IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JULIEON EDWARD QUICHOCHO KIM,
Defendant-Appellant.

Supreme Court Case No.: CRA14-020
Superior Court Case No.: CF0030-13

OPINION

Cite as: 2015 Guam 25

Appeal from the Superior Court of Guam
Argued and submitted on February 24, 2015
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Julieon E.Q. Kim appeals from a conviction of one count of Second Degree Burglary for stealing copper wire from the fenced portion of a school yard. Kim first argues the judgment for Second Degree Burglary should be reversed because the trial court erroneously permitted an amendment to the original indictment to accurately reflect the statutory language of Guam's burglary statute. This amendment, in his view, resulted in new factual allegations necessitating a grand jury assessment. Second, Kim contends this amendment was duplicitous because both, (1) entry into a school building, and (2) entry onto a school yard, were included in a single burglary charge. Third, Kim challenges the trial court's denial of his motion to dismiss the amended burglary charge because entry into a fenced area to commit theft does not fall within Guam's burglary definition. Finally, Kim believes Guam's burglary statute is void for vagueness if we find it encompasses entry onto a fenced school yard.

[2] We hold that the trial court should have dismissed the burglary charge. The court improperly extended the definition of "separately secured or occupied portion thereof" to include a fenced enclosure. We need not address the remaining issues on appeal. Accordingly, Kim's burglary conviction is reversed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On December 21, 2012, police responded to a call from Wettengel Elementary School ("Wettengel") reporting that two men jumped the fence out of the school's property. The investigating officer discovered that copper wire was removed from the junction panel boxes on

the roof and exterior of the building. Six or seven bundles of copper wire and a bag of tools were found along the northern perimeter of Wettengel's fence line.

[4] Officer Donald Nakamura conducted a follow-up investigation of the copper wire thefts. Kim became a suspect because he took several loads of copper wire to Viba's Recycling Center, where he exchanged the wire for money. When interrogated by Nakamura, Kim admitted to the Wettengel theft.

[5] Kim was charged with Burglary (As a Second Degree Felony) and also with Attempted Theft of Property (As a Second Degree Felony). The first charge of the original Indictment charged Kim as follows:

> On or about December 21, 2012, in Guam, JULIEON EDWARD QUICHOCHO KIM did commit the offense of Burglary, in that he did enter or surreptitiously remain in the habitable property of Wettengel Elementary School, ***or in a separately secured or occupied portion thereof,*** with the intent to commit the crime of theft therein, at a time when the premises was neither open to the public nor the defendant was licensed or privileged to so enter in, in violation of 9 GCA §§ 37.20(a) and (b).

Record on Appeal ("RA"), tab 8 at 1 (Indictment, Jan. 25, 2013). (emphasis omitted). Following empanelment of the jury on March 26, 2014, the People moved to amend the indictment to accurately reflect the language of Guam's burglary statute set forth in 9 GCA § 37.20(a). The People conceded there was no evidence indicating there was "entry into any of the habitable property at Wettengel." Transcripts ("Tr.") at 2 (Jury Trial, Apr. 3, 2014). Instead, the People sought to prosecute a "burglary" which occurred on a separately "secured or occupied portion" of the habitable property of Wettengel. *Id.* Kim objected to the amendment, asserting the amended charge would result in a different crime that should be brought to a grand jury. The People maintained that the burglary charge within the original indictment would be the same, but the proposed amendment would accurately reflect the language of 9 GCA § 37.20(a). *Id.* at 5-6.

[6] Despite Kim's written opposition to the People's Motion to Amend the Indictment, the trial court granted the motion. The Amended Indictment was filed on March 28, 2014, and charged Kim as follows:

> On or about December 21, 2012, in Guam, JULIEON EDWARD QUICHOCHO KIM did commit the offense of Burglary, in that he did enter or surreptitiously remain in the habitable portion of Wettengel Elementary School, *or in a separately secured or occupied portion thereof*, with the intent to commit the crime of theft therein, when the premises was neither open to the public nor the defendant was licensed or privileged to so enter in, in violation of 9 GCA §§ 37.20(a) and (b).

RA, tab 58 at 1 (Am. Indictment, Mar. 28, 2014) (emphasis added) (original emphasis omitted). Kim moved to dismiss the Amended Indictment on the ground that the fenced area did not satisfy Guam's burglary statute, but the trial court denied the motion, reasoning that the "plain language" of Guam's statute included a fence as a "separately secured or occupied portion" of the "habitable property" of Wettengel. RA, tab 59 at 4-5 (Mot. to Dismiss Am. Indictment, Mar. 31, 2014); Tr. at 23-24 (Jury Trial, Apr. 2, 2014). Kim also moved to dismiss the Amended Indictment as void for vagueness, which the People opposed and the trial court denied.

[7] Trial commenced on April 3, 2014. At the close of the People's case, Kim moved for acquittal on the amended burglary charge, but this motion was also denied. The jury returned a verdict convicting Kim of Burglary (As a Second Degree Felony), and the lesser included offense of Attempted Theft of Property (As a Third Degree Felony). Kim was found not guilty of Attempted Theft of Property (As a Third Degree Felony).

[8] The trial court sentenced Kim to five years in prison, with all but one year suspended, for the charge of Burglary, to run concurrent with a three-year sentence, with all but one year suspended, for the charge of Attempted Theft. Judgment was entered on August 29, 2014. . Kim timely appealed.

II. JURISDICTION

[9] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-37 (2015)); 7 GCA §§ 3105, 3107(b), and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[10] We review a trial court's decision to permit an amendment to a charging document for an abuse of discretion. *People v. San Nicolas*, 2013 Guam 21 ¶ 9 (citing *People v. Riocne*, 2012 Guam 5 ¶ 4) (footnote omitted)). The underlying question of whether the amendment charged new or different offenses or prejudiced the defendant, however, is reviewed *de novo*. *Id.* (citing *People v. Diaz*, 2007 Guam 3 ¶ 15).

[11] Issues of statutory interpretation are reviewed *de novo*. *People v. Flores*, 2004 Guam 18 ¶ 8 (quoting *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10)). "The constitutionality of a statute is a question of law reviewed *de novo*." *People v. Perez*, 1999 Guam 2 ¶ 6 (citations omitted).

IV. ANALYSIS

A. Whether a Fenced Area is a "Separately Secured or Occupied Portion" of Habitable Property under Guam's Burglary Statute.

[12] The parties in this case dispute whether entry into a fenced area to commit theft falls within the definition of burglary. Kim argues that entry into a fenced area cannot satisfy the definition of burglary because "separately secured or occupied portion" of habitable property is meant to refer to separately secured offices, apartment units, and ship cabins rather than fenced enclosures. Appellant's Br. at 10 (Dec. 1, 2014) (citing Model Penal Code § 221.1 cmt. at 73 (1980)). He also contends that the explicit mention of fencing and enclosures within Guam's criminal trespass statute evidences legislative intent to exclude fenced areas from Guam's burglary statute. *Id.* at 11 (citing 9 GCA § 37.30(a) (as amended by Pub. L. 30-121:3, Apr. 1,

2010)). The People argue, and the trial court agreed, that a fenced area is a "separately secured or occupied portion" of the habitable property of Wettengel. Appellee's Br. at 11-13 (Dec. 31, 2011); Tr. at 17-18, 24 (Jury Trial, Apr. 2, 2014). The trial court was convinced that the plain meaning of the term "separately secured" encompasses an area secured by a fence. Tr. at 24 (Jury Trial, Apr. 2, 2014).

1. The plain meaning and legislative intent behind Guam's burglary statute.

[13] We have stated "[o]ur duty is to interpret statutes in light of their terms and legislative intent." *Flores*, 2004 Guam 18 ¶ 8 (quoting *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 46 n.7. Unless there is "clear legislative intent to the contrary, the plain meaning prevails." *Id.* (quoting *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17).

[14] At the time of Kim's alleged crime, Guam's burglary statute provided that:

> A person is guilty of burglary if he enters or surreptitiously remains in any *habitable property, building, or a separately secured or occupied portion thereof*, with intent to commit a crime therein, unless the premises are at the time open to the public or the defendant is licensed or privileged to enter . . . .

9 GCA § 37.20(a) (as amended by Pub. L. 30-121:2, Apr. 1, 2010) (emphasis added).[1] The statute was derived from Model Penal Code ("MPC") section 221.1 (1962); California Penal Code sections 1050-1056 (1971); Massachusetts General Laws chapter 266, sections 9-12 (1972); and New Jersey Statutes Annotated section 2C:18-2 (1971). 9 GCA § 37.20, SOURCE.

[15] The term "habitable property" is defined by Guam's "Arson, Negligent Burning, and Criminal Mischief" section in 9 GCA § 34.10, rather than the Burglary definition section set

[1] Guam Penal Code sections 459-464 (1970) previously provided Guam's burglary law, and section 37.20 was enacted in 1977. 9 GCA § 37.20, SOURCE. Subsection (b) was repealed and reenacted by Public Law 14-143 (1978), to provide for mandatory sentencing. Section 37.20 was further amended by Public Law 30-121:2 (Apr. 1, 2010) to cover breaking into vehicles, and by Public Law 32-162:4 (May 23, 2014), to specifically include schools. 9 GCA § 37.20, SOURCE (the portion amended in 2014 includes: "or if he enters or surreptitiously remains in any School as defined in § 37.10(e) of this Chapter").

forth in 9 GCA § 37.10. 9 GCA § 37.10 (as amended by Pub. L. 30-121:1, Apr. 1, 2010).[2] Section 34.10 defines "habitable property" as "any structure, vehicle or vessel adapted for the accommodation or occupation of persons." 9 GCA § 34.10(b) (2005). Our definition of "habitable property" is derived from the MPC and prior versions of California, Massachusetts, and New Jersey statutes. 9 GCA § 34.10(b), SOURCE.

[16] The People maintain that the first charge in the Amended Indictment is consistent with the plain language and legislative intent of 9 GCA § 37.20(a). Appellee's Br. at 14-15. The trial court agreed with the People, and reasoned that a plain reading of section 37.20(a) "would seemingly apply to the area surrounding the school building, secured by the fence" because "the language or in a separately secured or occupied portion thereof, describes a separate and secured portion of habitable property. The, [sic] word thereof, applying to the habitable property, and therefore, the habitable property in this case is the Wettengel school building." Tr. at 24 (Jury Trial, Apr. 2, 2014).[3] Kim, however, argues the statute's plain language provides for entry into a separately secured or occupied portion of the school building, but that a school yard is not a secured or occupied portion of the school building. Appellant's Reply Br. at 4 (Jan. 12, 2015). In this case, "thereof" means the school. *Id.*

[17] The meaning of "separately secured or occupied structure" can likely be found within our source jurisdictions despite the Guam statute's unique "habitable property" language. The MPC uses the language "building or occupied structure" rather than Guam's "habitable property" phrase and provides:

[2] The applicable statute at the time of Kim's alleged offense was the 2010 version of 9 GCA § 37.10, but that statute was amended in 2014 by Public Law 32-162:3.

[3] There is no dispute Wettengel Elementary School is a structure adapted for accommodation or occupation of persons, namely students, teachers, and staff, thus satisfying the habitable property requirement of section 37.20(a). Appellee's Br. at 15-16.

> A person is guilty of burglary if he enters a ***building or occupied structure, or separately secured or occupied portion thereof,*** with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. . . .

Model Penal Code § 221.1(1) (1962) (emphasis added).[4] The MPC defines "occupied structure" as "any structure, vehicle or place adapted for overnight accommodations of persons, or for carrying on business therein, whether or not a person is actually present." Model Penal Code § 220.1(4) (1962). The MPC commentary explains that the language referring to "separately secured or occupied portions of buildings and occupied structures" was designed to cover "the situation of apartment houses, office buildings, hotels, steamships with a series of private cabins, etc., where occupancy is by unit." Model Penal Code § 221.1 cmt. at 73 (1980). The drafters of the MPC reasoned that "the individual unit as well as the overall structure . . . must be safeguarded." *Id.*

[18] The version of California's Penal Code used as source material for 9 GCA § 37.20 likewise indicated that "[w]here a building consists of two or more units separately secured or occupied, each unit shall be deemed a separate building in itself." Cal. Penal Code Revision Project § 1050(a) (1971). Massachusetts also clarified that "each unit of a building consisting of two or more units separately secured or occupied is a separate structure." Mass. Gen. Laws ch. 266, § 1(p) (1972). Accordingly, three of the four source jurisdictions for Guam indicate that a "separately secured or occupied structure" refers to building units rather than fenced enclosures.

[4] The MPC included a subsection providing that a person may not be convicted for both burglary and for the offense which it was his intent to commit upon entry to the premises, nor for an attempt to commit that offense, which is absent from 9 GCA § 37.20. *Compare* Model Penal Code § 221.1(3) (1962) ("Multiple Convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree."), *with* 9 GCA § 37.20 (2010) (including a comparable first paragraph defining burglary and second paragraph with respect to grading of the offense, but omitting the third subsection regarding multiple convictions).

[19] The People contend that Guam's burglary statute plainly encompasses entry into habitable property, or a secured or occupied portion thereof, and that 9 GCA § 37.20's use of the term "habitable property" rather than the MPC's "occupied structure" renders its commentary inapplicable. Appellee's Br. at 11-12. Accordingly, the People believe the MPC's interpretations of "separately secured or occupied portions" cannot be applied to "habitable property." *Id.* at 12.

[20] The only statutory language at issue in this case "is the phrase 'or in a separately secured or occupied portion thereof.'" *Id.* at 15. The language "separately secured or occupied portion thereof" is copied verbatim from the MPC, from which it was modeled. The MPC meant this language to refer to separately secured portions of buildings, not fenced enclosures. Model Penal Code § 221.1 cmt at 73 (1980). California and Massachusetts likewise treated the term "secured" as to apply to units within a building. Cal. Penal Code Revision Project § 1050 (1971); Mass. Gen. Laws ch. 266, § 1(p) (1972).

[21] The source jurisdictions are instructive in this analysis, and a plain reading of the phrase "a separately secured or occupied portion" would include individual classrooms of Wettengel rather than the "secured" fenced enclosure. Extending that language to a fenced enclosure because it "secures" habitable property strains the plain meaning of the phrase. There is no clear legislative intent to the contrary. Furthermore, the distinction between "habitable property" and "occupied property" is negligible. Thus, we interpret Guam's "separately secured or occupied portion thereof" language to refer to individual units of apartments, office buildings, and schools rather than fenced enclosures. *See* 9 GCA § 37.20.

2. Other jurisdictions generally hold that entry onto a fenced yard does not satisfy the elements of burglary absent inclusive statutory language.

[22] Although our statute refers to "habitable property" and otherwise traces the language of the MPC, California, New Jersey, and Massachusetts, a discussion of authorities that have addressed the issue of whether entry into a fenced area falls within the definition of burglary is instructive. Jurisdictions generally hold that entry onto a fenced yard does not satisfy the elements of burglary unless the legislature expanded statutory definitions to distinctly encompass a fenced yard, curtilage, or building appurtenances. For example, a California court did not permit a conviction of burglary for entry onto a fenced wrecking yard for the purpose of siphoning gasoline. *People v. Chavez*, 140 Cal. Rptr. 3d 860, 862, 867 (Ct. App. 2012). The applicable burglary statute in California enumerates various structures and buildings, but also includes "a catchall for other buildings." *Id.* at 864; *see also* Cal. Penal Code § 459 (1991). California interpreted a "building" for burglary purposes to require a structure with four walls and a roof. *Chavez*, 140 Cal. Rptr. 3d at 864 (citing *People v. Gibbons*, 273 P. 32, 32 (Cal. 1928)). Following an extensive survey of other jurisdictions, the California court determined that absent a special statutory definition, states have uniformly held that a fenced yard is not a "building" for burglary purposes. *Id.* at 865.

[23] California's survey noted that reversal of a burglary conviction was required in Texas when the defendant cut and entered through a chain link fence to take property from a concrete block structure with large doorways incapable of being closed because the structure was not a "building" under the applicable statute. *Day v. State*, 534 S.W.2d 681, 684-85 (Tex. Crim. App. 1976). Similarly, the Supreme Court of Louisiana determined that an unauthorized entry into a fenced yard of a business did not satisfy the definition of a "structure" for burglary purpose. *State v. Alexander*, 353 So. 2d 716, 717-18 (La. 1977). Likewise, Illinois declined to expand the

statutory definition of "building" to include a fenced lot adjacent to and abutting an auto body shop. *In Interest of E. S.*, 416 N.E.2d 1233, 1234-35 (Ill. App. Ct. 1981). Finally, a North Carolina court held that their legislature intended to restrict the term "building" for burglary purposes to structures having walls and a roof, which a fenced-in area did not satisfy. *State v. Gamble*, 286 S.E.2d 804, 806 (N.C. Ct. App. 1982).

[24] On the other hand, there are some jurisdictions that have held a fenced yard falls within the unique and inclusive language of their burglary definitions. The majority of cases dealing with convictions for entry into curtilage such as fenced areas are found in Florida because the applicable statute defines the term "dwelling" to expressly include curtilage of a building. Fla. Stat. Ann. § 810.011(2) (2007). Consequently, Florida caselaw has affirmed burglary convictions for entry into a fenced yard. *See Baker v. State*, 622 So. 2d 1333, 1335-36 (Fla. Dist. Ct. App. 1993); *see also Tobler v. State*, 371 So. 2d 1043, 1045 (Fla. Dist. Ct. App. 1979) (the fenced area surrounding trailer park was part of the curtilage so that entry onto the grounds to accomplish a theft constitutes burglary). Arizona also has a statute that provides that entry into a "fenced commercial or residential yard" is burglary and upholds burglary convictions for entry into a storage yard. Ariz. Rev. Stat. Ann. § 13-1506 (2003); *see also State v. Jones*, 552 P.2d 769, 770-71 (Ariz. Ct. App. 1976).

[25] There are additional jurisdictions with inclusive statutory language.[5] For instance, entering a junkyard enclosed by a fence in Delaware was sufficient to uphold a burglary

[5] Iowa also has unique language that defines an "occupied structure" as any building, structure, or appurtenances to buildings and structures. Iowa Code Ann. § 702.12 (1984). Accordingly, a fenced enclosure of an automobile parts store was determined to fall within the meaning of the term "appurtenances," and the court affirmed a defendant's burglary conviction for stealing pistons from that area. *State v. Hill*, 449 N.W.2d 626, 627-28 (Iowa 1989). Additionally, in Oklahoma, a fenced lumber yard was subject to the burglary definition under statute covering buildings "or other structure[s] or erection[s]." *Stanley v. State*, 512 P.2d 829, 831 (Okla. Crim. App. 1973) (citations omitted); *see also* Okla. Stat. Ann. tit. 21, § 1435 (1961).

conviction because the statutory definition of "building" included an "inclosure [sic]." *Jenkins v. State*, 230 A.2d 262, 275 (Del. 1967). Washington's definition for a building also explicitly includes the term "fenced area," so entry into a fenced residential area can result in a burglary conviction. *State v. Wentz*, 68 P.3d 282, 283, 286 (Wash. 2003). Similarly, a fence surrounding a lumber yard was a "structure" under Indiana's burglary statute that criminalized entry into a "building or structure"[6] of another person. *Joy v. State*, 460 N.E.2d 551, 557 n.7, 558-59 (Ind. Ct. App. 1984) (citing Ind. Code Ann. § 35-43-2-1 (1979 Repl.)) (distinguishing *Day*, 534 S.W.2d at 681, because the Texas statute did not include the stand-alone term "structure").

[26] Finally, the Supreme Court of Pennsylvania held that "a fenced and secured storage lot is a 'place adapted for carrying on a business'" for burglary purposes. *Commonwealth v. Hagan*, 654 A.2d 541, 544 (Pa. 1995). The storage lot at issue contained two vacant buildings and was used to store several tons of railroad steel for business purposes. *Id.* at 543. Kim distinguishes this case on the ground that the court relied on "for carrying on business therein" language absent from 9 GCA § 37.20. Appellant's Br. at 12.

[27] A review of these authorities shows that courts uniformly hold that an area within a stand-alone fence does not fall within a burglary definition unless explicitly included in the statutory definition, or if the statute is so broad as to provide culpability for entry into an unqualified "structure." This issue does not appear to involve a judicial split of authority on the issue of whether a fenced area falls within the definition of burglary. Instead, courts expand the burglary definition to fenced areas if instructed by the legislature.

[6] Indiana does not have the caveats that Guam does in relation to the term "structure." Indiana vaguely states that a person commits burglary when he or she "breaks and enters the building or structure of another person, with intent to commit a felony or theft in it." Ind. Code Ann. § 35-43-2-1 (2014). Guam, on the other hand, requires a "structure" to be adapted for the accommodation or occupation of persons. 9 GCA § 34.10(b).

[28] Kim's conduct as charged did not satisfy the elements of burglary. Accordingly, Kim's burglary conviction is reversed and vacated. The remaining issues on appeal concerning (1) whether the indictment was properly amended, (2) whether the Amended Indictment was duplicitous, and (3) whether 9 GCA § 37.20 is void for vagueness need not be considered. *See Presto v. Lizama*, 2012 Guam 24 ¶ 54.

V. CONCLUSION

[29] The trial court improperly extended the definition of "separately secured or occupied portion thereof" to include a fenced enclosure. For the foregoing reasons, we **REVERSE** Kim's burglary conviction, **VACATE** the burglary sentence imposed, and **REMAND** this matter to the trial court for further proceedings not inconsistent with this opinion.

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