This rule is particularly appropriate for our jurisdiction, whose case law consists of slightly more than ten years of Guam Supreme Court precedent. It would be unfair to require defendants to demonstrate plain error with a case directly on point given that many issues have not yet been resolved by this court.

[33] It is a fundamental principle of American jurisprudence that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23 (1995); *see also* 8 GCA § 90.21(a). The instructions as given failed to convey the idea that each and every

element must be proved beyond a reasonable doubt, and such a failure must be considered "clearly and obviously defective under current law." *Jones*, 2006 Guam 13 ¶ 24.

2. Errors Affecting Substantial Rights

[34] In *United States v. Olano*, the United States Supreme Court suggested that the affecting-substantial-rights analysis was the "harmless error" analysis with one important difference:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: *It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.*

507 U.S. at 734 (emphasis added). The test for harmless error "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18 (1967)). Because the harmless error and plain error tests are so intertwined, we are guided by those cases that apply the harmless error analysis.

[35] A threshold question is whether the failure to give an each-and-every-element instruction was so serious an error as to require automatic reversal. The United States Supreme Court has referred to such errors as "structural defects" or "structural errors," because they cannot be excused by applying a harmless error analysis. *See Sullivan*, 508 U.S. at 282; *Ariz. v. Fulminante*, 499 U.S. 279, 288-295 (1991) (plurality opinion). Any error "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 282. In other words, a harmless error analysis of a structural error is not only unwise, it is impossible.[7]

[7] *Johnson v. United States* lists several examples of structural errors. 520 U.S. 461, 469 (1997). *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927)

[36] For example, in *Sullivan*, the Court considered whether an unconstitutional jury instruction defining reasonable doubt could be subjected to harmless error analysis. 508 U.S. at 277. The jury instruction in *Sullivan* incorrectly defined a reasonable doubt as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt." *Cage v. Louisiana*, 498 U.S. 39, 40 (1990) (cited by *Sullivan* for the text of the actual jury instructions at issue). The Court determined that the error required reversal, finding that the failure to properly instruct on the standard of reasonable doubt was a structural error not subject to harmless error analysis. 508 U.S. at 281-82.

[37] The rationale in *Sullivan* for defining the jury instruction error as "structural" was that the Sixth Amendment does not allow a court to simply conclude that the jury would have found a defendant guilty despite the flawed instructions:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because *to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.*

Sullivan, 508 U.S. at 279 (Scalia, J.) (first emphasis in original, second emphasis added); *see also* Benjamin E. Rosenberg, *The Effect of Sullivan v. Louisiana on Harmless Error Analysis of Jury Instructions that Omit an Element of the Offense*, 29 Rutgers L.J. 315, 326-27 (1998) (using a hypothetical to illustrate why flawed jury instructions are a more serious error than errors in the trial itself). If application of a harmless error analysis to the present case would result in

(lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial); *Sullivan*, 508 U.S. 275 (erroneous reasonable-doubt instruction to jury). More recently, the Supreme Court found deprivation of the right to choice of counsel to be structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006).

"hypothesiz[ing] a guilty verdict that was never in fact rendered," then reversal would be mandatory. *Sullivan*, 508 U.S. at 279.

[38] However, *Sullivan* can be distinguished from the present case in that the jury in *Sullivan* was misinformed as to the definition of reasonable doubt. There, the jury's misunderstanding arose from a direct instruction that actively deceived them as to the correct standard of proof. Here, the jury *was* correctly instructed as to the definition of reasonable doubt. The possibility that a misunderstanding may have arisen regarding proof of each and every element must be extrapolated from omissions and ambiguities in the actual instructions given. Nothing in the jury instructions directly misinformed the jury as to the correct standard of proof.

[39] A more analogous case is *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the Court declined to extend the ruling of *Sullivan* to a failure to allow the jury to determine an essential element of a crime. 527 U.S. at 15. There, the District Court had instructed that the jury "'need not consider' the materiality of any false statements," where materiality was an element of the crime charged. *Id.* at 6. On appeal, the Court agreed that the instructions were given in error but found that failure to instruct on an element of the crime *was* subject to harmless error analysis. *Id.* at 15. Because the defendant "did not, and apparently could not, bring forth facts contesting the omitted element [of materiality]" the conviction was affirmed. *Id.* at 19, 25. Here, too, it may be possible to determine whether the jury would have reached a different conclusion given the evidence in the record.

[40] We therefore conclude that the failure to give a proper each-and-every-element instruction is subject to a harmless error analysis as part of the plain error analysis, see *Olano*, 507 U.S. at 734, which is the standard of review we are required to apply in this case. As the court in *Olano* stated: "Normally, although perhaps not in every case, the defendant must make a

specific showing of prejudice to satisfy the 'affecting substantial rights' prong [of the plain error analysis]." 507 U.S. at 735. Because we have determined that the error in the present case does not require automatic reversal, we look to Perry's arguments that he was prejudiced and determine whether or not he has met his burden of persuasion. In doing so, we will examine the entire record, including the transcripts of testimony admitted at trial.

[41] Perry's briefs do not explain how he was prejudiced by the error. At oral argument, Perry's attorney suggested that the victim may have misidentified Perry as the perpetrator of the crimes. He also suggested that sexual penetration may have initially been consensual. Finally, in the Petition for Rehearing, Perry simply concludes without explanation that the transcripts clearly demonstrate that Perry would have received a more favorable verdict absent the error. Pet. for Reh'g, at 4 (Jan. 9, 2009). The Petition then quotes excerpts from the victim's testimony where she testified: (1) that she was gradually losing her memory as a result of the attack but that "it's like a shock, but it's not that bad"; (2) that she worked as a prostitute; (3) that it was dark because it was night at the time of the attack; (4) that she saw Perry the night of the attack, in the newspaper, on television, and at trial; (5) that she was never asked to identify Perry in a police line-up; and (6) that she has received medical treatment over the last five years because she occasionally hears voices. *Id.* at 4-10. Apparently, Perry questions the victim's credibility. In further support of Perry's credibility argument, our own review indicates that the victim testified that she had very poor vision. Transcripts ("Tr."), vol. VIII at 101-02 (Trial, Aug. 21, 2006). However, she was permitted to approach the defendant at trial to identify him. *Id.* at 98.

[42] Unfortunately, Perry does not explain how the victim's credibility issue relates to the error that he claims. The error in the present case was that the unanimity instruction, coupled with the lack of an each-an-every element instruction, might have lead the jury to believe that the

prosecution only needed to prove the "act" element of each crime beyond a reasonable doubt. Given the type of error described here, Perry could only demonstrate prejudice by showing that other elements were subject to a greater degree of doubt than the acts themselves. We therefore examine the evidence establishing the elements of the crimes for which Perry was convicted.

[43] Perry's identity as the perpetrator of the sexual assault, assault, and terrorizing was established at trial by overwhelming evidence. Officer Asanoma testified that he responded to the scene of the crime at the Governor's Complex, where the injured victim was discovered, at about 5:50 AM. Tr., vol.VI at 145 (Trial, Aug. 8, 2006). He testified that the description of the suspect and the suspect's car given by the victim matched that of Perry, whom he had pulled over outside the Governor's Complex at 4:30 AM that same morning. *Id.* at 138-41, 145. He also testified that after administering a field sobriety test, he asked Perry to park his car at the Mobil station, which Perry did. *Id.* at 142-43.

[44] Later, Officer Asanoma located a used condom on the ground next to where Perry's car had been parked at the Mobil station. *Id.* at 146. Agent Trainer from the Naval Criminal Investigative Services testified that she recovered a pair of boxer shorts from the lavatory on board the ship where Perry was stationed. *Id.* at 106-08. The People's expert witness, Dr. Kalafut, tested the condom, the boxer shorts, and the rape kit that was completed while the victim was at the hospital. Tr., vol. VII at 72-75 (Aug. 9, 2006). He also tested biological samples collected from Perry. *Id.* at 77-80. Sperm DNA collected from the boxer shorts was found to include Perry's known DNA profile, and only one in fifty-three quintillion people would also have a DNA profile consistent with the sperm. *Id.* at 80-82. The boxer shorts also contained non-sperm DNA, which was a mixture of DNA from at least three separate individuals. *Id.* at 83-84. Both Perry's and the victim's DNA were consistent with the non-

sperm DNA mixture. *Id.* at 85. The DNA of approximately one in a thousand persons would also be consistent with the DNA mixture.[8] *Id.* at 86. Dr. Kalafut testified that he obtained a partial DNA sequence from the condom, and that it was consistent with the victim and only one in a hundred and ninety billion people would also have DNA consistent with that discovered on the condom. *Id.* at 88-89. No male DNA was obtained from the rape kit. *Id.* at 90.

[45] The victim identified Perry as her attacker in the courtroom. Tr., vol. VIII at 98. However, she also testified that she had never identified Perry in a lineup and that she had seen Perry's picture in newspapers and on the television. *Id.* at 122-23. As mentioned above, she also testified to having poor eyesight. *Id.* at 98. Although the jury might have had any number of reasons to doubt the victim's identification of Perry, the People presented very strong physical and circumstantial evidence connecting Perry with the crime. There is no reasonable probability that the unanimity instruction lead the jury to identify Perry as the perpetrator of the crime despite reasonable doubt as to that element.

[46] There is similarly overwhelming evidence that the victim suffered personal injury (an element of First Degree CSC) and serious bodily injury (an element of Aggravated Assault). *See* 9 GCA §§ 19.20, 25.15. In addition to the victim's testimony describing her injuries, Tr., vol.

[8] On cross examination, Perry's defense attorney spent a considerable amount of time questioning the validity of the DNA evidence given that Dr. Kalafut's probability calculations were based on Black, Caucasian, and Hispanic populations but not an Asian population. Tr., vol. VII at 95-105. Dr. Kalafut opined that the probability of a member of an Asian population having DNA consistent with the mixed sample would be "in the same ballpark" as the estimates for the other populations; that is, somewhere between one in a hundred and one in ten thousand. Tr., vol. VII at 87, 101, 103. The transcripts suggest that Perry's attorney was attempting to infer that one in a hundred was a more likely probability based on the fact that the victim was Korean and that Guam's population contains a higher percentage of Asians than are typically found on the mainland. Tr., vol. VII at 95-105.

However, Dr. Kalafut never testified that the probability of inclusion based on an Asian population would be higher than for the populations actually used. Instead, he only admitted it was possible the probability could be as high as one in one hundred. Tr., vol. VII at 103. In fact, the data themselves suggest that probabilities calculated from an Asian database might even be lower rather than higher. Although at least one Black individual (Perry) had DNA consistent with the mixed sample, the probability of inclusion by another member of the Black population was actually significantly less (1 in 5000) than the probability of inclusion from a member of the Caucasian or Hispanic populations (1 in 1300 and 1 in 1000 respectively). *See* Tr., vol. XI at 20 (Closing Arguments).

VIII at 88-90, 97, there was strong corroboration by other witnesses. Dr. Eusebio, the victim's admitting physician, testified that the victim spent over a week in the hospital recovering from a pelvic fracture, bleeding in the pelvis, and multiple facial contusions. Tr., vol. V at 54-57 (Trial, Aug. 4, 2006). Dr. Eusebio also testified that the victim's injuries were life threatening. *Id.* at 60. Special Agent Debbie Fasano from the Naval Criminal Investigative Service testified that the victim's face was swollen and bruised, that her eyes were swollen shut, and that blood was coming out of her eye. *Id.* at 88. In addition, photographs of the victim's injuries were admitted into evidence. *Id.* at 91; Tr., vol. VI at 20-23. Again, there is no reasonable probability that the jury harbored any reasonable doubt that the victim suffered very serious injuries.

[47] There is corroborating evidence that Perry had sex with the victim. The condom recovered at the Mobil station contained DNA that almost certainly came from the victim. The boxer shorts contained semen DNA that almost certainly came from Perry, and a mixed DNA sample that likely came from both Perry and the victim. Dr. Ellen Bez from the Healing Hearts Rape Crisis Center performed a sexual assault exam on the victim in the hospital, but the exam was limited due to the victim's pelvic fracture. Tr., Vol. IX at 73-74 (Trial, Aug. 22, 2006). Dr. Bez testified that the victim claimed she had experienced oral, vaginal, and anal penetration. *Id.* at 78. The only physical evidence of sexual penetration that Dr. Bez uncovered was some redness of the vagina.[9] *Id.* at 81. However, Dr. Bez also testified on cross-examination that a professional prostitute might be less readily damaged by sex acts than the average person. *Id.* at 91.

[48] The only direct evidence of particular acts of sexual penetration, particularly oral and anal penetration, comes from the victim's own testimony and her statements to Dr. Bez.

[9] Dr. Bez also testified that the victim's teeth, mouth, vagina, abdomen, and anus were caked with sand. Tr., vol. IX at 80.

Similarly, the victim's testimony provides the only direct evidence of force and coercion (all three degrees of CSC), intent (all crimes charged except Aggravated Assault), and recklessness (Aggravated Assault).[10] In fact, the victim's testimony was the only direct evidence for *all* the elements of Terrorizing. *See* 9 GCA § 19.16. Nevertheless, the jury found Perry guilty on all counts. From this, we conclude that the jury found the victim's recitation of what happened at the crime scene to be wholly credible.

[49] To meet his burden of showing that the unanimity-instruction error affected his substantial rights, Perry must give us some reason to doubt the victim's testimony regarding elements such as intent or force and coercion, while at the same time demonstrating that the victim's testimony may have proven the "acts" beyond a reasonable doubt. Our review of the victim's testimony indicates that she told a consistent story of a sexual assault that was violent, forceful, and coercive from beginning to end. Tr., vol. VIII at 83-95, 106-09, 114-17. Even if it were possible to judge a witness's credibility on appellate review, we see no reason to preferentially assign doubt to any particular aspect of the victim's version of the attack. More importantly, there is no reasonable probability that the jury would have doubted any particular element of the victim's story while at the same time finding her account of the "acts" to be wholly credible. As this court has stated before, "where '[u]pon review of the record, it would appear that the jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses,' then there is no error affecting substantial rights." *People v. Moses*, 2007 Guam 5 ¶ 21 (quoting *People v. Evaristo*, 1999 Guam 22 ¶ 34).

[10] The extent of the victim's injuries, as described in the previous paragraph, also provides circumstantial evidence as to the defendant's *mens rea* and the use of force and coercion.

IV. CONCLUSION

[50] The trial court committed clear error when it failed to properly instruct the jury that each and every element of the charges needed to be proved beyond a reasonable doubt and then instructed that at least one act must be proven for each crime. Because the error was not preserved at trial, it is subject to a plain error analysis, and Perry failed to meet his burden of showing that the error affected his substantial rights. The verdict of the trial court must therefore be **AFFIRMED**. This Amended Opinion supersedes our earlier opinion in *People v. Perry*, 2008 Guam 24.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice