IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

GERALD P. YINGLING,
Defendant-Appellant.

Supreme Court Case No. CRA08-006
Superior Court Case No. CF0454-03

OPINION

Cite as: 2009 Guam 11

Appeal from the Superior Court of Guam
Submitted on Appellant's Brief, September 24, 2008
Hagåtña, Guam

For Plaintiff-Appellee:
Jeffrey A. Moots
Assistant Attorney General
Office of the Attorney General of Guam
Prosecution Division
287 W. O'Brien Drive
Hagåtña, Guam, 96910

For Defendant-Appellant.
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook, PC
210 Archbishop Flores Street
Hagåtña, Guam 96910

BEFORE: ROBERT J. TORRES, Chief Justice; RICHARD H. BENSON, Justice *Pro Tempore*; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.

TORRES, CJ:

[1] Defendant-Appellant Gerald P. Yingling appeals from a final judgment of conviction of two criminal counts: Fraudulent Use of a Credit Card (As a Felony) and Official Misconduct (As a Misdemeanor). He asserts the trial court erred in denying his motion for acquittal on the grounds that each conviction was supported by insufficient evidence. The People of Guam ("Government") did not file a brief opposing Yingling's appeal, instead conceding in a letter addressed to the Clerk of the Supreme Court that the evidence at trial was insufficient to support Yingling's convictions. After an independent examination of the law and the record on appeal, we agree that the evidence presented at trial was insufficient to support Yingling's convictions, and that the trial court erred in not granting the motion for acquittal. Accordingly, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Gerald P. Yingling was the Executive Manager of the Guam International Airport Authority (GIAA) between May 1998 and early January 2002. Transcripts ("Tr."), at 20 (Trial, Mar. 2, 2005). As part of his official responsibilities, Yingling was tasked with entertaining foreign airlines officials whose business GIAA sought to recruit. *Id.* at 23. The GIAA Board of Directors issued Yingling a credit card in 1999 to use on official business, both abroad and in Guam. *Id.* at 14; Gov't's Ex. 6 at 5 (Minutes Board of Directors Mtg., July 29, 1999). This case involves two criminal convictions arising from Yingling's alleged use of the GIAA credit card to obtain property or services not related to official GIAA business.

[3] Both prior to and after issuance of the GIAA credit card, Yingling's standard practice was to obtain advance *per diem* for his travel abroad and to file trip-expense reports showing his expenses.[1] In December 2002, for the first time, a reconciliation was conducted in which Yingling's credit card statements from mid-1999 through mid-2001 were checked against his travel expense reports and *per diem* requests. Tr. at 102 (Trial, Mar.2, 2005). Joseph Cabana, Acting Controller at GIAA during the time period in question, identified credit card charges that may have overlapped with *per diem* expenses or have been otherwise improper. *Id.*[2] at 41 (Trial, Mar. 3, 2005).

[4] Mr. Cabana's reconciliation found that during periods for which travel authorizations indicated that Yingling received advance *per diem,* credit card charges were incurred at overseas hotels (the Makati, Shangri-la Hotel in the Philippines; the Tokyo Hilton Hotel; the Houston Marriott Hotel; the Ritz Carlton Hotel in Kuala Lumpur, Malaysia; the Westin Philippine Plaza Hotel; the Marco Polo Hotel in Baguio, Philippines; and the JW Marriott Hotel and Hotel InterContinental in Seoul, Korea). Gov't's Ex. 16 (First Hawaiian Bank MasterCard Statement, Mar. 28, 2000); *see also* Tr. at 14 (Trial, Mar. 3, 2005).

[5] Mr. Cabana testified that he identified these credit card charges in his reconciliation as possibly improper on the ground that they were incurred "about the same period also when a *per diem* was issued." *See, e.g.*, Tr. at 14-15 (Trial, Mar. 3, 2005). Mr. Cabana's reconciliation also identified several charges (including golf at the Guam International Country Club and Talofofo

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[1] *Per diem* expenses are those for which an employee receives a daily flat rate of payment in lieu of actual lodging and meal expenses. Tr. at 7, (Trial, Mar.2, 2005); Gov't's Ex. 3 (GIAA Am. Travel Policy, May 25, 2000).

[2] Mr. Cabana asserted he was not himself competent to attest to which days *per diem* had actually been paid, testifying "[t]hat's another person that—that's reconciling the—that does reconcile on expense reports on travel." Tr. at 40 (Trial, Mar. 3, 2005).

Golf Resort, and meals at various local restaurants in Guam) which were incurred on-island and therefore not subject to *per diem* reimbursement, but for which no receipts or authorizations were found, contravening an official policy that requires such charges to be accompanied by documentation. Gov't's Ex. 1 at 2 (GIAA Internal SOP for Corporate Credit Cards). Acting on the information provided by Mr. Cabana's reconciliation, GIAA deducted the amount identified as possibly improper reimbursement from Yingling's last check, without objection from Yingling.

[6] Yingling's use of the GIAA credit card between July 1, 1999, and June 30, 2001, resulted in an indictment and superseding indictment, charging Yingling with two crimes: Fraudulent Use of a Credit Card (As a Felony) and Official Misconduct (As a Misdemeanor). Appellant's Excerpts of Record ("ER"), at 1 (Indictment, Sept. 15, 2004). The Superior Court denied Yingling's motion to dismiss the superseding indictment, in which Yingling contested the sufficiency of the evidence and other issues. Decision and Order, CF0454-03 (Nov. 23, 2004). The Superior Court also denied Yingling's motion for a jury questionnaire, which had been sought to assist in selecting a jury in a case which had received intense publicity. Appellant's Br. at 3 (Sept. 24, 2008). He also sought a writ of prohibition from this court, contending in part that there was insufficient competent evidence before the grand jury to establish reasonable cause. This, too, was denied. Order, WRP04-003 (Mar. 1, 2005).

[7] Yingling then went to trial. Over the course of a five-day trial, the Government presented testimony of four witnesses. Appellant's Br. at 4. Credit card statements, numerous reconciliation statements, GIAA policies regarding credit cards and travel, and travel requests and authorizations were admitted into evidence. *See* Tr. at 115-16 (Trial Ex. Index, Mar. 2,

2005); Tr. at 110-12 (Trial Ex. Index, Mar. 3, 2005); Tr. at 114-16 (Trial Ex. Index, Mar. 4, 2005). After the close of the Government's case, Yingling made a motion for a judgment of acquittal, arguing insufficiency of the evidence. ER at 121 (Order Regarding Mot. for Acquittal, Mar. 10, 2005). The Defense then rested its case without presenting any witnesses, and renewed its motion for a judgment of acquittal. Tr. at 2-3 (Trial, Mar. 9, 2005). The court reserved ruling on the motion until such time as the jury returned its verdict. *Id.* at 3. After the jury found Yingling guilty on both charges, the trial court issued a written order denying the motions for acquittal. *Id.* at 128; ER at 121 (Order Regarding Mot. for Acquittal).

[8] After denial of his motion for acquittal, Yingling filed an Objection to Judge Unpingco, seeking his recusal. Appellant's Br. at 3; ER at 198 (Docket Sheet, Mar. 15, 2005 entry). Pursuant to statute, the matter was referred to a separate judge who determined that Judge Unpingco was indeed conflicted and must be recused from all further proceedings. Appellant's Br. at 3-4; ER at 205 (Docket Sheet, June 15, 2005 entry). After his case was reassigned, Yingling renewed his motion for judgment of acquittal and moved for a new trial. ER at 215 (Docket Sheet, May 23, 2007 and Sept. 17, 2007 entries). These motions were denied. *Id.* (Oct. 23, 2007 entry). On May 13, 2008, a judgment of conviction was entered on the docket. *Id.* at 218 (May 13, 2008 entry).

[9] Yingling timely appealed, presenting four separate issues for review. He asserted the trial court erred when it denied his motion for acquittal based on his claim that there was insufficient evidence to support the convictions, that the official misconduct charge did not properly allege a crime, that the court's refusal to permit the jury questionnaire and limitation on *voir dire* affected his right to a fair trial, and that the court's failure to recognize its conflict of

interest required a new trial. Appellant's Br. at i. Because the issue of sufficiency of the evidence is dispositive, we do not reach the remaining issues.

II. JURISDICTION

[10] This court has jurisdiction over this appeal from a final judgment in a criminal case. 48 U.S.C. § 1424-1(a)(2) (Westlaw 2009); 7 GCA §§ 3107(b), 3108(a) (2005); *see also* 8 GCA § 130.15(a) (2005) (permitting defendant's appeal from a final judgment of conviction).

III. STANDARD OF REVIEW

[11] Where a defendant has raised the issue of sufficiency of evidence by motion for acquittal in the Superior Court, the denial of the motion is reviewed *de novo. People v. Maysho*, 2005 Guam 4 ¶ 6.

IV. DISCUSSION

[12] The Government did not file a brief opposing Yingling's appeal, instead filing a letter with this court pursuant to Rule 13(i) of the Guam Rules of Appellate Procedure.[3] This letter stated that the Government could no longer ethically prosecute the appeal, having determined that Yingling's claim of insufficient evidence was meritorious:

> After having completely reviewed the trial transcripts in this case and the case law regarding the issue of sufficiency of the evidence on appeal, the People must concede that Counsel for Mr. Yingling is correct in his assertion that the evidence presented at trial was not sufficient to support a conviction in this matter. Counsel for the People can not ethically make a good faith argument that the evidence contained in the record is sufficient to support the convictions in this matter.

[3] Rule 13(i) requires counsel to "timely inform the Clerk and each other party by letter of all developments affecting appeals, certified questions, motions or writ petitions pending in this Court, including contemplated and actual settlements, circumstances or facts that could render the matter moot and pertinent developments in applicable case law, statutes and regulations." GRAP 13(i).

Rule 13(i) Letter of Jeffrey A. Moots on behalf of the Government, to Hannah Gutierrez-Arroyo, Clerk of Court (Dec. 4, 2008).

[13] The Government has asserted that this change in its position is dispositive of the issues raised in this appeal. *Id.* However, this court is mindful of the United States Supreme Court's admonition that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States,* 315 U.S. 257, 259 (1942). As the United States Supreme Court stated in *Young v. United States*:

> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function.

Id. at 258. Therefore, although the Government may have fulfilled their ethical obligation in confessing error, we have not been relieved of our responsibility to independently examine the law and the record to determine whether the prosecutor's concession is well-founded. *See United States v. Wilson*, 169 F.3d 418, 427 n.8 (7th Cir. 1999) (collecting cases); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996); *United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996); *United States v. Stern*, 13 F.3d 489, 496-97 (1st Cir. 1994); *United States v. Kepner*, 843 F.2d 755, 763 n.6 (3d Cir. 1988); *Every v. Blackburn*, 781 F.2d 1138, 1140-41 (5th Cir. 1986); *United States v. Brainer*, 691 F.2d 691, 693 (4th Cir. 1982); *United States v. Gaskins*, 485 F.2d 1046, 1047 (D.C. Cir. 1973) (*per curiam*).

[14] Where the evidence is insufficient to sustain a conviction of such offense or offenses, the court on motion of a defendant shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed. 8 GCA § 100.10 (2005). In evaluating whether the evidence at trial was sufficient to

sustain the convictions, this court does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. *People v. Quintanilla*, 2001 Guam 12 ¶ 37. Rather, our inquiry is into whether, even crediting all of the Government's evidence and drawing every reasonable inference from it in favor of the prosecution, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Maysho*, 2005 Guam 4 ¶ 8; *People v. Guerrero*, 2003 Guam 18 ¶ 13. We now review Yingling's convictions for fraudulent use of a credit card as a felony and official misconduct as a misdemeanor.

A. Fraudulent Use of a Credit Card

[15] The statutory crime of Fraudulent Use of a Credit Card (as a Felony) provides that a person commits an offense if he uses a credit card with the intent of obtaining property or services with knowledge that his use of the card is unauthorized.[4] 9 GCA § 46.35(a) (2005). The court's jury instructions stated the essential elements which the Government bore the burden of proving beyond a reasonable doubt:

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[4] Section 46.35 provides:

> (a) A person commits an offense if he uses a credit card with the intent of obtaining property or services with knowledge that:
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> (1) the card is stolen or forged;
>
> (2) the card has been revoked or cancelled; or
>
> (3) for any other reason his use of the card is unauthorized.
>
> (b) It is an affirmative defense to prosecution under Paragraph (3) of Subsection (a) if the defendant proves by a preponderance of the evidence that he had the ability and intended to meet all obligations to the issuer arising out of his use of the card.
>
> (c) Credit card means a writing purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.
>
> (d) An offense under this Section is a felony of the third degree if the value of the property or services secured or sought to be secured by means of the credit card exceeds $500; otherwise it is a misdemeanor.

9 GCA § 46.35 (2005).

> that the defendant, Gerald Yingling, used a credit card belonging to Guam International Airport Authority, *with the intent of obtaining property or services not related to official business*, *with knowledge* with [*sic*] that his use of the card was unauthorized . . . .

Tr. at 120 (Trial, Mar. 9, 2005) (emphasis added).[5]

[16] An essential element of the charges is that Yingling used the GIAA credit card with intent of obtaining property or services *not related to official business*. Upon review of the trial record, we find that no rational trier of fact could find this element to have been proven beyond a reasonable doubt. Presumably, if it could be shown that Yingling obtained both *per diem* reimbursement intended to cover the credit card expenses *and* reimbursement for credit card charges of the same expenses, a rational trier of fact may have determined that Yingling, in double-dipping, had the requisite intent of obtaining property or services not related to official business. However, the Government presented no witness who could testify that any of the charges identified by the reconciliation in fact represented an expense for which *per diem* had already been provided.

[17] Yingling was authorized to spend airport funds *over and above* his *per diem* allowance for purposes such as the entertainment of foreign airlines officials whose business GIAA sought to recruit. Tr. at 23, 25-30 (Trial, Mar. 2, 2005). Unrebutted testimony did show that the *per diem* allowance did not cover certain expenses validly incurred during Yingling's work,

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[5] The Superceding Indictment alleged that:

> On or about the period July 1, 1999, to June 30, 2001, inclusive, in Guam, Gerald P. Yingling, as Executive Manager, Guam International Airport, did knowingly use a First Hawaiian Bank MasterCard, Account No. [xxxx-xxxx-xxxx-xxxx], belonging to the Guam International Airport Authority, *with the intent of obtaining property or services not related to official business of the Guam International Airport Authority,* the amount of those property [*sic*] or services exceeding $500.00, in violation of 9 GCA §§46.35(a)(3), (c) and (d).

ER, tab ER1 at 1 (Superceding Indictment, Sept. 15, 2004) (emphases added).

including entertainment of prospective airport clients, transportation while traveling and communications (such as faxes or telephone calls from a hotel room or by cellular phone). *Id.* at 35-37. Therefore, criminal intent cannot be inferred from the mere fact that Yingling incurred credit card expenses during time periods in which he also claimed *per diem* compensation.

[18] We are mindful of the fact that intent, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. As expressed by the court below in instructing the jury,

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

Tr. at 117 (Trial, Mar. 9, 2005).

[19] In the absence of direct proof that any credit card charge did indeed cover a *per diem* expense, the question is what other circumstances support an inference beyond a reasonable doubt that Yingling intended to obtain property or services unrelated to official business. In this case, the surrounding facts and circumstances at the time of Yingling's credit card charges are not sufficient to support such an inference.

[20] Yingling's criminal intent cannot be inferred from the kinds of products and services Yingling purchased. No testimony was presented to document that a single charge incurred by Yingling was in fact for property or services not related to official business. Undisputed evidence was introduced to show that, as GIAA Executive Manager, Yingling's main goal was to attract more airlines to come to Guam. Tr. at 22 (Trial, Mar. 2, 2005). His job required him to

travel frequently to promote the airport and "entice business." *See e.g. id.* at 22. No testimony or evidence showed that the expenses incurred in Guam were not incurred in the course of entertaining foreign officials pursuant to Yingling's official responsibilities. Although under other circumstances a government official's credit card charges for overseas hotel rooms and golfing excursions could suffice as *prima facie* evidence of criminal intent to obtain services not related to official business, this is not the case here, where Yingling's official function was to lobby and recruit business from Asian airlines.

[21] Similarly, Yingling's criminal intent cannot be inferred from the mere fact that Yingling did not object to having a number of allegedly improper reimbursements deducted from his final paycheck. At trial, the Government's principal witness, Mr. Cabana, acknowledged on cross-examination that at least $1,573.00 of the amount deducted was for credit card charges which he now would concede were GIAA-related and for which inexplicably the documentation had been overlooked during his reconciliation. Tr. at 60 (Trial, Mar. 4, 2005). Since Yingling had agreed to pay for and had in fact paid for *all* the allegedly unsubstantiated charges, Mr. Cabana testified that Yingling in fact was owed money by GIAA. *Id.* at 20.

[22] The record also reveals that Mr. Cabana testified repeatedly on cross-examination that he had no basis, other than the lack of accompanying receipts or annotations at the time he conducted the reconciliation years after the charges were incurred, upon which to determine whether any of the allegedly improper charges actually were for expenses already covered by *per diem.* Defense counsel, toward the conclusion of his testimony, asked Mr. Cabana:

> Q: Isn't it true now, after having reviewed all these documents and having had a chance to reflect more on the statements and the exhibits and the reconciliation, that you cannot tell this jury that as to not even one of these

> charges, that this – that a particular charge was improperly charged beyond a reasonable doubt; am I correct, sir?

Id. at 62. Mr. Cabana replied "That's correct." *Id.*

[23] The jury, the judge, and we on appeal are in exactly the same situation as Mr. Cabana. We do not and cannot know whether any single charge was improper. There is more than a reasonable doubt as to Yingling's guilt, and we reach this conclusion from the Government's evidence, drawing all inferences that might be drawn in the Government's favor.

[24] In *United States v. Barker,* the Ninth Circuit considered a case with similar evidentiary proffers. 967 F.2d 1275 (9th Cir. 1991). Defendants had been charged with making false claims against the government by billing the federal government on days for which they did not work. *Id.* at 1277. The principal witness for the government indicated that he could not say whether the persons indeed worked those days or not. *Id.* The Ninth Circuit held that under such circumstances, there could not be a finding of guilty beyond a reasonable doubt. *Id.* at 1277-78.

[25] In this case, the testimony of the Government's other witnesses did not cure the deficiencies in Mr. Cabana's testimony. Ms. Josephine Dela Rosa, an employee who worked in the Controller's Office during the two-year period, testified to the verification process for credit card expenses. Ms. Dela Rosa did not testify that any reimbursement to Yingling was irregular, compared with how such matters were generally being handled. Tr. at 65-96 (Trial, Mar. 2, 2005).

[26] Another Government witness, Rosalina E. Wirkkunen, was the Financial Controller at GIAA until December 22, 1999. She testified to little more than the fact that her office reviewed the travel expense reports after travel was completed, *id.* at 56, and responded to *per diem* requests by writing checks. *Id.* at 57.

[27] Ms. Tessie Marcos, Vice Chairperson of the Board of Directors of GIAA, also testified. *Id.* at 14. A GIAA policy stated that any usage of GIAA credit cards for personal expenditures not related to GIAA business "may result in, subject to a written determination, reimbursement requirements, including but not limited to, interest at law and/or disciplinary proceedings and/or any other appropriate legal action." *Id.* at 16; Gov't's Ex. 1 at 2 (GIAA Internal SOP for Corporate Credit Cards). However, Ms. Marcos testified that, to her knowledge, the Board had never made a written determination pursuant to the credit card policy that Yingling had ever used the GIAA credit card for personal expenses. *Id.* at 52-53.

[28] The Government alleged there was "no evidence that [Yingling] ever submitted anything to the Board about his travels," in apparent violation of the travel policies.[6] Tr. at 5 (Trial, Mar. 9, 2005). However, the defense introduced into evidence seven travel itineraries of official travel, approved by the Governor, that corresponded to a large number of the expenses incurred pursuant to § 6.01(b). *See* Def.'s Exhibits KK (TA, Nov. 1, 1999); LL (TA, Dec. 21, 1999); MM (TA, Mar. 7, 2000); OO (TA, May 11, 2001); PP (TA, June 6, 2001); and QQ (TA, Dec. 23, 1999). No explanation was given for why Mr. Cabana was not aware of these itineraries during his reconciliation. Upon reviewing them at trial, Mr. Cabana testified that they changed his

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[6] Travel policies adopted by the GIAA Board of Directors on October 28, 1999 and May 25, 2000, respectively, were admitted into evidence. Tr. at 5, 6 (Trial, Mar. 2, 2005); Gov't's Exs. 2; 3 (GIAA Travel Policy, respectively). These policies required receipts for all travel expenses claimed by the traveler. Gov't's Ex. 2 at 13 (GIAA Travel Policy §6.01); Gov't's Ex. 3 at 8 (GIAA Travel Policy §6.01). The travel policies also stated that within ten days after conclusion of travel, the traveler shall submit detailed information to the Board, including:

> a. an itemized statement of account supported by receipts, an affidavit, or both, of actual expenses incurred for lodging, meals and travel expenses incurred [sic] on official business during the period of official travel, or
>
> b. An Itinerary of the official travel.

Id. GIAA travel expense policy stated that the traveler must submit expense reports within ten days of returning from travel, supported by receipts, an affidavit, or both. Tr. at 9 (Trial, Mar. 2, 2005).

determination that the charges corresponding to those authorizations were improper. Tr. at 31 (Trial, Mar. 4, 2005).

[29] Further, Ms. Marcos confirmed on cross-examination that the GIAA expense documentation policy did not require receipts to always be submitted. Tr. at 44 (Trial, Mar. 2, 2005). In practice, she testified that she herself might submit neither a receipt nor affidavit "if it's just a minimal amount." *Id.* at 51. Ms. Marcos affirmed on cross examination that the effect of an individual's failure to submit a travel report pursuant to the travel expense policy was simply that the individual could not expect to be reimbursed. *Id.* at 38.

[30] Here, not a single charge incurred by Yingling was shown to have been for property or services unrelated to official business. No evidence was introduced at trial to suggest that prior to the December 2002 reconciliation, any person on the GIAA staff or the GIAA Board of Directors had noticed anything irregular about Yingling's use of the credit card. Furthermore, no testimony indicated that airport documentation policies were systematically followed by any other individual to whom a credit card had been issued, and there is no evidence that Yingling's approach to requisitioning his expenses was ever brought to his attention or identified by any individual in the accounting chain as being irregular. In the absence of such evidence, under these circumstances, there can be no finding of guilt beyond a reasonable doubt.

[31] Although the burden may be on an employee to provide affirmative proof that charges are validly incurred before obtaining reimbursement, in a criminal prosecution, the burden is on the Government to prove that the charges were incurred with intent of obtaining property or services unrelated to Yingling's official business, not upon Yingling to prove that the charges were legal.

[32] We recognize that the type and extent of expenses incurred by Yingling gave rise to external criticism. Through public disapproval or legislative mandate, such lobbying practices may be checked and the boundaries of legal conduct of public officials narrowed from those of other lobbyists.[7] However, the same conduct that may create an appearance of impropriety in the public's eye is not necessarily conduct criminalized under statute.

[33] In summary, in a criminal trial, the Government bears the burden of proof. Here, none of the Government's witnesses testified that any single charge was improper. A rational trier of fact correctly applying a reasonable doubt standard of proof could not have convicted Yingling. Viewing the record in the light most favorable to the Government, we concur with the Government's confession of error, finding that the Superior Court erred when it denied Yingling's motion for a judgment of acquittal on the charge of Fraudulent Use of a Credit Card.

B. Official Misconduct

[34] Yingling asserts that he is not guilty of Official Misconduct because no evidence showed that any credit card charge he made was "improper." Appellant's Br. at 10. The crime of official misconduct is provided by statute in 9 GCA § 49.90.[8] The judge instructed the jury that the Government must prove beyond a reasonable doubt each of the following elements:

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[7] The record suggests that GIAA amended its policies in response to publicity surrounding the expenses incurred by its lobbyist, abolishing airport-issued credit cards, discontinuing a communication allowance, and adding a new requirement of board approval of all travel requests. ER at 22 (Ex. 1 at 88, Pacific Daily News article, "Audit: More travel abuse," Sept. 24, 2003).

[8] It provides:

> 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

> [T]hat the defendant, Gerald Yingling, *with the intent to benefit himself*, committed an act relating to his office as Executive Manager of the Guam International Airport Authority, constituting an unauthorized exercise of his official function, knowing that such act was unauthorized, by knowingly using a credit card belonging to the Guam International Airport Authority, *with the intent of obtaining property or services not related to the official business of the Guam International Airport Authority*, on or about the period between July 1st, 1999 to June 30th, 2001, in Guam.

Tr. at 122 (Trial, Mar. 9, 2005) (emphases added).

[35] Yingling's intent to benefit himself is a statutory element of the misdemeanor crime of Official Misconduct, as is Yingling's intent of obtaining property or services "not related to the official business" of GIAA. *Id.* For the reasons described in our analysis of the first charge, we find the evidence insufficient to infer Yingling's intent of obtaining property or services "not related to the official business." *Id.*

[36] The facts of Yingling's case present a very different picture than those in *People v. Diaz*, 2007 Guam 3 ¶¶ 43-48, where this court similarly considered whether sufficient evidence sustained a conviction for Official Misconduct involving use of a government credit card. In that case, the defendant had acknowledged that he had made various personal charges on the credit card at various restaurants, hotels, and stores, purchasing a computer for his daughter and plane

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> (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.

9 GCA § 49.90 (2005).

The specific charge against Yingling stated:

> On or about the period July 1, 1999, to June 30, 2001, inclusive, in Guam, Gerald P. Yingling, did, with intent to benefit himself, commit an act relating to his office as Executive Manager of the Guam International Airport but constituting an unauthorized exercise of his official function, that is GERALD P. YINGLING, did knowingly use a First Hawaiian Bank Mastercard, Account No. [xxxx-xxxx-xxxx-xxxx], belonging to the Guam International Airport Authority, with the intent of obtaining property or services not related to official business of the Guam International Airport Authority, in violation of 9 GCA §§ 49.90(a) and (b) and 80.34(a).

ER at 1-2 (Superceding Indictment) (emphasis added).

tickets for his wife and daughter. *Id.* ¶¶ 2-3. Thus, in *Diaz* there was no dispute about the fact that defendant had intentionally used the credit card to obtain property or services "not related to official business." Instead, Diaz contended on appeal that there was insufficient evidence that the use of the credit card was unauthorized and that Diaz knew that the use was unauthorized. *Id.* ¶ 46.

[37] We found sufficient evidence supported Diaz's conviction where testimony in the record showed that only charges made "on behalf of the authority" were authorized, but Diaz had signed a paper certifying personal charges made on the credit card. *Id.* ¶ 47. Furthermore, in *Diaz*, another government employee testified that although her normal duties included writing checks to make payments on the Bank of Guam credit accounts, she refused to sign the checks which were issued by the agency to the bank to pay for Diaz' personal charges, so they were signed by someone else. *Id.* She testified that she stopped issuing checks for payment of the credit card to the Bank of Guam in November 2000 because she "was very uncomfortable . . . to cut a check for charges that [she] knew were not relevant to government activity." *Id* (citation omitted). Viewing such evidence "in a light most favorable to the government," we concluded that "[i]t 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." *Id.* ¶ 48.

[38] In contrast, in Yingling's case, even crediting all the Government's evidence, there is no proof of Yingling's intent to benefit himself, and no proof that the products or services obtained by Yingling were unrelated to official business. The trial court erred when it denied Yingling's motion for a judgment of acquittal at the close of the Government's case with regard to the charge of Official Misconduct.

[39] Because the issue of insufficient evidence is dispositive of all charges, we need not reach the additional issues raised by Yingling.

V. CONCLUSION

[40] This court will not and cannot relax the Constitutional requirement that the Government establish proof beyond a reasonable doubt of every element of a crime. Because at the close of the Government's case there was insufficient evidence to support a finding that Yingling intended to obtain property or services not related to official business, an element essential to both convictions, the trial court erred in denying Yingling's motion for a judgment of acquittal of both counts. Accordingly, Yingling's convictions for Fraudulent Use of a Credit Card and Official Misconduct are **REVERSED** and the trial court is ordered to enter an acquittal as to each count.

Original Signed By: **Miguel S. Demapan**
MIGUEL S. DEMAPAN
Justice *Pro Tempore*

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice *Pro Tempore*

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