

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KURT ANDERSON DAMIAN,
Defendant-Appellant.

Supreme Court Case No.: CRA14-023
Superior Court Case No.: CF0107-14

OPINION

Cite as: 2016 Guam 8

Appeal from the Superior Court of Guam
Argued and submitted on August 17, 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 Kurt Anderson Damian appeals from a final judgment convicting him of one count of theft by receiving stolen property and one count of eluding a police officer. On appeal, Damian argues that the trial court erred in failing to preliminarily instruct the jury regarding certain principles of criminal law and failing to consider his mental health issues as a mitigating factor when sentencing him to the maximum term of imprisonment. He also argues that he was deprived of effective assistance of counsel due to several alleged errors by trial counsel. For the reasons herein, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On March 2, 2014, the police were dispatched to respond to a domestic disturbance complaint at the house of Janessa Tydingco. When the police arrived, Tydingco's ex-boyfriend, Kurt Anderson Damian, was leaving the scene in a Toyota Corolla. Tydingco informed the police that Damian had assaulted her and stolen her cellphone, laptop and iPad. The police pursued in their vehicles for several miles until Damian got out of the Corolla and attempted to flee on foot. The police canvassed the area and managed to apprehend Damian with a taser. He was arrested and charged with aggravated assault, robbery and eluding the police. It was revealed that the Toyota Corolla was stolen, and Damian was also charged with theft by receiving stolen property and felony vehicle identification for using a false or defaced license plate.

[3] Following arraignment, a pretrial conference was held, wherein defense counsel raised the issue of Damian's mental state. A psychiatric evaluation was requested and submitted to the court.

[4] The case went to trial and, following jury selection, the jury was empaneled, sworn, and given preliminary instructions on its duties and conduct. Thereafter, the trial recessed for two weeks. When trial resumed, the court repeated similar preliminary instructions as those issued previously. During the delivery of the preliminary instructions, the trial court did not instruct the jury as to the People's burden of proof, the defendant's presumption of innocence and right not to testify, or the fact that the indictment was not evidence of the defendant's guilt. The defense did not object to these preliminary instructions or request additional instructions.

[5] Following the prosecution's case, the trial court granted Damian's motion for a judgment of acquittal as to the charges of aggravated assault and second degree robbery. At the close of trial, the court again instructed the jury. At that point, the trial court informed the jury that the People bore the burden of proof beyond a reasonable doubt, that the defendant was entitled to a presumption of innocence, that the defendant is under no obligation to testify, and that the indictment is not evidence of the defendant's guilt. Considering the remaining charges, the jury returned a verdict of not guilty on the charges of felony vehicle identification and misdemeanor assault, but guilty of theft by receiving stolen property and eluding a police officer.

[6] The Office of Probation submitted a Pre-sentence Investigation Report ("PSI"), which was later amended. The court held a sentencing hearing wherein it requested sentencing memoranda from the parties. The defense proceeded to submit a sentencing memorandum, with the previously performed psychiatric evaluation attached. At a continued sentencing hearing, the

trial court imposed the maximum sentence of ten years for the offense of theft by receiving stolen property. For the offense of eluding a police officer, the court sentenced Damian to a term of one year, to run concurrently with the previous sentence.

[7] This appeal followed.

II. JURISDICTION

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

III. STANDARD OF REVIEW

[9] If no objections to jury instructions are made at the time of trial, the standard of review is plain error. *People v. Perry*, 2009 Guam 4 ¶ 9. “Plain error is highly prejudicial error.” *People v. Quitugua*, 2009 Guam 10 ¶ 11. “The plain error standard is met when: ‘(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.’” *People v. Diego*, 2013 Guam 15 ¶ 23 (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

[10] “We review the trial court’s imposition of a sentence for abuse of discretion.” *People v. Diaz*, 2007 Guam 3 ¶ 59.

[11] “Ineffective assistance of counsel claims are questions of law which this court reviews *de novo*.” *People v. Moses*, 2007 Guam 5 ¶ 9 (quoting *People v. Ueki*, 1999 Guam 4 ¶ 5).

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IV. ANALYSIS

A. Preliminary Jury Instructions

[12] Damian first claims that the trial court erred in failing to preliminarily instruct the jury on certain principles of criminal law, including the People’s burden of proof, the defendant’s presumption of innocence, the defendant’s right not to testify, and the fact that the indictment is not evidence of guilt. He argues that such preliminary instructions are required under Guam law.

[13] As no objection was made to the jury instructions at the time of trial, we review this claim for plain error. *Perry*, 2009 Guam 4 ¶ 9. “Plain error is highly prejudicial error.” *Quitugua*, 2009 Guam 10 ¶ 11. Thus, we reverse only if: “(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.” *Diego*, 2013 Guam 15 ¶ 23 (quoting *Felder*, 2012 Guam 8 ¶ 19).

[14] We first consider whether the trial court erred in failing to preliminarily instruct the jury regarding these principles of criminal law. In any criminal trial before a jury, it is the province of the court to instruct the jurors on all essential principles of law, whether requested or not. *See Morris v. United States*, 156 F.2d 525, 527 (9th Cir. 1946) (citing *Screws v. United States*, 325 U.S. 91, 107 (1945)). One such essential principle is that the prosecution bears the burden of proving each and every element of a charged offense beyond a reasonable doubt. *See Perry*, 2009 Guam 4 ¶ 50 (holding that failure to give “each and every element of the charges” instruction was clear error). This court has not had occasion to consider whether the defendant’s presumption of innocence, the defendant’s right not to testify, and the fact that the indictment is not evidence of guilt constitute essential principles that must be relayed to the jury as a matter of

course. While they may well fall into that category, *see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 489-90 (1978), we need not decide those issues at this time, because, here, the trial court did instruct the jury on each of these principles prior to deliberations. Tr. at 76, 83, 93 (Jury Trial, July 31, 2014).

[15] Damian contends that instructing the jury only prior to deliberations is insufficient and that the jury must also be informed of these principles before the trial begins. However, he includes no authority in support of this proposition. Although he cites to 8 GCA § 90.13(h), which provides for jury instructions as part of the order of the trial, he concedes that this statute only requires the court to instruct the jury after closing arguments and is silent as to preliminary jury instructions. 8 GCA § 90.13(h) (2005) (providing order of trial). Rather, he argues that “instructing the jury at the commencement of trial is implicitly required and has been the standard practice in the Superior Court of Guam.” Appellant’s Br. at 15-16 n.2 (Mar. 20, 2015).

[16] This argument is unpersuasive because the legislature could explicitly include mandatory preliminary instructions in 8 GCA § 90.13 if it desired. New York, for example, has a similar statute setting forth the order of the trial and it specifically provides that after the jury has been selected and sworn, “[t]he court must deliver preliminary instructions to the jury.” N.Y. Code Crim. Proc. § 260.30(2) (McKinney 2015). New York also has adopted a separate statute requiring preliminary instructions regarding the jury’s “basic functions, duties and conduct,” including, among other things, that the jurors may not discuss the case among themselves or with anyone else, investigate the case on their own outside of trial, or accept bribes. *Id.* § 270.40. This statute does not require instruction as to the principles of law identified by Damian, so even if an identical statute was adopted by Guam, the trial court would not have erred in this case, as it

preliminarily instructed the jury on its duties and conduct prior to trial. Tr. at 2-10 (Jury Trial, July 28, 2014).

[17] Other jurisdictions, such as the Ninth Circuit,¹ include preliminary instructions in their model criminal jury instructions. As of the time of this case, Guam has not adopted such model instructions² and, regardless, model instructions act merely as guidelines and do not by themselves provide a basis for error when a trial court fails to adhere to them. *See People of Territory of Guam v. McGravey*, 14 F.3d 1344, 1352 (9th Cir. 1994).

[18] As we are aware of no authority in any jurisdiction finding error for failing to give preliminary instructions such as those sought by Damian, and he has conceded that no such authority exists in Guam law, we conclude that the trial court did not err in this instance. Accordingly, Damian's claim of instructional error fails under the first prong of the plain error standard of review, and we need not address the remaining prongs.

B. Sentencing

[19] Damian next claims that the trial court erred in failing to consider his mental health issues as a mitigating factor when sentencing him to the maximum term of imprisonment for the offense of theft by receiving stolen property.

[20] Prior to sentencing, the court asked for sentencing memoranda from the parties. Tr. at 6 (Sentencing, Aug. 21, 2014). The defense memorandum included a psychiatric examination

¹ The Ninth Circuit's model criminal jury instructions include preliminary instructions stating that "[t]he indictment is not evidence and does not prove anything" and that "[t]he defendant has pleaded not guilty to the charge[s] and is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt." 9th Cir. Crim. Jury Instr. 1.2 (2010). They do not address the defendant's right not to testify.

² The Guam Judiciary Subcommittee on Proposed Criminal Instructions favors adoption of model preliminary jury instructions similar to those adopted by the Ninth Circuit, which would include instruction on the defendant's presumption of innocence, the prosecution's burden of proof, and the fact that the indictment is not evidence.

which discussed the state of Damian’s mental health, his treatment, and his capacity to understand and control his actions. In his memorandum, Damian asked for a five-year sentence, highlighting his mental health and substance addiction and the psychiatric examination’s observation that he “‘may have not had the capacity to have the state of mind to have specific cognitions necessary to commit the offense.’” RA, tab 74 at 2 (Def. Sentencing Mem., Aug. 23, 2014). During his allocution, Damian emphasized his drug addiction which “‘manipulated and distorted what is right from wrong.’” Tr. at 11 (Cont. Sentencing, Sept. 3, 2014).

[21] Prior to imposing the sentence, the trial court listed several aggravating factors, including Damian’s criminal history, his substance abuse problems, his failure to complete previous treatment programs, and the risk of recidivism. *Id.* at 22-24. As for mitigating factors, the court stated that it “‘cannot find any factors in mitigation of the sentence that . . . the Court may impose upon you.’” *Id.* at 25. It then sentenced Damian to the maximum term of ten years imprisonment and a special parole term of not less than three years for the crime of theft by receiving stolen property.

[22] We now consider whether the court erred in failing to consider Damian’s mental health as a mitigating factor. This court has previously held that:

A sentencing court must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed. [H]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics. A trial court’s discretion in sentencing is therefore largely unlimited either as to the kind of information he may consider, or the source from which it may come. Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant.

People v. Castro, 2013 Guam 20 ¶ 62 (citations and internal quotation marks omitted); *see also Burns v. United States*, 287 U.S. 216, 220 (1932) (“It is necessary [for the sentencing judge] to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.”).

[23] Although the trial court may consider a wide range of information, we have previously held that it is not required to take into account all factors that may be considered relevant. In *Diaz*, the defendant argued that his sentence was excessive because the same judge had previously imposed significantly less severe sentences for the same offense as that of which he was convicted. 2007 Guam 3 ¶ 59. In denying the claim, we stressed that “the imposition of sentences within the statutory limits lies almost entirely within the discretion of the trial judge” and held that “[t]he court was not required to take the other defendants’ sentences into consideration when sentencing [the defendant].” *Id.* ¶¶ 67-68 (citation omitted).

[24] Some jurisdictions have adopted statutes with a comprehensive list of factors that must be considered by a sentencing judge. *See* Tenn. Code Ann. § 40-35-210 (West 2015) (Tennessee); N.J. Stat. Ann. § 2C:44-1 (West 2015) (New Jersey); 18 U.S.C.A. § 3553(a) (Westlaw through Pub. L. 114-14 (2015)) (federal). Guam has only adopted factors to be considered in imposing or withholding probation. *See* 9 GCA § 80.60 (2005). The court considered the sentencing memoranda provided by the parties and the presentence investigation report, as well as the defendant’s allocution and his history and characteristics in general. Absent some authority requiring the sentencing court to specifically consider a defendant’s mental health as a mitigating factor, Damian’s claim of error is baseless.

[25] Furthermore, the record indicates that the trial court did, in fact, consider Damian’s mental health in delivering its sentence. The trial court stated during the continued sentencing hearing that it had “due regard for . . . the history, the character, [and] the condition of . . . Damian” and had considered the defense’s sentencing memorandum which highlighted Damian’s mental health issues. Tr. at 22 (Cont. Sentencing). Thus, there is no reason to doubt that the trial court took into account the psychiatric evaluation included in his memorandum. Once we are persuaded that the trial court considered a relevant sentencing factor and as long as the sentence is within the statutory guidelines, we defer to the trial court’s discretion to ultimately sentence a defendant. *See Castro*, 2013 Guam 20 ¶ 62.

[26] Accordingly, we conclude that there was no error in the trial court’s sentencing process. Its imposition of the maximum sentence for the crime of theft by receiving stolen property was well within its discretion.

C. Ineffective Assistance of Counsel

[27] Finally, Damian claims that various errors made by his trial counsel deprived him of effective assistance of counsel.

[28] The following principles guide our analysis of this claim:

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e.” U.S. Const. amend. VI. The Sixth Amendment right to counsel is the right to the effective assistance of counsel. Counsel can deprive a defendant of the right to effective assistance simply by failing to render adequate legal assistance.

People v. Meseral, 2014 Guam 13 ¶ 44 (citations and internal quotation marks omitted). In order to determine whether the performance of a defendant’s counsel was constitutionally ineffective, we apply the test prescribed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Id.* ¶ 45. First, the defendant must demonstrate that counsel’s

performance was sufficiently deficient. *Id.* ¶ 46. Second, the defendant must demonstrate that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* ¶ 47.

[29] The court further provided:

Ineffective assistance of counsel claims are mixed questions of law and fact, which we review *de novo*. Although an ineffective assistance of counsel claim may be heard on direct appeal, it is more properly brought as a writ of habeas corpus. Courts will often decline to reach the merits of ineffective assistance of counsel claims [where] such claims are more appropriately addressed in a habeas corpus proceeding because [they] require[] an evidentiary inquiry beyond the official record. This court reviews such claims, however, where the record is sufficiently complete to make a proper finding.

Id. ¶ 13 (citations and internal quotation marks omitted).

[30] Damian lists several claimed errors, which can be grouped into three subsuming assertions. First, that trial counsel was ineffective for failing to raise various defenses at trial concerning Damian’s mental health and culpability. Second, that trial counsel was ineffective for failing to sufficiently draw the court’s attention to Damian’s mental health issues during sentencing. Third, that trial counsel was ineffective for failing to request preliminary instructions regarding those principles of criminal law discussed previously. With regard to each of these assertions of ineffectiveness, we first must consider whether the record is sufficiently complete to make a proper finding as to effectiveness.

[31] Damian’s first assertion concerns the intricacies of trial counsel’s defense strategy. Every criminal case requires choices to be made by the defense regarding which theories are advanced to the exclusion of other possible lines of argument. Such strategic decisions are presumed to be sound and generally do not amount to ineffective assistance of counsel. *See People v. Reyes*, 1998 Guam 32 ¶ 22 (“Although counsel’s choice of defense was unsuccessful,

conviction is not sufficient to overcome the strong presumption that counsel's actions were sound trial strategy."); see also *Angoco v. Bitanga*, 2001 Guam 17 ¶ 9 ("Where counsel consciously decides to omit a defense or pursue a certain argument, such conduct is deliberate strategy, and a choice of strategy that backfires is not the equivalent of ineffective assistance of counsel."). In order to prevail, Damian would need to establish that the decisions about which he complains were not made for strategic purposes but out of a lack of diligence or for some illegitimate motive. Such a finding cannot be gleaned from the record and therefore requires a separate fact-finding proceeding, more appropriately conducted pursuant to a writ of habeas corpus. See *Meseral*, 2014 Guam 13 ¶ 49. Accordingly, we decline to review this portion of Damian's ineffective assistance claim.

[32] Damian's second and third assertions, however, can be more straightforwardly addressed as questions of law or based on the record before us. Thus, we turn to the issue of whether trial counsel was ineffective under *Strickland* for failing to sufficiently draw the court's attention to Damian's mental health issues during sentencing. As discussed above, the record shows that the trial court did consider Damian's mental health issues. It did so because Damian's trial counsel drew the court's attention to these issues by raising the issue in his sentencing memorandum and attaching a copy of the psychiatric evaluation. RA, tab 74 at Ex. A (Def. Sentencing Mem.). Trial counsel informed the court that the psychiatric examiner had stated Damian's diagnosis and treatment, and trial counsel further "noted that due to his substance use disorder, Mr. Damian 'may have not had the capacity to have the state of mind to have specific cognitions necessary to commit the offense.'" *Id.* at 2.

[33] Although Damian suggests that trial counsel should have emphasized the evaluation further at sentencing, it is not obvious that doing so would have been to the defense's benefit. Thus, it was reasonable for trial counsel to focus his arguments at sentencing elsewhere. Accordingly, we conclude that trial counsel was not deficient in this regard.

[34] Finally, we consider Damian's assertion that trial counsel was ineffective for failing to request preliminary instructions regarding the People's burden of proof, the defendant's presumption of innocence, the defendant's right not to testify, and the fact that the indictment is not evidence of guilt. With regard to this claim, we need not consider whether trial counsel's performance was deficient, because Damian has not demonstrated prejudice. *People v. Campbell*, 2006 Guam 14 ¶ 49 (holding that the court need not determine if there was deficient performance if there is no prejudice to the defendant). All of the principles of criminal law identified by Damian were communicated to the jury prior to deliberations, and there is no indication that the jury deviated from them. Thus, no reasonable probability exists that Damian would have been acquitted had only the jury heard these same instructions prior to trial.

[35] While the first ineffective assistance of counsel claim, because it is substantially a question of fact, would be more appropriately addressed in a habeas proceeding, we are not persuaded by the second and third ineffective assistance of counsel claims. Accordingly, Damian has not established that he was deprived of his constitutionally guaranteed right to counsel due to ineffective assistance within the purview of this appeal.

V. CONCLUSION

[36] The trial court did not err in failing to preliminarily instruct the jury with regard to the principles of criminal law identified by Damian. Nor did it err in failing to consider Damian's

mental health issues as a mitigating factor. Finally, the record does not reflect that trial counsel was ineffective so as to deprive Damian of his constitutional right to counsel. Accordingly, we **AFFIRM** the judgment of conviction.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

KATHERINE A. MARAMAN
Associate Justice

/s/

ROBERT J. TORRES
Chief Justice