IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MARK ALLEN CUMMINS,
Defendant-Appellant.

Supreme Court Case No.: CRA09-014
Superior Court Case No.: CF0347-07

OPINION

Cite as: 2010 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted July 16, 2010
Hagåtña, Guam

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

TORRES, C.J.:

[1] After a jury trial, Defendant-Appellant Mark Allen Cummins was convicted of three charges of Second Degree Criminal Sexual Conduct ("CSC") and of two charges of First Degree CSC. Cummins appeals the First Degree convictions, alleging that the trial court erred by failing to instruct the jury that Second Degree CSC is a "lesser included offense" of First Degree CSC under the applicable Guam statutes. For the reasons set forth below, we disagree, and affirm Cummins' convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] A grand jury indicted Defendant-Appellant Mark Allen Cummins on three counts of First Degree CSC as well as three counts of Second Degree CSC. The indictment alleged that between December 1, 2004 and January 4, 2005, Cummins engaged in sexual penetration and sexual contact with a minor under the age of eighteen.

[3] At trial, the minor, J.C.S., then fifteen years old, testified about three distinct incidents during which Cummins allegedly sexually assaulted her, after he moved into the Dededo apartment where she resided with her mother and sister. According to this testimony, all three incidents took place between December 1, 2004 and January 4, 2005, when J.C.S. was eleven years old and attending sixth grade. J.C.S. testified that Cummins engaged in digital-vaginal sexual penetration on the first and third occasion, but that on the second occasion, she didn't remember whether penetration had occurred.

[4] After the close of the evidence, the Government requested an instruction that the jury consider each charge of the indictment separately. The Government also requested an instruction

on Second Degree CSC as a lesser included offense of First Degree CSC. The court denied the request, stating that "because there is a separate charge for second degree[,] it is not required of this court to include, in the first charge of First Degree, lesser included of second, because it is separately and independently charged." Transcript ("Tr.") at 7 (Jury Trial, Mar. 10, 2009).

[5] After a jury trial, Cummins was convicted of all three of the Second Degree CSC charges and of two of the three First Degree CSC charges, but acquitted of one First Degree CSC count. A judgment of conviction was entered, and Cummins timely filed his notice of appeal.

II. JURISDICTION

[6] This court has jurisdiction over appeals taken from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 111-264 (2010)); 7 GCA §§ 3107 and 3108(a) (2005); and 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[7] In the instant case, Cummins neither requested an instruction that Second Degree CSC is a lesser included offense of First Degree CSC, nor objected to the trial court's denial of the Government's request for such an instruction. Where there was no objection to jury instructions at the time of trial, this court generally applies a plain error standard of review. *See, e.g.*, *People v. Perry*, 2009 Guam 4 ¶ 9; *People v. Jones*, 2006 Guam 13 ¶ 9; *People v. Perez*, 1999 Guam 2 ¶ 21 (citing *United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995); *United States v. Ponce*, 51 F.3d 820, 830 (9th Cir. 1995)). Indeed, both Cummins and the Government agree that we review for plain error only. However, Cummins specifically has alleged that the trial court's failure to give the instruction constituted a violation of the court's duty to issue lesser included offense instructions "without regard to whether such instructions were requested or objected to by the parties." *Angoco v. Bitanga*, 2001 Guam 17 ¶ 21. We do not necessarily agree that plain error

analysis is the appropriate standard of review in these circumstances. Nevertheless, under any of the three standards of review, Cummins' convictions are affirmed because there was no error.

IV. ANALYSIS

[8] This case presents two distinct questions: first, whether under the law enunciated in *Angoco v. Bitanga*, 2001 Guam 17, a court is required to instruct on a lesser offense, where the lesser offense has been separately charged in the indictment; and second, whether Second Degree CSC is a lesser included offense of First Degree CSC under 8 GCA § 105.58(b)(1). We answer both questions in the negative.

A. No duty to provide a lesser included offense instruction, when the lesser offense has been independently charged

[9] The lesser included offense doctrine allows a jury to convict a defendant of a crime for which he was not indicted, but for which he had sufficient notice to defend. Under existing Guam law, "trial courts must issue lesser-included offense instructions if there is a rational basis for such as shown by substantial evidence, without regard to whether such instructions were requested or objected to by the parties." *Angoco*, 2001 Guam 17 ¶ 21.

[10] The purpose of the *Angoco* rule is to ensure that a jury is not forced to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, and is motivated by the principle that our courts are forums for the truth, and a jury should not be hindered from discovering truth in its deliberations. *See id.* ¶ 20 (citation omitted). Cummins now cites to *Angoco* to argue that the trial court erred in failing to instruct the jury on Second Degree CSC as a lesser included offense of First Degree CSC. A closer look at *Angoco* suggests that the bright-line rule it articulates is not even applicable in a case where a lesser offense has been separately

charged, and consequently, where the jury is already receiving instructions defining the latter offense.

[11] In *Angoco*, the defendant had been charged with felony aggravated murder, premeditated aggravated murder, first degree robbery, burglary, theft, special allegations of use of a deadly weapon, and hindering apprehension or prosecution of murder. *Id.* ¶ 2. At trial, the jury was not instructed on the lesser included offense of negligent homicide within the felony aggravated murder charge. *Id.* The jury found Angoco guilty of felony aggravated murder and of hindering apprehension. *Id.* On appeal to the District Court of Guam Appellate Division, Angoco's counsel failed to argue that the trial court committed reversible error by not instructing the jury *sua sponte* on lesser included offenses to the felony aggravated murder charge. *Id.* ¶ 3. Affirming the trial court's grant of habeas relief on the basis of ineffective assistance of appellate counsel, we determined that the failure of Angoco's counsel to raise the omitted instruction argument in his appeal to the Guam Appellate Division was prejudicial error. *Id.* ¶ 22.

[12] Angoco was never charged with the lesser included offense of negligent homicide, therefore the jury could not consider whether he was guilty of that crime when they deliberated. The jury was faced with an all-or-nothing choice between felony aggravated murder and acquittal of that charge. Cummins' case differs from Angoco's in this key respect. Cummins was separately charged with both First Degree CSC and Second Degree CSC. The jury had the choice of convicting him or acquitting him of one or both of the crimes. The jury was not faced with the kind of all-or-nothing choice that the *Angoco* rule sought to eliminate.

[13] Where a lesser offense is independently charged, the all-or-nothing doctrine is inapplicable. Other concerns exist when the lesser and greater offense have been independently charged—the defendant may not be sentenced on both charges, and it has been said that where a

jury has found a defendant guilty of both the greater and lesser offense, the conviction of the greater is controlling, and the conviction for the lesser is to be reversed. *See People v. Campbell*, 2006 Guam 14 ¶ 6 n.2 (citing *People v. Moran*, 463 P.2d 763 (Cal. 1970)). But these concerns are not what *Angoco* sought to address. In summary, a court's failure to provide additional lesser included offense instructions, when the lesser offense has been independently charged, is not reversible error.

[14] Ordinarily, our analysis would end here. However, the vagueness of the indictment, alleging that all the charged criminal acts occurred between December 1, 2004 and January 4, 2005, presents some ambiguity about whether the three Second Degree charges refer to the same exact three instances of conduct as the three First Degree charges, or whether each charge refers to a separate criminal incident.[1] The testimony suggests that there were exactly three incidents being alleged, independently charged under two provisions of the criminal code. Under this scenario, Cummins would not be entitled to a separate lesser included offense instruction, since the lesser offenses were independently charged. However, if each of the six charges refers to an independent incident, alleging in total six distinct criminal acts, there may be an argument that Cummins was entitled to a separate instruction, of Second Degree CSC as a lesser included offense of each of the three First Degree CSC charges. In order to address the latter scenario, we must consider whether Second Degree CSC is a lesser included offense of First Degree CSC under 8 GCA § 105.58(b)(1).[2]

[1] The appeal before us does not involve a motion to dismiss the indictment, or a motion for a bill of particulars, either of which might have clarified the questions presented here.

[2] Cummins does not assert that Second Degree CSC is a lesser included offense of First Degree CSC under 8 GCA 105.58(b)(3). Under Guam Rules of Appellate Procedure Rule 13, the failure to adequately brief an issue may be treated as a waiver of the issue on appeal. *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶¶ 3 n.2, 7 n.3.

B. Second Degree Criminal Sexual Conduct is not a lesser included offense of First Degree Criminal Sexual Conduct under 8 GCA § 105.58(b)(1).

[15] Cummins contends that he was entitled to an instruction on Second Degree CSC as a lesser included offense of First Degree CSC because "[s]exual contact can be proven by the same or less than all the facts necessary to establish sexual penetration." Appellant's Br. at 8 (May 10, 2009) (citing *People v. Lastimoza*, No. 82-0017A, 1983 WL 29940 (D. Guam App. Div. 1983)).

[16] In determining whether one offense is a lesser included offense of another, this court turns to 8 GCA § 105.58, "Guilt of Included Offense Permitted: Defined." *See People v. Demapan*, 2004 Guam 24 ¶¶ 9-12 (applying 8 GCA § 105.58 to determine that the statutory offense of criminal trespass was not included within the offense of burglary); *Perez*, 1999 Guam 2 ¶ 22 (stating that "lesser included offense" is defined in 8 GCA § 105.58). Subsection (a) provides that "[t]he jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is included in that with which he is charged." 8 GCA § 105.58(a) (2005). Subsection (b) provides that an offense is "included" for the purposes of subsection (a) when:

> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

8 GCA § 105.58(b).

[17] On appeal, Cummins alleges that Second Degree CSC is a lesser included offense of First Degree CSC under 8 GCA § 105.58(b)(1). In the double jeopardy context, we have construed

whether an offense is included under section 105.58(b)(1) by determining whether each offense requires proof of an additional fact which the other does not. *See People v. Aguirre*, 2004 Guam 21 ¶ 17 n.2 (citations omitted). In a more analogous case involving the court's duty to provide jury instructions, we have referred to the test as the "same or less facts test." *Demapan*, 2004 Guam 24 ¶ 10.

[18] In *Demapan*, we rejected the argument that criminal trespass was a lesser included offense of burglary. Because criminal trespass contained a scienter element not included in the greater offense of burglary, we held that criminal trespass did not have the same or less facts than those required to prove burglary, and we rejected the claim that it was a lesser included offense.

[19] Applying the "same or less facts" test to construe whether Second Degree CSC is a lesser included offense of First Degree CSC, it is apparent that Second Degree CSC contains a scienter element not included within the greater offense of First Degree CSC. Under 9 GCA § 25.15, a person is guilty of First Degree CSC "if he or she engages in *sexual penetration* with the victim" and the victim is under fourteen (14) years of age. 9 GCA § 25.15(a)(1) (2005) (emphasis added). "Sexual penetration" is defined as any intrusion, however slight, of any part of a person's body into the genital or anal openings of another person's body. 9 GCA § 25.10(a)(9) (2005). Thus, First Degree CSC does not include a scienter element.

[20] Under 9 GCA § 25.20, Second Degree CSC occurs when a "person engages in *sexual contact* with another person" and that other person is under fourteen (14) years of age. 9 GCA § 25.20(a)(1) (2005) (emphasis added). "*Sexual [c]ontact* includes the intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being *for the purpose of sexual arousal or gratification.*" 9 GCA § 25.10(a)(8) (second emphasis added). Thus, Second Degree CSC requires proof of scienter.

[21] Cummins cites to a 1983 District Court of Guam Appellate Division case, *People v. Lastimoza*, in which the court reasoned that Michigan precedent should be persuasive when interpreting Guam criminal sexual conduct statutes, because these statutes are patterned after Michigan laws. *Lastimoza*, 1983 WL 29940, at *1. *Lastimoza* in turn relied on *People v. Green*, in which the Michigan Court of Appeals held that second degree criminal sexual conduct is a necessarily included lesser offense of first degree criminal sexual conduct. *People v. Green*, 272 N.W.2d 216 (Mich. Ct. App. 1978). Consequently, the *Lastimoza* court found error in the trial court's failure to instruct the jury on Second Degree CSC as a lesser included offense of First Degree CSC. *Lastimoza*, 1983 WL 29940, at *4.

[22] In light of our decision in *Demapan*, we would be disinclined to give much weight to the statements in *Lastimoza*, to the extent they contradict legal rules articulated by this court. Further, although we generally will not deviate from precedent of the Appellate Division if it was well established in law and well reasoned, we will deviate from such precedent when there is sufficient reason to do so. *See Sumitomo Constr. Co., Ltd. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 6 (citation omitted); *Limtiaco v. Guam Fire Dep't*, 2007 Guam 10 ¶ 46 n.9 (citations omitted). The *Green* decision relied upon by the *Lastimoza* court has been subsequently called into question, providing sufficient reason to deviate from *Lastimoza.* In *People v. Garrow*, the Michigan Court of Appeals specifically mentioned that second degree criminal sexual conduct requires proof of arousal or gratification of sexual emotions, while first degree criminal sexual conduct does not. 298 N.W.2d 627, 629-30 (Mich. Ct. App. 1980). The court observed that *Green* failed to consider the differences in the plain language of the statutory definitions of *sexual penetration* and *sexual contact. Id.* at 630. Because proof of a sexual purpose was not required to find an accused guilty of first degree criminal sexual conduct, second degree criminal

sexual conduct was not a necessarily lesser included offense of first degree criminal sexual conduct. *Id.* at 629.

[23] For the purposes of the bright-line rule set forth in *Angoco*, we will not expand the definition of lesser included offenses under 8 GCA § 105.58(b)(1) to embrace offenses that are not necessarily included offenses, such as those that Michigan now terms "cognate lesser offenses." *Compare People v. Perry*, 594 N.W.2d 477, 480 n.17 (Mich. 1999) (declining to abandon Michigan's approach to lesser offense instructions in favor of federal model that does not allow cognate lesser instructions) *with People v. Birks*, 960 P.2d 1073, 1090 (Cal. 1998) (holding that criminal defendant has no unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge) *and People v. Vincze*, 11 Cal. Rptr. 2d 430, 433 n.6 (Ct. App. 1992) (trial court not required to instruct *sua sponte* on lesser "related" offenses (citations omitted)). Instead, where warranted by the evidence, a trial court has a *sua sponte* duty to instruct on an *uncharged* lesser offense *necessarily included* in a charged offense. *See Birks*, 960 P.2d at 1078.

[24] Because Second Degree CSC is not a necessarily included lesser offense of First Degree CSC under 8 GCA § 105.58(b)(1), the trial court's failure to provide a lesser included offense instruction was not error.

V. CONCLUSION

[25] The trial court's failure to instruct the jury on Second Degree CSC as a lesser included offense of First Degree CSC under 8 GCA § 105.58(b)(1) was not error. *Angoco* vests the court with the obligation to instruct on necessarily included lesser offenses, and Second Degree CSC is not a necessarily included lesser offense of First Degree CSC. Furthermore, there is no duty to

provide an additional, separate lesser included offense instruction where the lesser offense has been independently charged. Accordingly, Cummins' convictions are **AFFIRMED**.

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