IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

LUKE ALLEN PANGELINAN TAITANO,
Defendant-Appellant.

Supreme Court Case No.: CRA14-017
Superior Court Case No.: CF0211-12

OPINION

Cite as: 2015 Guam 33

Appeal from the Superior Court of Guam
Argued and submitted on May 12, 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] This case comes before the court following the criminal conviction of Defendant-Appellant Luke Allen Pangelinan Taitano after a jury trial. The dispute centers on whether Plaintiff-Appellee People of Guam ("the People") presented sufficient evidence to establish that Taitano assaulted the victim during the timeframe alleged, whether a material variance in proof affected Taitano's substantial rights, and whether the trial court improperly admitted testimony about separate incidents of sexual contact. Taitano claims that the trial court erred in denying his Motion for Judgment of Acquittal and Motion for a New Trial. Specifically, Taitano asserts that the trial court should have found insufficient evidence supporting his conviction based on the material variance between details of the crime for which he was indicted and those presented at trial. He further suggests that the trial court abused its discretion in admitting testimony of other alleged incidents of sexual assault against the victim and for not issuing a limiting instruction about this testimony to the jury.

[2] We reverse Taitano's conviction, vacate his sentence, and remand for a new trial on the basis that a material variance between the allegations and proof offered at trial violated his constitutional rights to notice and to protection from double jeopardy.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The case arises from a criminal conviction for Second Degree Criminal Sexual Conduct ("CSC") (as a First Degree Felony). The People initially charged Taitano with three counts of Second Degree CSC against the same victim, L.J.H. The first charge alleged a timeframe "[o]n or about the period between January 1, 2008 through December 31, 2009, inclusive. . . ." RA,

tab 2 at 1 (Compl., Mar. 30, 2012). The second charge included "the period between January 1, 2010 through December 31, 2010. . . ." *Id.* at 2. The final charge encompassed "the period between January 1, 2011 through December 31, 2011. . . ." *Id.* Attached to the Complaint was the signed declaration of Assistant Attorney General ("AAG") Brooke E. Wright, which stated that the 2008-2009 incident occurred in Yigo, the 2010 incident occurred in Mangilao, and the 2011 incident was committed in NCS Dededo. The grand jury returned an indictment as to the second charge only, charging that on or between the period January 1, 2010 through December 31, 2010, Taitano did commit the offense of Second Degree CSC by touching the genital area of L.J.H., a minor under the age of fourteen.

[4] Following a scheduling conference, the People filed their trial memorandum. This document stated that while there was evidence of four separate alleged incidents, the one for which Taitano had been indicted occurred in Mangilao. Taitano filed a Motion in Limine to exclude evidence of all alleged incidents of unlawful sexual conduct except the one for which he had been indicted, pursuant to Rule 404(b) of the Guam Rules of Evidence ("GRE"). The People responded, arguing that the admission of such evidence was relevant and probative of Taitano's motive, intent, plan, and lack of mistake. At trial, Taitano renewed his objection and specifically argued that testimony regarding any uncharged acts would be more prejudicial than probative. The trial court overruled Taitano's objection.

[5] Testimony at trial from several witnesses revealed ambiguity and some contradiction with regard to the precise timeline of where the family had lived during each period. During the prosecution's case-in-chief, the victim, L.J.H., was called to testify. Her testimony described in detail how Taitano had touched her "private part" in Yigo, and identified the contact as a "bad touch" consistent with criminal sexual conduct. Transcript ("Tr.") at 13-19, 34-35 (Cont. Jury

Trial, Nov. 26, 2012). However, when questioned about the incident in Mangilao, the victim stated that "nothing happened," explaining that Taitano had attempted to touch her on one occasion but that she awoke and stopped him. *Id.* at 19-21. The victim also testified, over Taitano's GRE 403 objection, regarding incidents in Mongmong-Maite and Dededo in which Taitano had unsuccessfully tried to touch her while she was sleeping. Following the prosecution's case in chief, Taitano moved for acquittal, claiming that insufficient evidence was presented as to the Mangilao incident or that any sexual contact occurred in 2010. His motion was denied.

[6] The jury returned a verdict finding Taitano guilty of Second Degree Criminal Sexual Conduct (As a First Degree Felony). Following the verdict, Taitano renewed his motion for a judgment of acquittal and alternately moved for a new trial, again asserting that insufficient evidence was presented to convict him for the Mangilao incident. The People opposed, claiming that the testimony of the victim as to multiple instances of abuse enabled a rational jury to conclude that such abuse had occurred in 2010. The trial court denied these motions, reasoning that any variance which arose through proof at trial did not defeat sufficiency or adversely affect the rights of the defendant, since time was not an element of the offense. The court sentenced Taitano to fifteen years of incarceration.

[7] Taitano timely filed a notice of appeal, challenging his conviction and seeking dismissal.

II. JURISDICTION

[8] This court has jurisdiction over appeals from final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-49 (2015)), and 7 GCA §§ 3107(b) and 3108(a) (2005). This is an appeal of a final judgment issued by the Superior Court on July 28, 2014.

III. STANDARD OF REVIEW

[9] Ordinarily, a claim of material variance "will be treated as an attack on the sufficiency of the evidence." *People v. Diaz*, 2007 Guam 3 ¶ 10 (citing *People v. Campbell*, 2006 Guam 14; *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001)). "[C]laims of insufficient evidence are matters of law that are reviewed *de novo*." *People v. Flores*, 2009 Guam 22 ¶ 10 (citing *People v. Maysho*, 2005 Guam 4 ¶ 6; *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004)). "'In reviewing the sufficiency of the evidence to support a criminal conviction,' this court inquires as to 'whether the evidence in the record could reasonably support a finding of guilty beyond a reasonable doubt.'" *People v. Root*, 2005 Guam 16 ¶ 33 (quoting *People v. Guerrero*, 2003 Guam 18 ¶ 13; *People v. Sangalang*, 2001 Guam 18 ¶ 20). However, a material variance claim will also involve the interpretation of Fifth Amendment considerations regarding fair notice and double jeopardy. *See United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997). Such considerations are reviewed *de novo*. *People v. Muritok*, 2003 Guam 21 ¶ 10; *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991).

[10] We review admission of evidence of prior similar bad acts under GRE 404(b) for abuse of discretion. *People v. Evaristo*, 1999 Guam 22 ¶ 6 (citing *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1996)); *see also People v. Quintanilla*, 2001 Guam 12 ¶ 9. However, the trial court's determination of whether the evidence falls within the scope of GRE 404(b) is reviewed *de novo*. *People v. Palisoc*, 2002 Guam 9 ¶ 7 (citing *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993)). The trial court's analysis under 6 GCA § 403 is subject to an abuse of discretion review. *Evaristo*, 1999 Guam 22 ¶ 6 (citation omitted).

IV. ANALYSIS

A. Taitano's Motion for Judgment of Acquittal and Motion for a New Trial on Grounds of Material Variance and Insufficient Evidence

[11] Analysis of a material variance claim consists of two separate but related inquiries. To the extent that the variance concerns a lack of proof at trial regarding the essential elements of an indictment, it functions as an attack on the sufficiency of evidence supporting a conviction. *Diaz*, 2007 Guam 3 ¶ 10; *Antonakeas*, 255 F.3d at 721. However, a variance also constitutes reversible error if it affects the substantial rights of a defendant, including proper notice of charges and protection against double jeopardy. *Berger v. United States*, 295 U.S. 78, 82 (1935). In this sense, a claim of variance also functions as a challenge based on the deprivation of due process rights under the Fifth Amendment of the United States Constitution, made applicable to Guam by the Organic Act. *See Tsinhnahijinnie*, 112 F.3d at 992; 48 U.S.C.A. § 1421b(u). Thus, both factors must be evaluated when addressing Taitano's claim of variance.

1. Sufficiency of Evidence

[12] "A claim of fatal variance is treated as an attack on the sufficiency of the evidence." *Diaz*, 2007 Guam 3 ¶ 37 (citing *United States v. Hewlett*, 453 F.3d 876, 879 (7th Cir. 2006)); *see also United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986); *Antonakeas*, 255 F.3d at 721. This court has previously addressed the proper standard for evaluating a sufficiency of evidence challenge, explaining that:

> In reviewing the sufficiency of the evidence to support a criminal conviction, this court inquires as to whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt. Because this is a highly deferential standard of review, [w]hen a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this court reviews the evidence *in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.*

Guerrero, 2003 Guam 18 ¶ 13 (alteration in original) (citations and internal quotation marks omitted). When reviewing a jury conviction for sufficiency, the only relevant question is "whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

[13] Taitano was indicted on a single count of Second Degree Criminal Sexual Conduct (as a First Degree Felony). Specifically, the indictment alleged that:

> On or about the period between January 1, 2010 through December 31, 2010, inclusive, in Guam, **LUKE ALLEN PANGELINAN TAITANO** did commit the offense of ***Second Degree Criminal Sexual Conduct,*** in that he did intentionally engage in sexual contact with another, to wit: by causing the Defendant's hand to touch the primary genital area of ***L.J.H.*** . . . , a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

RA, tab 7 (Indictment, Apr. 5, 2012). The indictment is consistent with the essential elements of Second Degree CSC, which requires "evidence of the following elements: (1) defendant engaged in sexual contact with another; and (2) the other person is under fourteen (14) years of age." *Campbell*, 2006 Guam 14 ¶ 15. The proper question is whether, viewing the evidence in the light most favorable to the prosecution, any reasonable trier of fact could have found, beyond a reasonable doubt, that Taitano engaged in sexual contact with L.J.H., a minor under fourteen years of age on or about the period between January 1, 2010 through December 31, 2010.

[14] Evidence in the record clearly establishes that, at all relevant times, L.J.H. remained a minor under the age of fourteen. Tr. at 19-20, 40 (Jury Trial, Nov. 21, 2012); Tr. at 14 (Jury Trial, Nov. 26, 2012). Indeed, at the time of trial, L.J.H. was only eleven years old. Tr. at 9 (Nov. 26, 2012). Further, testimony from several sources establishes a firm basis to conclude that Taitano engaged in sexual contact with the victim. L.J.H. herself identified Taitano as the one who touched her vagina, which she referred to as "private parts," on several occasions and was able to understand and identify the contact as "bad touch." Tr. at 13-19, 34-35 (Jury Trial,

Nov. 26, 2012). Further, Taitano admitted to touching his children between the legs on several occasions, though he claimed the contact was accidental. Tr. at 55 (Jury Trial, Nov. 27, 2012); Tr. at 62 (Jury Trial, Nov. 23, 2012). Taitano claims, however, that there was no proof presented indicating that the victim could have been assaulted in, or reasonably near, 2010. Appellant's Br. at 11 (Jan. 20, 2015). The basis of this claim is Taitano's assertion that no evidence established that the victim was attacked while living in Mangilao. *Id.* at 11-13. This fact was relevant because the People stated in their complaint declaration that the incident in 2010 was believed to have occurred in Mangilao, while the incident in Yigo was alleged to have occurred in 2008 or 2009. RA, tab 2 at 3 (Decl. of AAG Wright, Mar. 30, 2012). The victim in this case identified Yigo as the location where sexual contact had occurred and denied that any contact had taken place while in the family's Mangilao residence. Tr. at 13-21 (Jury Trial, Nov. 26, 2012). Further, the People seem to concede that insufficient evidence was presented with regard to the Mangilao incident. *See* Appellee's Br. at 23, 25 (Mar. 19, 2015). However, these facts do not impugn the sufficiency of evidence for several reasons.

[15] First, as shown above, location is not considered an element of criminal sexual conduct. *See* 9 GCA § 25.20 (2005); *see also Geboy v. Brigano*, 489 F.3d 752, 763 (6th Cir. 2007); *State v. Brown*, 757 A.2d 768, 771 (Me. 2000); *State v. Sweeney*, 867 A.2d 441, 453 (N.H. 2005). Consequently, sufficiency does not require proof of the People's allegation as to the location of the offense, so long as the essential elements of the indictment could have been found by a rational trier of fact. *See Geboy*, 489 F.3d at 763. Taitano's contention that evidence at trial indicated the assault occurred in Yigo, rather than Mangilao, is of no consequence to the question of sufficiency, so long as the incident occurred in or reasonably near the period alleged in the indictment.

[16] Second, time is not an essential element of the offense of Second Degree CSC. *Campbell*, 2006 Guam 14 ¶ 16. This fact is explicitly acknowledged by Taitano. *See* Appellant's Br. at 11. It is admittedly possible to challenge the sufficiency of evidence where time is not an essential element, but in such cases, the People need only demonstrate that the crime occurred on a date reasonably near the one alleged in the indictment. *Campbell*, 2006 Guam 14 ¶ 17; *see also United States v. Harrison-Philpot*, 978 F.2d 1520, 1526 (9th Cir. 1992). In interpreting this requirement, this court has held that "where time is not an element of a crime, '[p]roof of any date before the return of the indictment and within the statute of limitations is sufficient.'" *Diaz*, 2007 Guam 3 ¶ 40 (quoting *People v. Atoigue*, DCA No. CR91-95A, 1992 WL 245628, at *7 (D. Guam App. Div. Sept. 11, 1992)) (citations omitted). In this case, any of the dates established by the evidence would have occurred before the return of the indictment, which happened in 2012. RA, tab 7 (Indictment). Additionally, each would have fallen within the statute of limitations. *See* 8 GCA § 10.15 (2005) (sex crimes involving a person under the age of consent may be commenced up to three years after the minor reaches the age of consent); 8 GCA § 10.15 (as amended by Pub. L. 30-049:1 (July 14, 2009)) (sex crimes involving a minor may be commenced up to three years after the minor reaches the age of majority). Even accepting Taitano's premise that the trial evidence indicated the assault had occurred in 2008 or 2009, this timeframe would be reasonably near enough to the alleged period of 2010 to affirm the sufficiency of evidence. *See Diaz*, 2007 Guam 3 ¶ 40.

[17] For these reasons, we hold that evidence in the record could have led a reasonable jury to find all material elements of the indictment satisfied beyond a reasonable doubt. However, this conclusion is not dispositive, since mere sufficiency of evidence does not end the court's inquiry in a material variance context.

2. Material Variance Between Allegations and Proof

[18] Notwithstanding that the People proved all elements of the crime, we must examine whether a material variance between the allegations and the proof offered at trial affected Taitano's substantial rights. As a general rule, "allegations and proof must correspond." *Campbell*, 2006 Guam 14 ¶ 12 (quoting *Berger*, 295 U.S. at 82). This concept stems from the Fifth Amendment rights of a criminal defendant to "fair notice of what he is accused of, and not to be twice put in jeopardy on the accusation." *Tsinhnahijinnie*, 112 F.3d at 992; *see also* U.S. Const. amend. V; *United States v. Laykin*, 886 F.2d 1534, 1542 (9th Cir. 1989). A variance between an allegation and proof presented is a reversible error if it affects the substantial rights of a defendant by either: (1) taking them by surprise and hindering their ability to present a defense, or (2) exposing them to the risk of another prosecution for the same offense. *Campbell*, 2006 Guam 14 ¶ 12; *Berger*, 295 U.S. at 82. By contrast, a mere variance which does not impair a defendant's substantial rights in this manner is not considered a Fifth Amendment violation and constitutes harmless error. *See United States v. Hazeem*, 679 F.2d 770, 773-74 (9th Cir. 1982); *see also Diaz*, 2007 Guam 3 ¶ 39 (quoting *United States v. Cina*, 699 F.2d 853, 857 (7th Cir. 1983)). Accordingly, the relevant questions are not only whether the People proved the essential elements of the crime, but also whether that proof constitutionally demonstrated the specific allegations of which Taitano was accused. *See Tsinhnahijinnie*, 112 F.3d at 992.

[19] We begin this analysis by determining whether or not a variance occurred in this case. In the majority of instances, material variance refers to a discrepancy between the proof at trial and the wording of the indictment. *See, e.g.*, *United States v. Bhagat*, 436 F.3d 1140, 1146 (9th Cir. 2006); *United States v. Chilingirian*, 280 F.3d 704, 711 (6th Cir. 2002). However, there is a split of authority regarding whether submissions other than the accusatory pleading can form the basis

for a variance claim. The People rely on the Sixth Circuit decision in *Geboy*, which held that since the bill of particulars was not the actual indictment, variance from information provided in that document could not form the basis for challenging a conviction. 489 F.3d at 762. However, *Geboy* was decided under the extremely deferential standard of review governing federal *habeas corpus* petitions. *Id.* at 756; *see also Renico v. Lett*, 559 U.S. 766, 773 (2010) (noting the highly deferential standard of evaluating state court rulings under federal *habeas* review). Under this standard, a conviction will not be disturbed under any basis other than if it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d). By contrast several jurisdictions conducting appellate review of a criminal conviction under standards mirroring our own have ruled that challenges may be considered which allege variance between trial evidence and party submissions other than the charging document. *See, e.g., United States v. Green*, 202 F.3d 869, 873 (6th Cir. 2000) (analyzing variance of the bill of particulars); *United States v. Burgos*, 269 F.2d 763, 767-68 (2d Cir. 1959) (finding no prejudice from variance with bill of particulars). Regarding the particular facts of the present dispute, we are aware of a single unpublished federal case which explicitly evaluated the notice requirements in a material variance case using information provided in the prosecution's trial brief. *See Burbine v. Scribner*, No. CIV S-04-1691LKKEFBP, 2009 WL 2136303, at *22-23 (E.D. Cal. July 15, 2009). While not itself citable guidance, the reasoning of this decision is based on the settled proposition that a court may look to sources other than the indictment for evidence of adequate notice, including "a complaint, an arrest warrant, or a bill of particulars," as well as information provided "during the course of a preliminary hearing." *See Sheppard v. Rees*, 909 F.2d 1234, 1236 n.2 (9th Cir. 1990).

[20] The indictment itself does not specify Mangilao as the location of the crime, and sufficient proof was presented that Taitano committed an assault against the victim in, or reasonably near, 2010. RA, tab 7 (Indictment). Thus, no variance exists between the indictment, as written, and the testimony at trial. However, Taitano relies on the variance between the People's asserted theory and the evidence presented at trial. He initially supports this argument by pointing to the supporting declaration attached to the Magistrate's Complaint, which alleges that the 2010 charge referred to an incident in Mangilao, while a separate charge (for which no indictment was returned) for the incident in Yigo was believed to have transpired in 2008 or 2009. Appellant's Br. at 12; RA, tab 2 at 3 (Decl. of AAG Brooke Wright). In felony cases, a complaint is not considered an accusatory pleading like an indictment, and serves only as an application for a warrant of arrest/summons and the basis for preliminary examination. 8 GCA § 15.10 (Note) (2005). As such, a supporting declaration for a pre-indictment complaint, standing alone, cannot form the basis of a material variance.

[21] Notwithstanding this limitation, several factors support Taitano's claim of variance. Taitano relies on the People's post-indictment Trial Memorandum, which claims that the charge for which he was indicted occurred in Mangilao. RA, tab 35 at 2 (Trial Mem., Oct. 22, 2012). Taitano's claim of variance is further bolstered by the parties' exchange on his Motion in Limine to Exclude 404(b) Evidence, in which Taitano sought to exclude testimony on all instances other than the Mangilao allegation. RA, tab 56 at 1 (Mot. Limine Exclude 404(b) Evidence, Nov. 19, 2012). The People defended inclusion of the other three alleged sexual offenses for the limited purpose of demonstrating motive, opportunity, intent, lack of mistake, and planning. *See* RA, tab 60 at 2-4 (Resp. Obj. 404(b) Evidence, Nov. 21, 2012). These examples, viewed together with the complaint declaration and subsequent indictment, would have led Taitano to reasonably

conclude that the grand jury had not indicted him on the Yigo incident or the NCS Dededo incident and that he was facing trial solely on the charge of the Mangilao incident. Based on examination of the circumstances in totality, use of testimony regarding the Yigo incident as the basis for conviction creates serious concern of unfair surprise and deprivation of notice with regard to the charges faced. Indeed, Taitano renewed this objection during the trial, arguing that because the People stated that he was facing only the Mangilao charge, evidence of the other instances was inadmissible and unduly prejudicial. Tr. at 24 (Jury Trial, Nov. 26, 2012). The People again indicated that the three instances other than the Mangilao incident were admissible only to show a continuing motive, intent, and scheme. *Id.* at 24-25. These examples provide substantial support that conviction based upon the Yigo incident itself would constitute unfair surprise which would undermine Taitano's ability to present a defense.

[22] The People contend that their "failure to prove that Taitano committed the crime in Mangilao, as listed in the magistrate's complaint, rather than at Marianas Terrace in Yigo, as proved at trial, was not prejudicial." Appellee's Br. at 25. This claim was supported by noting that in *Geboy*, "[t]he Sixth Circuit noted that the defendant suffered no prejudice because his defense was that the sexual abuse never happened and thus did not rely on location." *Id.* at 22 (citing *Geboy*, 489 F.3d at 765). However, while his overall denial that inappropriate contact occurred would have remained the same, Taitano provides concrete examples of how his defense would have differed to refute allegations of the Yigo incident. This included presentation of evidence that his residence in Yigo contained its own washing machine, which would have contradicted the victim's testimony that the assault occurred while her mother had gone to the laundromat. Evidence that his youngest son was not yet born when the family resided in Yigo,

would have also potentially refuted the victim's testimony that she left to feed the baby following the assault. Appellant's Br. at 15; Tr. at 18, 33 (Jury Trial, Nov. 26, 2012).

[23] In addition to the detriment suffered through unfair surprise of the charges against him, Taitano has also been placed in significant risk of double jeopardy as a result of the ambiguous verdict. The protection of an individual against double jeopardy is embodied in the Fifth Amendment of the Constitution, drawn from the deep-rooted legal principle that "an accused should not be tried twice for the same offense." *Benton v. Maryland*, 395 U.S. 784, 809 (1969). This risk is particularly concerning in instances where a defendant is convicted of some, but not all, similarly worded accusations in a charging document. *See, e.g.*, *Commonwealth v. LaCaprucia*, 708 N.E.2d 952, 957 (Mass. 1999) (examining whether double jeopardy bars retrial of defendant on some indictments for sex crimes against his children, because it cannot be determined whether he was acquitted of those crimes; the question is whether "the alleged conduct for which the grand jury indicted the defendant . . . , the evidence, the charge, and the jury verdicts are sufficiently distinguishable to permit an understanding of the allegations on which the jury acquitted the defendant and on which they convicted him."); *Goforth v. State*, 70 So. 3d 174, 189-90 (Miss. 2011) (finding violation of double jeopardy protection where insufficient effort was made to distinguish among five separate incidents of sexual abuse). A similar concern arises with the present conviction. While sufficient evidence exists for a rational jury to find that Taitano engaged in sexual contact with the victim in or reasonably near 2010, it is not clear which incident formed the basis of Taitano's actual conviction. As a result, it is also unclear which of the remaining unindicted allegations included in the initial complaint are barred

from prosecution.[1] For example, the People could potentially bring an identical indictment against Taitano for the incident in Mangilao, claiming that the present conviction covered the incident in Yigo. *See, e.g.*, Appellee's Br. at 25; Tr. at 13-21 (Jury Trial, Nov. 26, 2012). Alternately, it is unclear if the existing conviction would preclude the People from bringing Taitano to trial under the theory that the Yigo incident had occurred in 2009, using their own trial memorandum to claim that the present case dealt with the 2010 incident in Mangilao. *See, e.g.*, RA, tab 35 (Trial Mem.); Tr. at 41 (Jury Trial, Nov. 21, 2012). The variance between the People's post-indictment pleadings and the evidence presented at trial has created a substantial risk that Taitano would be exposed to secondary prosecution for a crime which was already brought to trial. *See Valentine v. Konteh*, 395 F.3d 626, 634-36 (6th Cir. 2005) (holding that while an indictment need not state specific times and dates, undifferentiated sexual assault charges over a ten-month period which created uncertainty over which incident the jury had returned convictions for deprived defendant sufficient constitutional protections from double jeopardy). This result is impermissible under the Fifth Amendment and constitutes a deprivation of Taitano's substantial rights. *See Tsinhnahijinnie*, 112 F.3d at 992; *Laykin*, 886 F.2d at 1542.

3. Appropriate Remedy

[24] In finding that a material variance warrants reversal of Taitano's conviction, we must also address whether the appropriate remedy is a new trial or an appellate acquittal subject to the protections of double jeopardy. A claim of material variance is generally treated as an attack of the sufficiency of evidence. *Diaz*, 2007 Guam 3 ¶ 10; *Campbell*, 2006 Guam 14 ¶ 9.

[1] Though the People have previously charged Taitano with each of these incidents, that fact would not shield him from further prosecution, since "[t]he Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so." *United States v. Williams*, 504 U.S. 36, 49 (1992). Since L.J.H. is still a minor, the statute of limitations has also not expired for any of these alleged incidents. *See* 8 GCA § 10.15 (sex crimes involving a minor may be prosecuted up to three years after the victim has reached the age of consent (for crimes committed prior to July 14, 2009) or the age of majority (for crimes committed on or after July 14, 2009)).

Additionally, where the court finds evidence insufficient to sustain a conviction, the normal remedy is reversal resulting in judicial acquittal. *See, e.g*, *People v. Tenorio*, 2007 Guam 19; *Maysho*, 2005 Guam 4. However, as explained by the Texas Court of Criminal Appeals:

> a material variance usually presents only a notice problem and that a material variance does not, like a "standard insufficiency claim," present a problem of the government's failure to prove the defendant guilty of the crime charged, this raises the question of whether we may apply our traditional state-law remedy of a remand for a new trial for a "material" variance.

Fuller v. State, 73 S.W.3d 250, 253 n.2 (Tex. Crim. App. 2002). This distinction between notice-problem variance and sufficiency of evidence is consistent with the United States Supreme Court's proclamation that state appellate courts are required to provide appellate acquittal only upon a finding of insufficient evidence "due to a failure of proof at trial" with "respect to the guilt or innocence of the defendant." *Burks v. United States*, 437 U.S. 1, 15-16 (1978).

[25] This case involves a situation in which sufficient evidence was presented to support the elements of the indictment but where variance significantly hindered Taitano's Fifth Amendment rights. The appropriate remedy for the material variance is a new trial, rather than outright acquittal. *People v. Angoco*, 2004 Guam 11 ¶ 21 ("For trial errors other than a conviction based on insufficient evidence, this court has reversed convictions and remanded the charges for retrial."); *see also United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012) (new trial is warranted where errors deprive defendant of constitutional due process rights); *Sedgwick v. Giant Food, Inc.*, 110 F.R.D. 175, 176 (D.D.C. 1986) (unfair surprise warrants a new trial if it deprives a party of a fair hearing). This conclusion is supported by other federal courts which, in analyzing material variance claims, have found a new trial an appropriate remedy. *See, e.g.*,

United States v. Sheppard, 219 F.3d 766, 770 (8th Cir. 2000); *United States v. Baker*, 544 F. Supp. 2d 522, 540 (E.D. La. 2008).

[26] For these reasons, we hold that despite the sufficiency of evidence in establishing all material elements of the indictment, material variance between the allegations and the proof at trial affected Taitano's substantial rights by denying him sufficient notice to prepare a defense and failing to shield him from the possibility of double jeopardy in violation of the Fifth Amendment. We further find that such deprivation warrants the remedy of a new trial.

B. Admitting Evidence of Alleged Incidents of Sexual Assault for which Taitano was not Indicted

[27] In addition to his claim of material variance, Taitano also alleges that the trial court abused its discretion in admitting testimonial evidence from the victim regarding three purported incidents of sexual contact other than the one for which he was indicted. Appellant's Br at 15-17. Taitano claims that such evidence was not probative of an essential element of the crime charged and was used to show criminal propensity in violation of GRE 404(b). *Id.* at 15-16. He further asserts that in the event such evidence was admissible, the court erred by not issuing a limiting instruction to ensure it was evaluated solely for its admissible purpose. *Id.* at 16-17. Additionally, Taitano alleges that even if such evidence fell within a legitimate purpose, its prejudicial effect far outweighed its probative value, rendering it inadmissible under GRE 403. *Id.* at 15-17. Finally, Taitano claims in his reply brief that such evidence is inadmissible under GRE 413, which addresses the admissibility of evidence of similar crimes in criminal sexual conduct cases. Appellant's Reply Br. at 4-5 (Apr. 2, 2015).

[28] Under normal circumstances, our conclusion above that a reversible error warrants remand would end our inquiry, as addressing additional issues would be unnecessary to resolution of the dispute. *See Gutierrez v. Guam Power Auth.*, 2013 Guam 1 ¶ 64; *Flores*, 2009

Guam 22 ¶ 85. However, we may, in our discretion, review issues necessary to ensure the clarity of our holding and provide guidance necessary to the resolution of the case below. *See, e.g.*, *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1 (courts may exercise discretion in addressing waived issues to address questions of law and preserve integrity of the judicial process); *People v. Quenga*, 1997 Guam 6 ¶¶ 12, 14 (holding that this court may exercise appellate review over issues necessary to clarify a holding or which materially assist in resolution of a particular case). In this case, the basis of the material variance stems directly from testimony regarding alleged sexual assaults other than the one for which Taitano was indicted. The admissibility of such evidence and the scope of its use are inextricably linked to the issue of material variance upon which the new trial is required. As such, this court must address each of these arguments in order to provide proper guidance to the trial court regarding avoidance of similar due process concerns during retrial. *See Levine v. Levine*, 964 So. 2d 741, 742 (Fla. Dist. Ct. App. 2007) (holding that interrelation of multiple issues "makes them part of one overall scheme that must be reviewed by appellate courts as a whole.").

1. Admissibility Under GRE 404(b)

[29] Taitano claims that the trial court erred in admitting testimony regarding three uncharged incidents in which he allegedly assaulted the victim. Appellant's Br. at 16. GRE 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Guam R. Evid. 404(b). Evidence of such acts is admissible, however, as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

[30] This court expressly defined the appropriate standard for evaluating the admission of evidence under GRE 404(b). *People v. Camaddu*, 2015 Guam 2 ¶ 12 (citing *People v. Torres*, 2014 Guam 8). As we explained:

> To be admissible under GRE 404(b), "the evidence of prior acts and crimes must (1) prove a material element of the crime currently charged; (2) show similarity between past and charged conduct; (3) be based on sufficient evidence; and (4) not be too remote in time." . . . The four-part test stated above has been referred to as the *Hinton* test, reiterated in *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994).

Camaddu, 2015 Guam 2 ¶ 12 (citations omitted). Here, each of the *Hinton* factors is satisfied.

[31] The evidence is probative of the material element that Taitano engaged in sexual contact with the victim. It makes this element of the currently charged offense more likely through emphasizing multiple incidents which followed a similar pattern in order to establish intent, plan, and lack of mistake or accident. *See State v. Munoz*, 932 A.2d 443, 451 (Conn. App. Ct. 2007) ("[A] prior incident of similar sexual misconduct is probative of the defendant's intent in that it is some evidence that an alleged improper touching was more than a mistake or otherwise unintentional."); *State v. Ondricek*, 535 N.W.2d 872 (S.D. 1995) (evidence of prior bad acts of sexual contact with and rape of other nieces was admissible to show common plan or scheme, and intent). This evidence is particularly relevant because Taitano seeks to defend himself from the charges by claiming that any inappropriate contact by him between L.J.H.'s legs was accidental and occurred during the course of his regular "spot checks" done to ensure the safety of the children. Tr. at 54-55 (Jury Trial, Nov. 27, 2012). Thus, this first factor is met. On the second factor, the People have established substantial similarities between the charged conduct and other instances of alleged assault. L.J.H. testified that the sleeping arrangement remained the same in every location they moved, that the assault always occurred while her mother was

out and the other children were sleeping, and that the attempted contact consistently came from behind while she was sleeping and was focused on her "private part." *See* Tr. at 15-18, 20-22, 27-33 (Jury Trial, Nov. 26, 2012). These substantial similarities demonstrate a clear pattern relevant to showing intent and opportunity as well as a lack of mistake. The second *Hinton* factor is thus satisfied.

[32] With regard to sufficiency, Guam statutory provisions and case law establish that the personal-knowledge testimony of a victim regarding sexual assault is itself sufficient to establish such allegations and does not require additional corroboration. *See* 9 GCA § 25.40 (2005); *People v. Flores*, 2004 Guam 18 ¶ 31. Consequently, L.J.H.'s testimony as to each of the other instances satisfies the third factor. Finally, the other bad acts alleged are not too remote in time, as all of the incidents allegedly occurred within the short period between 2008 and 2011, a timeframe this court has specifically upheld in analyzing GRE 404(b). *See* RA, tab 2 at 3 (Decl. AAG Wright); *Torres*, 2014 Guam 8 ¶ 45 n.9. All prongs of the *Hinton* test have been fulfilled, and the evidence in question was not inadmissible under GRE 404(b).

2. Admissibility Under GRE 403

[33] This court has held, consistent with other jurisdictions, that after analyzing the factors of the *Hinton* test under GRE 404(b), "[t]he trial court must then undertake a balancing test, weighing the admissibility of the evidence using the GRE 403 factors." *Camaddu*, 2015 Guam 2 ¶ 12; *see also State v. Kassebeer*, 193 P.3d 409, 423 (Haw. 2008). Under GRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice" or "confusion of the issues." Guam R. Evid. 403. Accordingly, unduly prejudicial or confusing evidence may be excluded even if it is presented for an otherwise

admissible purpose under GRE 404(b). *See Torres*, 2014 Guam 8 ¶ 46; *see also* Fed. R. Evid. 404 advisory committee's notes.

[34] Taitano claims that the trial court failed to conduct the proper GRE 403 examination upon his objection. Appellant's Br. at 16-17; Reply Br. at 6. In analyzing this requirement, this court, relying on a footnote from the Ninth Circuit decision in *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987), has held that the trial court has a duty to weigh the GRE 403 factors explicitly. *Evaristo*, 1999 Guam 22 ¶ 17. Other Ninth Circuit case law has

> refused "to require a mechanical recitation of Rule 403's formula on the record as a prerequisite to admitting evidence under Rule 404(b)," and concluded that the demands of Rule 403 are met if it "appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence."

United States v. Green, 648 F.2d 587, 592-93 (9th Cir. 1981) (quoting *United States v. Sangrey*, 586 F.2d 1312, 1315). However, even under this less stringent standard, a trial court commits error where "the record does not disclose that the trial judge performed the necessary weighing under Rule 403." *Id.* at 593. There is no showing in the record that indicates that the trial court undertook the required balancing before admitting the evidence of the other three unindicted sexual abuse allegations. Indeed, the trial court made no comments as to its reasoning in rejecting Taitano's motion in limine or overruling his objection at trial, despite the fact that he directed the court's attention to GRE 403 on both occasions. RA, tab 56 at 2 (Mot. Limine Exclude 404(b) Evidence); Tr. at 22-25 (Jury Trial, Nov. 26, 2012). The trial court failed to perform the balancing required when determining the admissibility of prior bad acts evidence. *See Camaddu*, 2015 Guam 2 ¶ 12.

[35] Further, evaluation of the merits reveals that admitting the evidence in the form presented would have been impermissible even if the appropriate inquiry had been performed. As

discussed above, the evidence was probative of whether Taitano engaged in intentional sexual contact with L.J.H., as it demonstrated a common pattern of abuse indicative of a plan and rebutted his claim that contact had been accidental. However, this value must be weighed against the prejudicial effect the evidence caused. It is well settled that evidence of separate bad acts carries an inherent risk of unfair prejudice to the defendant. *See, e.g.*, *Palisoc*, 2002 Guam 9 ¶ 29; *Gomez*, 763 F.3d at 860. This is particularly true of the allegations in this case, as "evidence of other sexual behavior is, by its very nature, uniquely apt to arouse the jury's hostility." *State v. Haslam*, 663 A.2d 902, 912 (R.I. 1995) (quoting *State v. Jalette*, 382 A.2d 526, 533 (R.I. 1978)). However, "[i]n considering whether Defendant's prior bad act evidence is prejudicial, the issuance of the proper limiting instruction can prevent that prejudice from being unfair." *Camaddu*, 2015 Guam 2 ¶ 15; *see also Palisoc*, 2002 Guam 9 ¶ 29 (emphasizing that "an instruction to the jury limiting the use for which the [404(b)] evidence can be considered should be given both at the time the evidence is offered and during closing jury instructions prior to jury deliberation.").

[35] In the present case, the introduction of testimony regarding unindicted sexual abuse allegations without any instruction as to the purpose of such evidence was extremely prejudicial and risked confusion of the issues, as it created a significant likelihood that Taitano was convicted on evidence of an incident other than the one for which he was charged. *See United States v. Nance*, 481 F.3d 882, 886 (6th Cir. 2007) (holding that allowing a jury to convict defendant on different crime than that charged was *per se* prejudicial). This risk of confusion was also compounded by the presentation of all allegations together, without any guidance on which testimony went to the charged offense and which was introduced for a more limited purpose. *See United States v. Moore*, 732 F.2d 983, 996 (D.C. Cir. 1984) ("The confused and

disorganized mode of presentation increased to an unacceptable level the danger that the jury considered the alleged prior bad acts testimony beyond the limited purpose for which it could be admitted."); *United States v. Foskey*, 636 F.2d 517, 524 n.6 (D.C. Cir. 1980). Accordingly, despite the probative value of the evidence in question and its tendency towards admissibility under GRE 404(b), its highly prejudicial nature and the absence of a proper limiting instruction to mitigate such prejudice warranted exclusion pursuant to GRE 403. *See Green*, 648 F.2d at 593 (finding error due to prejudicial effect of prior bad acts where no limiting instruction was used to cure such defects).

3. Consideration of GRE 413

[36] In his reply brief, Taitano claims that the unindicted allegations of criminal sexual conduct were not admissible under GRE 413. Reply Br. at 4-5. As an initial matter, this rule explicitly states that:

> In a criminal case in which the defendant is accused of an offense of criminal sexual conduct, evidence of the defendant's commission of another offense or offenses of criminal sexual conduct is admissible, and may be considered for its bearing on any matter to which it is relevant.

GRE 413(a). However, the People never sought to admit this evidence pursuant to GRE 413, nor was any analysis with regard to this rule presented in the opening pleading of this appeal. *See* RA, tab 56 (Mot. Limine Exclude 404(b) Evidence); RA, tab 60 (Resp. to Def. Obj. 404(b) Evidence); Tr. at 24-25 (Jury Trial, Nov. 26, 2012); Appellant's Br. at 15-17. As a general principle, this court will not address an issue in the first instance on appeal. *See Univ. of Guam v. Civil Serv. Comm'n*, 2002 Guam 4 ¶ 20 (declining to address an argument raised by the appellant for the first time on appeal); *B.M. Co. v. Avery*, 2001 Guam 27 ¶ 33, *supplemented*, 2002 Guam 19; *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20 ¶ 39. Further, we

generally do not address issues introduced in a reply brief that are not discussed in a party's initial brief, as they have been deemed waived. *See People v. Campos*, 2015 Guam 11 ¶ 22 n.2; *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 7 n.3. As such, this court declines to analyze the admissibility of such evidence under GRE 413.

V. CONCLUSION

[37] On the first issue, this court holds that sufficient evidence in the record supported conviction based on the indictment. However, we conclude that Taitano is nonetheless entitled to a new trial on the basis that material variance between the allegations and proof offered at trial violated his constitutional rights to notice and to protection from double jeopardy.

[38] On the second issue, we find that the evidence of unindicted allegations of sexual assault satisfies the standards of GRE 404(b). However, we hold that the trial court abused its discretion in failing to conduct a proper GRE 403 analysis and in admitting said evidence because its probative value was substantially outweighed by the danger of unfair prejudice.

[30] Finally, this court declines to address Taitano's argument regarding GRE 413, as it was introduced for the first time in his reply brief.

[40] Accordingly, we **REVERSE** Taitano's criminal conviction, **VACATE** the sentence imposed, and **REMAND** the case to the Superior Court for a new trial.

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