IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

DOMINICK L. FELDER,
Defendant-Appellant.

Supreme Court Case No. CRA11-002
Superior Court Case No. CF0081-08

OPINION

Cite as: 2012 Guam 8

Appeal from the Superior Court of Guam
Argued and submitted August 25, 2011
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Dominick L. Felder was indicted for first degree criminal sexual conduct ("CSC"). After the gathering of evidence and before the jury reached its verdict, Felder acquiesced to the trial court's issuance of a second degree CSC instruction to the jury. Felder was subsequently found guilty of second degree CSC and sentenced to twenty years in prison.

[2] Felder's failure to object to the jury instruction subjects the jury instruction to plain error review, and Felder has not met his burden to show how the error below needs to be reversed in order to prevent a miscarriage of justice. Additionally, the Superior Court did not sentence Felder as a first offender because it found that he was not a first offender. We find that the court's sentencing decision was not based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. As a result, we affirm his conviction and 20-year sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] G.K.H.H. (DOB 02/21/1995) was 12 years old in February 2008. At Felder's trial, G.K.H.H. testified that on the night of February 11, 2008, while her mother was sleeping, Tokiou Andon called her from Dominick Felder's cell phone and told her to come outside. When G.K.H.H. came outside, Andon told her to get in Felder's car. G.K.H.H. hopped in the back seat next to Andon. G.K.H.H. testified that when she got in the car, she did not know where they

were going. They ultimately ended up at Hotel Ypao in Tamuning.[1] Andon testified that once in the hotel he went back out to the car to fetch condoms after Felder asked him to do so. G.K.H.H. testified that at the hotel, Felder aka "Boss" penetrated her vagina with his penis and then Tokiou Andon did "the same thing." Tr., vol. 1 at 80-83 (Jury Trial, Oct. 15, 2009); Tr., vol. 3 at 25 (Cont. Jury Trial, Oct. 19, 2009).

[4] The next morning, G.K.H.H. reported to her school counselor what Felder and Andon did to her the night before. Accompanied by her mother, G.K.H.H. filed a police report and afterwards went to the Department of Mental Health and Substance Abuse, Healing Hearts Crisis Center, where G.K.H.H underwent an acute examination for sexual assault.

[5] The grand jury returned an indictment charging Felder with first degree CSC. At trial, before instructing the jury, the trial court went through each jury instruction with the parties and asked Felder for his response to the inclusion of an instruction for second degree CSC. Even though Felder was only indicted on first degree CSC, he did not object to the giving of an instruction on second degree CSC as a lesser included offense of first degree CSC. In response to the trial court's inquiry, Felder's counsel stated, "The Supreme Court [of Guam] has said in four or five cases [that] it is a lesser included offense." Tr., vol. 3 at 112 (Cont. Jury Trial, Oct. 19, 2009). The instruction that second degree CSC was a lesser included offense of first degree CSC was then given to the jury.

[6] The jury acquitted Felder of first degree CSC but convicted him of second degree CSC, a felony of the first degree. The trial court subsequently sentenced Felder to twenty years of

[1] Although Felder refused to put his name or car license plate number on the registration form, upon request, Felder wrote "Lion Felder" as his name. At trial, the attendant who received his registration materials also identified Felder's car and license plate. Tr., vol. 2 at 26 (Cont. Jury Trial, Oct. 16, 2009).

incarceration. Felder now appeals both the conviction on the basis of improper jury instructions and the trial court's decision to sentence him to twenty years of incarceration.

II. JURISDICTION

[7] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-104 (2012)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[8] Jury instructions are reviewed for plain error when no objection to the instructions was made at trial. *People v. Perry*, 2009 Guam 4 ¶ 9. When the defendant fails to object to a jury instruction giving rise to a constructive amendment, we also review for plain error. 8 GCA §§ 90.19(c), 130.50(b) (2005).

[9] Issues of statutory interpretation are reviewed *de novo*. *People v. Manley*, 2010 Guam 15 ¶ 12. The trial court's imposition of a sentence is reviewed for an abuse of discretion. *People v. Diaz*, 2007 Guam 3 ¶ 10.

IV. ANALYSIS

A. Whether the Giving of a Lesser Included Offense Charge of Second Degree CSC Warrants Reversal of Felder's Conviction.

[10] Felder argues that the giving of the lesser included offense charge of second degree CSC is reversible error and that it is not necessary to object to the instruction to have this appeal be subject to a standard other than plain error review. Appellant's Br. at 5-7 (May 27, 2011). He asserts that the trial court was required to give the lesser included offense instruction because the Supreme Court in four or five cases stated that second degree CSC is a lesser included offense of first degree CSC and there was a rational basis to support the giving of the instruction. Tr., vol.

3 at 112 (Cont. Jury Trial, Oct. 19, 2009). Substantiating this point, Felder cites to case law from the Appellate Division of the District Court of Guam that held that second degree CSC was an included offense of first degree CSC. Appellant's Br. at 5 (citing *People v. Lastimoza*, No. 82-0017A, 1983 WL 29940 (D. Guam App. Div., Aug. 16, 1983)). Felder now believes, however, that this court's holdings in *People v. Cummins*, 2010 Guam 19, and *People v. Songeni*, 2010 Guam 20, that second degree CSC is not an included offense of first degree CSC, compels this court to reverse Felder's conviction.[2] Appellant's Br. at 8. He argues that because he was only indicted for first degree CSC, a conviction for second degree CSC—a crime not charged in the indictment—constitutes a constructive amendment to the indictment, which is reversible error violating both the Fifth and Sixth Amendments to the Constitution. Appellant's Br. at 7-8.

[11] Although Felder was not indicted on second degree CSC charges, the People argue that it is within the power of the court to amend an indictment "if [the] substantial rights of the defendant are not prejudiced." Appellee's Br. at 4 (June 28, 2011) (citing 8 GCA § 55.20 (2005)). The People also request this court to take judicial notice of the fact that although second degree CSC is not a lesser included offense of first degree CSC, it is a lesser *related* offense to which defendants sometimes plead guilty in order to take advantage of the lower sentencing range. *See id.* at 5. Lastly, the People argue that Felder took the risk of requesting the second degree CSC instruction in order to take advantage of the lower sentencing range, and that he is now appealing because he did not anticipate the trial court sentencing him at the maximum end of the range. *Id.* at 6-7.

[2] The opinions in both *Cummins* and *Songeni* were issued after Felder was convicted.

[12] We must initially address whether Felder's failure to object to the jury instruction[3] subjects it to plain error review or rather, as Felder argues, reversible error review.

1. Felder's failure to object to the jury instruction subjects the instruction to plain error review.

[13] Title 8 GCA § 90.19(c) provides that "no party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection." 8 GCA § 90.19(c). However, on appeal, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [trial] court." 8 GCA § 130.50(b).[4]

[14] Notwithstanding sections 90.19 and 130.50, Felder argues that the need for a contemporaneous objection to a jury instruction is not necessary when there is a solid wall of binding authority that forecloses the trial court from correcting an error in light of the objection. Appellant's Br. at 6. When such authority exists, he argues, "it is not necessary for an objection to be made to have the court decide the issue under a standard other than plain error." *Id.* at 6-7. Here, Felder cites to three cases to support his argument that the standard of review is reversible error rather than plain error: *United States v. Scott*, 425 F.2d 55 (9th Cir. 1970), *overruled by*

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[3] Felder never denied that he failed to object to the instruction. *See* Appellant's Br. at 4. He also admitted to not objecting at oral argument:

> Justice Torres: But you don't disagree that you did not object to the inclusion of Second Degree CSC as a lesser included?
>
> Felder's Counsel: I did not object . . . .

Digital Recording at 10:20:17-10:20:25 (Oral Argument, Aug. 25, 2011).

[4] Title 8 GCA § 130.50 is derived from Federal Rules of Criminal Procedure Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); *see also* 8 GCA § 130.50. Thus, federal court interpretation of Rule 52(b) is persuasive authority.

United States v. Keys, 133 F.3d 1282, 1287 (9th Cir. 1998); *Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988); and *Guam v. Ibanez*, 880 F.2d 108 (9th Cir. 1989). *See* Appellant's Br. at 6.

[15] In *Scott*, appellant Scott argued that the inclusion of a jury instruction that was recently found unconstitutional compelled reversal of his conviction. *Scott*, 425 F.2d at 57. In response, the Ninth Circuit stated that "[t]he general rule is that a claim of error in a jury instruction is waived, unless the defendant excepts to the instruction before the jury retires to consider its verdict." *Id.* (citing Fed. R. Crim. P. 30; *Lopez v. United States*, 373 U.S. 427 (1963)). The court added, however:

> At the time of Scott's trial, there was a solid wall of circuit court authority, including our own, sustaining the presumption against constitutional attack. An exception would not have produced any results in the trial court. Under these circumstances were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency. We conclude that Scott's failure to except did not waive the point on appeal.

Id. at 57-58 (internal citations omitted). Therefore, the Ninth Circuit created an exception to the provision in Federal Rules of Criminal Procedure Rule 30 that failure to object to a jury instruction served as a waiver. *See* Fed. R. Crim. P. 30. The court essentially held that where there is a solid wall of circuit authority endorsing a jury instruction, failure to object to the instruction would not waive the point on appeal.

[16] In *Yang*, the Ninth Circuit, applying the *Scott* exception, reviewed an unobjected-to jury instruction for reversible error, rather than for plain error, because an objection to the instruction would have been futile given the Ninth Circuit's affirmance of the same instruction in an earlier unpublished case and the trial court's erroneous practice of relying on the Ninth Circuit's

unpublished decisions as binding precedent. *See Yang*, 850 F.2d at 512 n.8. For the same reasons, the Ninth Circuit also applied the *Scott* exception in *Ibanez* and reviewed the jury instruction at issue in that case for reversible error, rather than for plain error. *See Ibanez*, 880 F.2d at 111-12.

[17] Although under the *Scott* exception we would review the jury instruction in the instant case for reversible error because the existing precedent at the time of Felder's trial required the trial court to give the instruction, *see, e.g.*, *Lastimoza*, 1983 WL 29940, at *1-*2,[5] *Scott* is no longer good law. In 1998, on remand from the United States Supreme Court, *see United States v. Keys*, 520 U.S. 1226 (1997), the Ninth Circuit, applying the Supreme Court's holding in *Johnson v. United States*, 520 U.S. 461 (1997),[6] explicitly overruled both *Scott* and *Yang* and held that the plain error standard applies to unobjected-to jury instructions regardless of whether there are solid walls of authority endorsing such instructions.[7] *See Keys*, 133 F.3d at 1287.

[18] The law upon which Felder rests his argument that the standard of review is reversible error, and not plain error, has been overturned. *See id.* As such, we adhere to the settled rule that failure to object to a jury instruction before the jury retires to consider its verdict precludes reversal except where there is a plain error affecting substantial rights. Accordingly, we review

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[5] *See also Angoco v. Bitanga*, 2001 Guam 17 ¶ 21 (holding that "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" (emphasis added)); *accord* 8 GCA § 90.27 (2005).

[6] In *Johnson*, the Supreme Court affirmed the Eleventh Circuit's decision to review an unobjected-to jury instruction for plain error, despite the fact that the trial court's ruling on the instruction was plainly supported by existing precedent. *See Johnson*, 520 U.S. at 464-68.

[7] *Keys* did not explicitly overrule *Ibanez*. However, because *Ibanez* relied on the reversed *Scott* and *Yang* holdings, it was effectively overruled by *Keys*. *See Keys*, 133 F.3d 1282; *Ibanez*, 880 F.2d 108.

the unobjected-to lesser included offense instruction for plain error.[8] *See People v. Perry*, 2009 Guam 4 ¶ 9.

2. Whether the issuance of the instruction constituted plain error requiring reversal.

[19] "Plain error is highly prejudicial error." *People v. Quitugua*, 2009 Guam 10 ¶ 11. Thus, "[w]e will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* (citations omitted); *see also United States v. Olano*, 507 U.S. 725, 732 (1993). Felder bears the burden to demonstrate that reversal is warranted. *See Quitugua*, 2009 Guam 10 ¶ 11 (citing *People v. Van Bui*, 2008 Guam 8 ¶ 10; *People v. Chung*, 2004 Guam 2 ¶ 9). We will now conduct a plain error review of the jury instruction in this case.

a. Was the jury instruction in error?

[20] The jury instruction at issue stated that second degree CSC is a lesser included offense of first degree CSC. However, we have since held that second degree CSC is not a lesser included offense of first degree CSC because it does not fall into one of the three prongs of Guam's included offense statute, 8 GCA § 105.58. *See Songeni*, 2010 Guam 20 ¶ 27; *Cummins*, 2010 Guam 19 ¶ 24. Because second degree CSC is not a lesser included offense of first degree CSC, it is error to instruct the jury on second degree CSC if such charge is not included in the indictment. *See* 8 GCA § 1.15 (2005) ("Any felony . . . *shall* be prosecuted by indictment . . . ."

[8] Felder argues that *Yang* still applies because it was not overruled by *Perry*, but because *Yang* was overruled by the Ninth Circuit before *Perry* was decided, this court did not have to address *Yang* in its *Perry* decision. Appellant's Br. 6-8; *see also Yang*, 850 F.2d 507; *Perry*, 2009 Guam 4.

(emphasis added)); *Songeni*, 2010 Guam 20 ¶ 25 ("Convictions on crimes not charged in the indictment constitute 'constructive amendments' to indictments . . . ."). Under *Griffith v. Kentucky*, a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final[9] [when the new rule was decided], with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. 314, 328 (1987). Because a judgment of conviction had yet to be rendered against Felder at the time *Songeni* and *Cummins* were decided, Felder's case was "not yet final" for purposes of *Griffith* retroactivity. We therefore must apply *Songeni* and *Cummins* retroactively. Applying our holdings in *Songeni* and *Cummins* that second degree CSC is not a lesser included offense of first degree CSC, the trial court's issuance of the second degree CSC instruction, an offense for which Felder was not indicted, was contrary to law and in error.

b. Was the error clear or obvious under current law?

[21] Although the error was by no means clear or obvious at the time of Felder's trial, in order to satisfy the second prong of the plain error test, at a minimum, the error must be clear or obvious "under current law." *Olano*, 507 U.S. at 734. Thus, "in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 467-68. At the time of trial, it was settled that second degree CSC was a lesser included offense of first degree CSC; by the time of appellate consideration, the law changed, and it is now settled that second degree CSC is not a lesser included offense of first degree CSC. *See Cummins*, 2010

[9] By "final," the Court meant "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

Guam 19 ¶ 24. Furthermore, it is also settled that it is error for the trial court to constructively amend an indictment by giving an instruction that permits the jury to convict the defendant of an offense neither charged in the indictment nor included in the offense charged. *See Songeni*, 2010 Guam 20 ¶ 25. The second prong of the plain error test is therefore satisfied.

c. Did the error affect Felder's substantial rights?

[22] Even though an error is clear or obvious under current law, it must also "affect[] substantial rights" in order to warrant notice on appeal. *Quitugua*, 2009 Guam 10 ¶ 11; 8 GCA § 130.50(b). "Once a clear error has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case)." *People v. Mendiola*, 2010 Guam 5 ¶ 24 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 26).

[23] Felder suggests that under *Songeni*, automatic reversal of his conviction is required and that he need not show prejudice. *See* Appellant's Br. at 8 (citing *Songeni*, 2010 Guam 20 ¶¶ 25-26). In *Songeni*, we recognized that constructive amendments to indictments "have been found by federal courts to be reversible error as they violate both the Fifth and Sixth Amendments to the Constitution of the United States." *Songeni*, 2010 Guam 20 ¶ 25 (citing *United States v. Kelly*, 722 F.2d 873, 876 (1st Cir. 1983)). In a parenthetical to our citation to *United States v. Crocker*, 568 F.2d 1049 (3d Cir. 1977), which relied upon *Stirone v. United States*, 361 U.S. 212 (1960),[10] we quoted the Third Circuit's holding that "[t]he consequence of a constructive amendment is . . . per se reversible error, requiring no analysis of additional prejudice to the

[10] In *Stirone*, the United States Supreme Court, reviewing for harmless error, held that "[d]eprivation of [a defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217.

defendant." *Songeni*, 2010 Guam 20 ¶ 26 (citing *Crocker*, 568 F.2d at 1059-60, *abrogated on other grounds by United States v. Miller*, 527 F.3d 54, 79 n.21 (3d Cir. 2008)).

[24] While we find a constructive amendment error here, we do not agree that *Songeni* necessarily requires automatic reversal of Felder's conviction. First, the language in *Songeni* upon which Felder relies is dicta. *See id.* ¶¶ 25-26. More importantly, the constructive amendment cases cited in *Songeni* are federal cases analyzing the Fifth Amendment right to a grand jury indictment. *See Kelly*, 722 F.2d at 876; *Crocker*, 568 F.2d at 1059-60. Such constitutional right has not been extended to Guam; thus, this protection has no application here. *See Guam v. Inglett*, 417 F.2d 123, 124-25 (9th Cir. 1969) (holding the Guam Elective Governor Act extending Fifth Amendment to Guam did not make grand jury indictment mandatory in prosecution of infamous crimes by territorial government), *overruled on other grounds by United States v. Frame*, 454 F.2d 1136, 1138 (9th Cir. 1972); *Tarpley v. Estelle*, 703 F.2d 157, 161 n.7 (5th Cir. 1983) ("We note that in federal courts, the fifth amendment's guarantee of a grand jury indictment prohibits the sort of constructive amendment of the indictment that was worked by Tarpley's jury instructions. That constitutional protection, however, has never been incorporated into the fourteenth amendment's due process clause; it is inapplicable to state proceedings." (citations omitted)); *Hurtado v. California*, 110 U.S. 516, 534-35 (1884) (holding that due process clause of Fourteenth Amendment does not incorporate Fifth Amendment right to be charged by grand jury indictment). Rather, Guam provides a statutory, not a constitutional, right to a grand jury indictment. *See, e.g.*, 8 GCA § 1.15 ("Any felony together with any related misdemeanor shall be prosecuted by indictment . . . ."); 8 GCA § 50.10(a) (2005) ("A grand jury

is a body of the required number of persons summoned by the court and sworn to inquire into felonies and any related misdemeanors triable by the court.").

[25] Furthermore, the facts of *Songeni* are distinguishable. Although *Songeni* also involved the trial court's instruction on second degree CSC as a lesser included offense of first degree CSC, when second degree CSC was not charged in the indictment, Songeni preserved his claim below by repeatedly objecting to the lesser included offense instruction, so the question of plain error review was not implicated. *See Songeni*, 2010 Guam 20 ¶¶ 4-6. Here, however, Felder never objected to the instruction. While *Songeni* did not specify whether the *per se* rule applies under both harmless error and plain error review, *Stirone*, the United States Supreme Court case from which the *per se* rule derives, reviewed a constructive amendment to which the defendant raised an objection at trial, and thus does not necessarily extend the *per se* rule to the plain error context. *See Stirone*, 361 U.S. at 218.

[26] Finally, because plain error review was not implicated in *Songeni*, we did not discuss the impact of *Olano* on constructive amendment jurisprudence.[11] In *Olano*, the United States Supreme Court reviewed the Ninth Circuit's holding that the presence of alternate jurors during jury deliberations was "inherently prejudicial" and reversible *per se*, thereby satisfying the plain error doctrine. *Olano* at 730-31. The Court clarified the standard for plain error review of forfeited errors under Rule 52(b), laying out the four-prong test articulated above. *Id.* As to the third prong, the Court held that "[n]ormally, although perhaps not in every case,[12] the defendant

[11] In fact, both of the constructive amendment cases we cited to in *Songeni*—*Kelly* and *Crocker*—predate *Olano*. *See Kelly*, 722 F.2d 873; *Crocker*, 568 F.2d 1049.

[12] The Supreme Court reserved the question of whether there might be some errors for which specific prejudice need not be shown. The Court noted that "[t]here may be a special category of forfeited errors that can be

must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Id.* at 735. The Court then explained that Rule 52(b) is permissive, not mandatory: "If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, but is not required to do so." *Id.* The standard that should guide the exercise of discretion under Rule 52(b) is that the court "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736.

[27] *Olano* affected federal court interpretations of *Stirone*, because prior to *Olano*, it was established in many circuit courts of appeal that a constructive amendment required automatic reversal, even under plain error review. *See, e.g.*, *United States v. Bohuchot*, 625 F.3d 892, 897 (5th Cir. 2010) (recognizing that pre-*Olano*, constructive amendments were reversible *per se*, but that post-*Olano*, plain error review applies); *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) (recognizing that Ninth Circuit's pre-*Olano* jurisprudence required automatic reversal for constructive amendments even on plain error review, but that *Olano* had raised serious doubts that such a *per se* approach was still appropriate).

[28] Since *Olano*, many circuit courts do not require automatic reversal of unpreserved objections to constructive amendments. The First, Fifth, Seventh, and Tenth Circuits hold that constructive amendments in this context are subject to plain error analysis and that no presumption of prejudice should apply. *See United States v. Brandao*, 539 F.3d 44, 60 (1st Cir. 2008) ("We . . . apply the standard prejudice evaluation to constructive amendment claims on

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corrected regardless of their effect on the outcome," i.e., structural errors, but declined to address the issue. *Olano*, 507 U.S. at 735. The Court also declined to address "those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.*

plain error review and do not presume prejudice."); *United States v. Brown*, 400 F.3d 1242, 1253 n.6 (10th Cir. 2005) ("[T]he automatic reversal rule . . . no longer applies in a constructive amendment plain error case, *i.e.*, where the defendant failed to object in the district court."); *United States v. Fletcher*, 121 F.3d 187, 193 (5th Cir. 1997), *abrogated on other grounds as recognized by United States v. Robinson*, 367 F.3d 278, 286 n.11 (5th Cir. 2004) ("Following *Olano* . . . we have *discretion* to correct a *Stirone* error—an error that, prior to *Olano*, would have required reversal *per se*." (footnote omitted)); *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996) (finding third prong unsatisfied because defendant did not suffer prejudice from constructive amendment).

[29] The Ninth and District of Columbia Circuits have not squarely decided whether post-*Olano* constructive amendments always affect substantial rights, but nevertheless adhere to the usual plain error formulation when considering unpreserved constructive amendments. *See United States v. Hall*, 610 F.3d 727, 743 (D.C. Cir. 2010) (declining to decide whether constructive amendments always affect substantial rights because instant error did not satisfy fourth prong of plain error analysis); *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004) (finding that a constructive amendment did not violate defendant's substantial rights under plain error review without discussion of *per se* prejudice or structural error).[13]

[13] In the Third Circuit, however, constructive amendments warrant a rebuttable presumption of prejudice. *See United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002) ("[W]e will apply in the plain error context a rebuttable presumption that constructive amendments are prejudicial . . . ."). Lastly, the Second and Fourth Circuits treat constructive amendments as *per se* prejudicial errors that always affect substantial rights. *See United States v. Hassan*, 578 F.3d 108 (2d Cir. 2008) ("Constructive amendments are '*per se* violations . . . that require[ ] reversal even without a showing of prejudice to the defendant.'" (alterations in original) (quoting *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997))); *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994) ("[W]e hold that, under *Stirone*, constructive amendments of a federal indictment are error *per se*, and, under *Olano*, must be corrected on appeal even when not preserved by objection." (footnote omitted)).

[30] Because the Fifth Amendment right to a grand jury indictment has not been extended to the states, the issue of constructive amendments is rarely addressed in state courts. In some states, however, the right to a grand jury indictment is guaranteed by the state constitution. *See, e.g.*, *State v. Johnson*, 188 P.3d 912, 915 (Idaho 2008); *Michael v. State*, 805 P.2d 371, 373-74 (Alaska 1991). In that instance, application of federal constructive amendment analysis may be appropriate. *Id.* In Guam, however, the right to a grand jury indictment is provided by statute; therefore, federal constructive amendment analysis is inapplicable. *See Inglett*, 417 F.2d at 124-25.

[31] Because the right to a grand jury indictment is not a fundamental constitutional right in Guam, and because even where it is constitutionally provided, many federal circuit courts do not find an unpreserved objection to constructive amendment to be *per se* reversible error, we are hard-pressed to adopt such a *per se* rule here. *Cf. Rivera v. Illinois*, 556 U.S. 148, 161-62 (2009) ("Absent a federal constitutional violation, States retain the prerogative to decide whether [state-law] errors . . . require automatic reversal."); *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process. If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" (alteration in original) (citations omitted)). Instead, we hold that where the defendant fails to object to a constructive amendment at trial, we review the constructive amendment claim for plain error, and the burden lies with the defendant to show prejudice.[14]

[14] We find the Fifth Circuit's reasoning in *Fletcher* to be persuasive in this regard:

> [T]o hold that a constructive amendment of the indictment requires *per se* reversal even under *Olano* would encourage the kind of sandbagging that the plain error standard is designed in part to

[32] Felder does not claim a violation of his statutory right to a grand jury indictment, nor does he attempt to demonstrate how he was prejudiced by the erroneous jury instruction, presumably because he believes that the appropriate standard of review of the instruction is reversible error rather than plain error,[15] as discussed in section IV.A.1. above, and because he believes that *Songeni* controls our analysis of the constructive amendment issue in this case. Appellant's Br. at 5-7. Because there is no Fifth Amendment issue here, Felder's reliance upon *Songeni* in that regard is misplaced.

[33] However, the prohibition on constructive amendments is grounded not just in the Fifth Amendment's grand jury guarantee, but also in the Sixth Amendment right to "be informed of the nature and cause of the accusation."[16] *Songeni*, 2010 Guam 20 ¶ 25 (quoting *Kelly*, 722 F.2d at 876); *see also* U.S. Const. amend. VI. We discuss the Sixth Amendment further in section IV.A.2.d. below.

[34] Felder fails to satisfy the third prong of the plain error test; accordingly, we will not notice the error. Moreover, even if Felder's substantial rights were affected, reversal is not necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial system.

> prevent. Were we to so hold, no rational defense counsel would ever object to the erroneous instructions in a prosecution similar to this one [because] defense counsel would . . . know that a conviction would necessarily be reversed on appeal.

121 F.3d at 193.

[15] Under reversible error (i.e., harmless error) review, the burden lies with the prosecution to show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Olano*, 507 U.S. at 734 (noting that under "harmless error" inquiry, government bears burden of persuasion with respect to prejudice); 8 GCA § 130.50(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

[16] Felder alleged a violation of his Sixth Amendment rights in his opening brief. *See* Appellant's Br. at 8.

d. Reversal is not necessary in order to prevent a miscarriage of justice or to maintain the integrity of the judicial system

[35] In addition to our determination that Felder failed to demonstrate a violation of his substantial rights, we further find that the error here does not present exceptional circumstances justifying relief under the fourth prong of the plain error analysis, which permits correction of a clear error affecting substantial rights when "reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Quitugua*, 2009 Guam 10 ¶ 11.

[36] Reversal for plain error under 8 GCA § 130.50(b) is permissive, not mandatory. *Id.* ¶ 47 (citing *Olano*, 507 U.S. at 735). "'If the forfeited error is plain and affects substantial rights, [we have] authority to order correction, but [we are] not required to do so.'" *Id.* (quoting *Olano*, 507 U.S. at 735); *see also* 8 GCA § 130.50(b) ("Plain errors or defects affecting substantial rights *may* be noticed although they were not brought to the attention of the court." (emphasis added)). "'It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level.'" *Quitugua*, 2009 Guam 10 ¶ 47 (quoting *Olano*, 507 U.S. at 744).

[37] Reversal under the plain error rule "is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *People v. Carines*, 597 N.W.2d 130, 138 (Mich. 1999) (alteration in original) (quoting *Olano*, 507 U.S. at 736-37); *see also Quitugua*, 2009 Guam 10 ¶ 48 ("[P]lain error . . . also applies to cases where the putative error affects the fairness or integrity of the trial."). This

affords the court with great discretion in determining whether a miscarriage of justice would result if the conviction is not reversed. *Quitugua*, 2009 Guam 10 ¶ 48.

[38] In this case, we will not exercise our discretion to reverse Felder's conviction for several reasons. First, we find that Felder had notice of the charges against him. Unlike the Fifth Amendment right to a grand jury indictment, an accused's Sixth Amendment right to be informed of the charges against him is a constitutional right in Guam. *See* 48 U.S.C.A. § 1421b(g), (u) (Westlaw through Pub. L. 112-89 (2012)); *In re Oliver*, 333 U.S. 257, 273-74 (1948) (holding that Sixth Amendment guarantee of notice of charges against accused is applicable to the states through due process clause of Fourteenth Amendment).

[39] In the context of constructive amendments, actual notice is important to a Sixth Amendment inquiry. *See United States v. Alvarez-Moreno*, 874 F.2d 1402, 1416 (11th Cir. 1989) ("'If a defendant has actual notice, due process may be satisfied despite an inadequate indictment.'" (quoting *United States v. Becton*, 751 F.2d 250, 256 (8th Cir. 1984))).[17] The People argue that "Felder maintained his due process right to notice of the criminal charges against him because he was aware of the differences between the two charges." Appellee's Br. at 6. The People's argument is further supported by the fact that Felder's primary argument on appeal concerning his failure to object was that there was a "wall of circuit authority" that mandated the trial court to give an instruction on second degree CSC as a lesser included offense of first degree CSC. *See* Appellant's Br. at 6. Furthermore, because the existing precedent at the

[17] In *State v. Freeney*, the Supreme Court of Arizona recognized that "a violation of [one's statutorily provided right to a grand jury indictment] does not necessarily equate to an infringement of a defendant's Sixth Amendment rights." 219 P.3d 1039, 1043 (Ariz. 2009). The court found that "for Sixth Amendment purposes, courts look beyond the indictment to determine whether defendants received actual notice of charges, and the notice requirement can be satisfied even when a charge was not included in the indictment." *Id.*

time of Felder's trial did indeed require the trial court to instruct the jury on second degree CSC, Felder was not surprised by the instruction but rather was well aware that the instruction would be given, as evident through his counsel's statement to the trial court on the issue. *See* Tr., vol. 3 at 112 (Cont. Jury Trial, Oct. 19, 2009) ("The Supreme Court [of Guam] has said in four or five cases [that] it is a lesser included offense."). Additionally, Felder does not argue that his defense theory was affected by the second degree CSC instruction, such as might have been the case had his defense to the first degree CSC charge been that he merely engaged in sexual contact with G.K.H.H rather than sexual penetration.[18] Lastly, if Felder felt unduly burdened by the existing precedent, he could have stated his objection in order to avoid the burden of proving prejudice. Instead, Felder acquiesced to the instruction. Because Felder had adequate notice that the jury would be instructed on second degree CSC, we find no Sixth Amendment violation.[19]

[40] Second, we do not see the need to exercise our discretion to reverse Felder's conviction because Felder has not demonstrated that his defense would have been different had he also been

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[18] When reviewing a formal amendment to an indictment in *Diaz*, we stated:

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

2007 Guam 3 ¶ 17 (quoting *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940)).

[19] Furthermore, although we do not engage in a *Stirone* analysis of the constructive amendment in this case, we note that in *Stirone*, the "reversal of the conviction seemed to be based not solely on the possibility that the jury convicted the defendant on a charge not set forth in the indictment, but also on the possibility that if this charge had been presented to the grand jury it would have been rejected." *People v. Henderson*, 568 N.E.2d 1234, 1267-68 (Ill. 1990) (citing *Stirone*, 361 U.S. at 219), *declined to follow on other grounds by People v. Terry*, 700 N.E.2d 992, 995-96 (Ill. 1998). We do not find the latter possibility to exist here. While second degree CSC is not a lesser included offense of first degree CSC, we recognize that in most instances, the facts giving rise to a first degree CSC charge would also satisfy a finding of probable cause of second degree CSC. We harbor no doubt that had second degree CSC been presented to the grand jury in this case, the indictment would have included that charge.

indicted for second degree CSC. Felder's defense went to the credibility of the victim and co-defendant. In his opening statement, Felder's counsel stated:

> [W]hat I say today, and what [the People] said is not evidence. It's just to give you an idea about what's coming. So we're giving an outline of what we expect you to hear. . . . I don't know what you're going to hear, but you're going to hear from liars.
>
> . . . .
>
> [T]herefore, you will have to decide the truth of these witnesses, because Mr. Andon tells a different story than [G.K.H.H], both from the beginning through the end. And now they're going to come in here, and Lord knows what they're going to say, and it will be up to you to decide their credibility.

Tr., vol. 1 at 7, 10 (Jury Trial, Oct. 15, 2009). In his opening, therefore, Felder outlined his defense, which was based on attacking the credibility of the People's witnesses. Felder believed that their credibility would either lead to an acquittal or conviction. Moreover, at oral arguments on appeal, Felder stated:

> If you have sexual intercourse, you have to have, I mean if you have penetration, you have to have touching . . . . If the evidence is that my client, two people testified, had intercourse with this girl, one would assume they would either convict him or acquit him. I never conceived that a jury would come back with a lesser included of touching on the facts of this case. To me he was either going to be convicted or acquitted because if he didn't penetrate her I don't think there was any evidence that he touched her. You had to believe their witnesses or not believe their witnesses.

Digital Recording at 10:20:17-10:20:25 (Oral Argument, Aug. 25, 2011). Felder's opening argument at trial, and arguments to this court on appeal, make clear that even had Felder been charged with second degree CSC, his defense would not have changed. He rested his defense on what he perceived as the lack of credibility in the witnesses, and he believed that the case rested on whether or not the jury believed them. This defense would not have changed had Felder been indicted on second degree CSC. In addition to Felder's opening statement at trial, and his

representations to this court on appeal, he has never argued that he could or would have provided an alternative defense had he been charged with second degree CSC. We cannot now find that he would have changed his defense had he been charged with second degree CSC, and we therefore decline to reverse his conviction on this basis.

[41] Third, we are convinced that rather than having prejudiced Felder, the second degree CSC instruction benefitted Felder because it allowed the jury to convict him of an offense that carries a less severe penalty than the charged offense. Felder reaped the benefits that lesser included offense instructions are meant to provide, namely, that the jury is not left with an "all-or-nothing" decision when faced with a single charge. After the jury convicted Felder of second degree CSC, the trial court sentenced him to the maximum penalty given for a second degree CSC conviction, which is twenty years of imprisonment. *See* 9 GCA § 80.30(a) (2005). Had Felder been convicted of first degree CSC, the maximum penalty would have been life in prison.

[42] Lastly, this court has refused to reverse convictions, in spite of clear error, so long as enough evidence was found to prove guilt beyond a reasonable doubt. *See People v. Moses*, 2007 Guam 5; *People v. Ueki*, 1999 Guam 4. The facts supporting Felder's conviction from the entire record, including the transcripts of testimony admitted at trial, are sufficient to prevent reversal, in spite of any potential violation of his substantial rights.

[43] In this case, G.K.H.H. testified that on the night of the alleged incident, Andon called her from Felder's cell phone, and he told her to come outside. Tr., vol. 1 at 63-64 (Jury Trial, Oct. 15, 2009). She also testified that when she came outside, Andon told her to get in Felder's car. *Id.* at 64. G.K.H.H. then testified that she hopped in the back seat of Felder's car next to Andon. *Id.* at 64-65. At trial, Andon confirmed this testimony and testified to calling G.K.H.H. on

Felder's phone, encouraging G.K.H.H. to get in Felder's car, and being in Felder's car with Felder and G.K.H.H. as Felder drove to a hotel. Tr., vol. 3 at 24 (Cont. Jury Trial, Oct. 19, 2009). G.K.H.H.'s mother also confirmed at trial that Felder's number was the last number on her caller I.D. before G.K.H.H. disappeared. Tr., vol. 1 at 31 (Jury Trial, Oct. 15, 2009).

[44] The front desk supervisor at the hotel identified Felder's car and license plate number. Tr., vol. 2 at 25-27 (Cont. Jury Trial, Oct. 16, 2009). She testified that on the day of the alleged incident, a guest attempted to pay without filling out the hotel's registration form. *Id.* at 26. She asked the guest to write his name on the registration form, and the guest wrote "Lion Felder." *Id.* The front desk supervisor also stated that the driver refused to write his license plate information, and that she recorded his license plate information for him. *Id.* The recorded license plate number matched the license plate number on Felder's car. *See* Record on Appeal ("RA"), vol. II, seq. 148 (Gov't's Chain of Custody Receipt & Exs., Ex. 14, Oct. 22, 2009). The check-in form with Felder's nickname and license plate number was admitted into evidence. Tr., vol. 2 at 25 (Cont. Jury Trial, Oct. 16, 2009). The front desk supervisor then confirmed Felder's room number and identified the configuration of the room in pictures. *Id.* at 28. At trial, G.K.H.H. was able to describe the configuration of the room before and after looking at the same pictures. *Id.*

[45] Andon testified that once in the hotel he went back out to the car to fetch condoms after Felder requested him to do so. Tr., vol. 3 at 25 (Cont. Jury Trial, Oct. 19, 2009). G.K.H.H. testified that Felder told her to get on the bed and then proceeded to have sex with her. Tr., vol. 1 at 77-82 (Jury Trial, Oct. 15, 2009); Tr., vol. 3 at 25 (Cont. Jury Trial, Oct. 19, 2009). Andon

testified to watching Felder have sex with G.K.H.H. Tr., vol. 3 at 25 (Cont. Jury Trial, Oct. 19, 2009).

[46] At trial, a forensic nurse testified to conducting an acute examination of G.K.H.H. within 72 hours of the incident. Tr., vol. 2 at 39-40 (Cont. Jury Trial, Oct. 16, 2009). The test included a full examination of G.K.H.H.'s entire body. *Id.* at 40. The nurse testified that G.K.H.H.'s fossa navicularis[20] showed signs of redness and stretching. *Id.* at 44. G.K.H.H.'s cervix also showed signs of redness. *Id.* at 45. The forensic nurse testified that these injuries could be attributed to blunt force trauma such as penile penetration. *Id.* at 45. She concluded that the injuries were consistent with G.K.H.H.'s account of what took place that night. *Id.* at 46.

[47] Both Andon and G.K.H.H.'s mother testified to G.K.H.H. returning home early in the morning on the day of the incident. Andon testified that he returned home early that morning. Tr., vol. 3 at 33 (Cont. Jury Trial, Oct. 19, 2009). G.K.H.H.'s mother said that her daughter did not return home until well after midnight. Tr., vol. 1 at 41 (Jury Trial, Oct. 15, 2009). Felder's mother-in-law, who lived with Felder, testified that Felder did not return home until 3:30 a.m. the night of the incident. Tr., vol. 3 at 16 (Cont. Jury Trial, Oct. 19, 2009).

[48] On the basis of this evidence, a jury convicted Felder of second degree CSC.[21] We believe that this evidence is strong, if not overwhelming, proof of Felder's guilt, and even if we

[20] As described at trial, the injury was at the bottom of her hymen. Tr., vol. 2 at 44 (Cont. Jury Trial, Oct. 16, 2009).

[21] The jury found beyond a reasonable doubt that the facts here satisfied the elements of second degree CSC. Thus, the jury found that Felder:

1. Intentionally;
2. Engage[d] in sexual contact with another, to wit: by causing his penis to touch the vagina of [G.K.H.H.], and that the touching can reasonably be construed as being for the purpose of sexual gratification;

were able to exercise our discretion to correct the error, we would choose not to do so. *See Remsza*, 77 F.3d at 1044. Our decision not to exercise our discretion to notice the forfeited error is heavily dependent on the facts of this case. Felder was convicted of second degree CSC, which at the time was considered to be a necessarily included lesser offense of first degree CSC, the crime with which he was charged. Although it was error for the trial court to have instructed the jury on second degree CSC, Felder was fully aware of not only the possibility that the instruction would be given, but of the certainty that it would be given. Thus, Felder was not surprised by the instruction, and he does not assert how or whether the error prejudiced his defense. Furthermore, we have no doubt that had second degree CSC been presented to the grand jury, it would have returned an indictment charging that offense. Finally, the evidence at trial compelled the jury to find Felder guilty of second degree CSC beyond a reasonable doubt.

[49] "'The plain error rule is not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked only in exceptional circumstances . . . .'" *Quitugua*, 2009 Guam 10 ¶ 52 (quoting *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980)). Moreover:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete

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3. That [G.K.H.H.] (DOB: 02/21/1995) is a minor under (14) years of age;

4. On or about February 11, 2008, in Guam.

RA, vol. II, tab 145 (Jury Instruction No. 4b, Oct. 20, 2009).

> freedom from prosecution," and thereby "cost the society the right to punish admitted offenders."

People v. Grant, 520 N.W.2d 123, 130 (Mich. 1994) (alteration in original) (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). With these principles in mind, we find that the error here does not warrant reversal of Felder's conviction.

B. Whether the Trial Court's Sentence of Twenty Years of Imprisonment for Second Degree CSC is Contrary to Law and an Abuse of Discretion.

[50] Title 9 GCA § 25.20(b) states that "[c]riminal sexual conduct in the second degree is a felony in the first degree . . . ." 9 GCA § 25.20(b) (2005). Title 9 GCA § 80.30(a) provides that "[i]n the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years." 9 GCA § 80.30(a) (2005). In this case, the trial court sentenced Felder to the maximum of twenty years for his conviction for second degree CSC.

[51] Felder argues that the trial court erred when it sentenced him to an "enhanced" sentence because "9 GCA § 80.31(a) provides for first offenders sentences of three (3) to fifteen (15) years shall be imposed for a first degree felony."[22] Appellant's Br. at 9. Felder cites to *People v. Muritok*, 2003 Guam 21, to argue that "in order for an enhancement to take effect based upon a prior conviction, the prior conviction must be pled as set forth in 8 GCA § 55.40(a)." *Id.*

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[22] Title 9 GCA § 80.31 provides, in relevant part:

> In the cases to which § 80.30 is applicable as to the sentencing of the person, a person who has not previously been convicted of a criminal offense and has been convicted of a felony for the first time may be sentenced to imprisonment as follows:
>
> (a) In the case of a felony of the first degree, the court shall impose a sentence of not less than three (3) years and not more than fifteen (15) years;
>
> . . . .

9 GCA § 80.31 (2005).

Section 55.40(a) provides, "A prior conviction may be alleged when the existence of such conviction changes the punishment which can be imposed upon the defendant." 8 GCA § 55.40(a) (2005). Felder concludes by stating, "There were never any pleadings contained in the [i]ndictment which alleged any prior felony convictions against Felder, and therefore . . . the court should not have sentenced Felder to twenty (20) years, the maximum being fifteen (15)." Appellant's Br. at 9 (emphases omitted).

[52] Felder essentially argues that because the indictment did not allege any prior convictions, the trial court erred in imposing an "enhanced" sentence of twenty years when it should have sentenced him, as a first offender, to no more than fifteen years. A review of the record confirms that the indictment did not allege the existence of prior convictions against Felder; instead, several prior convictions were alleged in the People's Sentencing Memorandum, filed after the jury returned its verdict. *See* RA, vol. II, tab 155 at 1-2 (People's Sentencing Mem., Nov. 20, 2009). We do not agree, however, that the failure to allege Felder's prior convictions in the indictment precluded the trial court from sentencing Felder to no more than fifteen years of imprisonment.

[53] Although Felder argues that the indictment should have contained evidence of a prior conviction, the *Muritok* case states the opposite. In *Muritok*, the defendant also made a similar argument which was rejected by this court. *See People v. Muritok*, 2003 Guam 21 ¶ 48 ("Muritok . . . contends that *Apprendi* requires the People to charge in the indictment any fact which increases the statutory maximum penalty for the offense. We disagree."). We went on to hold that "unless otherwise required by law, the penalty enhancing facts which fall within the *Apprendi* rule need not be charged in the indictment." *Id.* Furthermore, we cited to the U.S.

Supreme Court when it held "'*[o]ther than the fact of a prior conviction*, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at ¶ 43 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Accordingly, evidence of prior convictions need not have been pleaded in the indictment in order for Felder to not be sentenced as a first offender.

[54] It should be noted that in the section of *Muritok* that Felder cites, a footnote states, "*See e.g.*, Title 8 GCA § 55.40". *See* Appellant's Br. at 9; *Muritok*, 2003 Guam 21 ¶ 48. Section 55.40(a) states that "[a] prior conviction may be alleged when the existence of such conviction changes the punishment which can be imposed upon the defendant." 8 GCA § 55.40 (2005). We do not believe that there is a "change" in punishment in this case because Felder was sentenced according to the standard sentencing guidelines for second degree criminal sexual conduct. *See* 9 GCA § 80.30(a) (2005). Title 8 GCA § 55.40, therefore, does not affect our analysis here.

[55] We need not address Felder's contention that the first offender sentencing statute, 9 GCA § 80.31, required the trial court to sentence him between the three to fifteen-year range, because the trial court found that Felder was not a first offender. RA, vol. II, tab 169 (Recording Log, Feb. 4, 2010). In response to the People's Sentencing Memorandum in which the People alleged the existence of several prior convictions against Felder, Felder submitted a memorandum arguing that the People never established evidence of prior convictions and requesting the court to sentence him as a first offender. *See* RA, vol. II, tab 158 at 2 (Sentencing Mem., Nov. 27, 2009). At the sentencing hearing, Felder and the People presented their arguments to the court. *See* RA, vol. II, tab 160 (Not. Hr'g, Dec. 7, 2009). In response, the trial

court noted that it distinguished section 55.40(a) and found the section inapplicable to the issue of whether the defendant may be sentenced as a first offender. RA, vol. II, tab 169 (Recording Log, Feb. 4. 2010). It added that the issue before the court was not an enhancement of the charge, but rather, whether the defendant should be considered for first offender sentencing. *Id.* The court concluded that it is the duty of the court, and not the jury, to decide whether the defendant has suffered a previous conviction. The court then found that the defendant was not a first offender. *Id.* The facts above show that the trial court considered Felder's arguments carefully before finding that he was not a first offender.

[56] On appeal, Felder does not contend that he had no convictions prior to the instant case. Instead, he argues that any prior convictions needed to be pleaded in the indictment in order for him to not be sentenced as a first offender. Appellant's Br. at 9. As reasoned above, we do not agree. Furthermore, on the basis of the record, we cannot find that the trial court abused its discretion in denying Felder a lesser sentencing range under the first offender statute, 9 GCA § 80.31.

V. CONCLUSION

[57] Because Felder failed to object to the second degree CSC jury instruction, we must review the unobjected-to instruction for plain error. Although giving the instruction was clear error under current law, reversal of Felder's conviction is not warranted because he failed to meet his burden of demonstrating prejudice by the instruction, and reversal is not necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.

[58] Moreover, on the basis of the record, we cannot find that the trial court abused its discretion in denying Felder a lesser sentencing range under the first offender statute, 9 GCA § 80.31.

[59] Accordingly, we **AFFIRM** the judgment.

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

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

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