IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

BERNARDINO R. KANISTUS,
Defendant-Appellant.

Supreme Court Case No.: CRA16-010
Superior Court Case No.: CF0281-15

OPINION

Cite as: 2017 Guam 26

Appeal from the Superior Court of Guam
Argued and submitted on March 2, 2017
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Bernardino R. Kanistus appeals his conviction by jury for attempted murder, arguing the trial court erred by giving deficient jury instructions that did not require the jury to find the proper *mens rea* to support his conviction on a theory of accomplice liability. In response, Plaintiff-Appellee People of Guam (the "People") maintain that the trial court's instructions were sufficient under *People v. Diego*, 2013 Guam 15, and *People v. Demapan*, 2004 Guam 24.

[2] For the reasons stated herein, we affirm the conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Kanistus and Saul Sos got into an argument that escalated into a physical altercation.[1] BJ Johnny,[2] Kanistus's co-defendant, began shooting pieces of rebar at Sos using a slingshot. Sos then ran at Johnny wielding a machete, which he subsequently used to attack Johnny.[3]

[4] Kanistus, Johnny, and a third co-defendant, Siren Nathan, all ended up fighting with Sos. During the melee, Kanistus got behind Sos and started choking him. While this was happening, Johnny and Nathan struck Sos's head and legs with machetes. The fight continued until witnesses intervened, with one witness striking Kanistus in the face with her fist. After being struck, Kanistus and the other co-defendants stopped their attack. When the fight was over,

[1] During witness testimony, Kanistus was often referred to by the witnesses as the "bald man." Kanistus is also referred to by the witnesses at trial as "Ready." *See* Transcript ("Tr.") at 24 (Jury Trial, July 14, 2015); *see also* Tr. at 175 (Jury Trial, July 15, 2015).

[2] Witnesses at trial also refer to B.J. Johnny as "CO." *See* Tr. at 13-14 (Jury Trial, July 14, 2015).

[3] At trial, Saul Sos was also known by witnesses as "Cabbage" and was referred to as "Cabbage" during the prosecution's case-in-chief. *See* Tr. at 175 (Jury Trial, July 15, 2015).

Kanistus, Johnny, and Nathan got into a car while Sos remained lying unconscious on the ground. Kanistus sat on the passenger seat, Nathan sat on the back seat, and Johnny sat on the driver's seat. Johnny then drove the vehicle over Sos's legs.

[5] The People initially charged Kanistus with two counts of Attempted Murder and two counts of Aggravated Assault. The People alleged for the first count of Attempted Murder that Kanistus "intentionally or knowingly attempt[ed] to cause" Sos's death and, by way of special allegation, that he used an automobile to do so. The People based its second count on the theory that Kanistus had aided and abetted Johnny and Nathan. This second count read:

> On or about the 2nd day of May 2015, in Guam, [Kanistus] did commit the offense of *Attempted Murder*, in that he did, with the intention of promoting or assisting in the commission of *attempted murder*, a violation of 9 GCA §§ 16.40(a)(1) and 13.10, induce and aid [Johnny] and [Nathan] to commit *attempted murder*, by restraining [Sos] while [Johnny] and [Nathan] struck him with a *machete*, in violation of 9 GCA § 4.60.

Record on Appeal ("RA"), tab 15 at 4-5 (Indictment, May 14, 2015). The Superseding Indictment and Amended Superseding Indictment returned against Kanistus contained the identical charge of attempted murder based on the theory that Kanistus had aided and abetted Johnny and Nathan—identified as the Fifth Charge. The Indictments also contained a charge of attempted murder, which included a special allegation of possession and use of a deadly weapon—an automobile—in the commission of a felony, which was identified as the Seventh Charge.

[6] After the close of evidence, the trial court instructed the jury that the following were the essential elements of the Fifth Charge, Attempted Murder based on the theory of aiding and abetting:

> [T]he essential elements of attempted murder as a first-degree felony, charge five -- the People must prove beyond a reasonable doubt that [Kanistus],

> one, on or about the 2nd day of May, 2015, two, in Guam, three, did with the intention of promoting or assisting in the commission of attempted murder, four, induce and aid [Johnny] and [Nathan] to commit attempted murder by restraining [Sos] while [Johnny] and [Nathan] struck him with a machete. He did not act in reasonable self-defense, five.

See Tr. at 225 (Jury Trial, July 17, 2015). The trial court gave the following instruction to the jury regarding the Seventh Charge of Attempted Murder:

> [T]he essential elements of attempted murder as a first-degree felony, noted in charge seven of the indictment against [Kanistus] – and it reads, the People must prove beyond a reasonable doubt that on or about the 2nd day of May, 2015, two, in Guam, three, he intentionally or knowingly attempted to cause the death of another human being, that is, [Sos].

Id. at 227. The jury was also instructed on self-defense and mere presence. Importantly, before providing the jury with instructions on attempted murder based on the theory of aiding and abetting and on attempted murder itself, the trial court also provided the jury with instructions on complicity and criminal homicide as to both defendants. The trial court read the following complicity instruction to the jury:

> [G]uilt established by complicity -- a person is guilty of an offense if, with the intention of promoting or assisting in the commission of the offense, he induces or aids another person to commit the offense.

Id. at 211-12. The trial court also read the following criminal homicide instruction to the jury:

> [M]urder defined -- criminal homicide constitutes murder when it is committed intentionally or knowingly or is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Murder is a felony of the first degree.

Id. at 215. Neither of the parties objected to the instructions given at trial.

[7] The jury found Kanistus guilty of the Fifth Charge of attempted murder based on accomplice liability and acquitted him of the Seventh Charge of attempted murder. Kanistus timely filed this appeal.

II. JURISDICTION

[8] This court has jurisdiction over an appeal from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)), 7 GCA §§ 3107(b) and 3108(a) (2005), and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] When no party objects to the jury instructions, we review them for plain error. *People v. Gargarita*, 2015 Guam 28 ¶ 11 (citing *People v. Felder*, 2012 Guam 8 ¶ 8). "Plain error is highly prejudicial error, which this court 'will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Id.* (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

IV. ANALYSIS

[10] The sole issue on appeal is whether the trial court committed plain error by failing to instruct the jury that it was required to find that Kanistus had the specific intent to cause the victim's death.

A. Whether the Trial Court Committed Error

[11] To begin our plain error analysis, we first address whether the trial court committed an error. Kanistus contends that the jury instructions given by the trial court were lacking an essential element of the crime Kanistus was charged with committing, thus constituting error. Appellant's Br. at 12 (Dec. 6, 2016). He argues that "there was no explanation" that in order to find him guilty of attempted murder, the jury was required to make a finding that he possessed the intent to commit that offense. *Id.* Importantly, he argues that the instructions were confusing

because they were read as general instructions related to all charges, rather than related to the specific underlying charge of which he was convicted.

[12] We first consider *de novo* whether the proffered instructions accurately stated the relevant law as it related to the attempted murder charge based on accomplice liability. *Gargarita*, 2015 Guam 28 ¶ 14 (citing *People v. Diego*, 2013 Guam 15 ¶ 9). In doing so, a single jury instruction should not be judged in artificial isolation, but should be considered and reviewed as a whole. *Id.* (citing *People v. Jones*, 2006 Guam 13 ¶ 28); *see also Boyd v. California*, 494 U.S. 370, 378 (1990).

[13] Jury instructions are better appreciated against a background of the elements as provided by the relevant statutes and case law. First, murder is criminal homicide that is committed intentionally or knowingly. 9 GCA § 16.40 (2005). Second, a person is guilty of attempt to commit a crime when, "with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime." 9 GCA § 13.10 (2005). Next, Title 9 of the Guam Code Annotated also dictates how a person is found guilty under the theory of accomplice liability:

> A person is guilty of an offense if, with the intention of promoting or assisting in the commission of the offense, he induces or aids another person to commit the offense. If the definition of the offense includes lesser offenses, the offense of which each person shall be guilty shall be determined according to his own culpable mental state and to those aggravating or mitigating factors which apply to him.

9 GCA § 4.60 (2005). Intent is defined in Guam law as follows: "A person acts intentionally, or with intent, with respect to his conduct or to a result thereof when it is his conscious purpose to engage in the conduct or cause the result." 9 GCA § 4.30(a) (2005). "[S]pecific intent to kill is a necessary element of attempted murder." *People v. Acero*, 208 Cal. Rptr. 565, 569 (Ct. App.

1984). Thus, to convict an aider and abettor of attempted murder, "a jury must find the aider and abettor shared the perpetrator's specific intent to kill." *Id.*

[14] Kanistus cites instructions from states from which Guam modeled its aiding and abetting statute[4] and argues that all of these states explicitly require a finding of specific intent while Guam does not make such a requirement clear. *See* Appellant's Br. at 8-12. As support, Kanistus offers the model instructions from Massachusetts and New Jersey. *Id.*; *see also* 9 GCA § 4.60, SOURCE. He argues that these model instructions make clear that a finding of specific intent is required. Appellant's Br. at 8-12. With respect to the specific intent requirement, Massachusetts' instruction for aiding and abetting provides, in pertinent part, that the "defendant knowingly and intentionally participated in some meaningful way in the commission of the alleged offense . . . and [defendant] did so with the intent required for that offense." *See id.* at 8 (quoting Mass. Crim. Model Jury Instr. 4.200 (2011)). New Jersey's model instruction similarly makes it clear that a finding of specific intent is required by compelling a showing that the "defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the act." *Id.* (quoting N.J. Model Jury Charge (Criminal) 2C:2-6 "Accomplice" (Nov. 2016)).

[15] Kanistus also offers case law from California, which has consistently held that specific intent is necessary to constitute attempted murder, along with a few cases from this jurisdiction. *See* Appellant's Br. at 10-12; Appellant's Reply Br. at 1-3 (Feb. 7, 2017). Kanistus is correct to the extent that New Jersey, Massachusetts, California, and Guam all require a finding of specific intent to support a conviction based on the theory of accomplice liability. *See* 9 GCA § 4.60. To that extent, we do not dispute the underlying proposition of the cases Kanistus has offered.

[4] Guam's aiding and abetting statute is modeled after statutes from Massachusetts, New Jersey, and California. 9 GCA § 4.60, SOURCE.

[16] In response to Kanistus's arguments, the People retort that Kanistus "does not dispute that the challenged jury instruction accurately tracks the statutory language on accomplice liability as set out in 9 [GCA] § 4.60." Appellee's Br. at 3 (Jan. 25, 2017); *see* Appellant's Br. at 12 ("The trial court's instruction on aiding and abetting . . . was simply a verbatim recitation of 9 GCA § 4.60."). The People posit that Kanistus's argument that the instructions "offered no guidance" because they were a verbatim recitation is "difficult to reconcile" with decisions of this court which hold that jury instructions that track the relevant statute are presumptively correct. Appellee's Br. at 3-4; *see also* Appellant's Br. at 12.

[17] The People support their contention with two cases. First, the People cite to *Diego*, 2013 Guam 15 ¶¶ 25-26. There, we held that the instructions given at trial, which mirrored the applicable criminal statute, did not constitute a misstatement of the law because they included the essential elements of the statute. *Id.* ¶¶ 25-26, 28. However, Kanistus contends that the trial court instructed the jury on only the first portion of 9 GCA § 4.60, and left out the language that goes on to state that "[i]f the definition of the offense includes lesser offenses, the offense of which each person shall be guilty shall be determined according to his own mental state and to those aggravating or mitigating factors which apply to him." Reply Br. at 1 (citing 9 GCA § 4.60). In short, he argues section 4.60 requires that the jury make a finding of guilt or innocence based on each individual defendant's respective mental state and that the trial court failed to relay that to the jury. *See* 9 GCA § 4.60 ("[G]uilt[] shall be determined according to his own mental state . . . .").[5]

[5] Kanistus also argues that the trial court failed to instruct the jury on lesser offenses, pursuant to 9 GCA § 4.60, and therefore the trial court did not accurately track the statute. Reply Br. at 2. He asserts that the trial court did however instruct the jury on lesser offenses as to the co-defendant, Nathan, and that this "created an absurd result" in regards to the proceeding against the two defendants. *See id.* The trial court instructed the jury on lesser offenses as to Kanistus in instructions 8B through 8F. *See* Tr. at 224-28 (Jury Trial, July 17, 2015) (instructing jury

[18] However, contrary to Kanistus's contention, the trial court did in fact instruct the jury about 9 GCA § 4.60 in its entirety while giving the jury general instructions, as even Kanistus acknowledges in a footnote. *See* Tr. at 211-12 (Jury Trial, July 17, 2015) (relaying entire instruction on 9 GCA § 4.60 in Instruction 5F); *see also* Reply Br. at 2 n.1 ("The trial court provided 9 GCA § 4.60 in its entirety approximately 40 instructions before the instruction on Attempted Murder against Kanistus."). Nevertheless, we find merit in Kanistus's argument. Even though the trial court did instruct the jury on 9 GCA § 4.60 in its entirety during the reading of the general instructions, the trial court failed to attach it to the specific underlying crime and make it obvious for the jury that "each person['s] [guilt] shall be determined according to *his own culpable mental state* . . . ." 9 GCA § 4.60 (emphasis added). Thus, the separation between the reading of the general instruction and the instructions with respect to Kanistus's Fifth Charge may have caused confusion with the jury.

[19] The People also rely on *People v. Demapan*, 2004 Guam 24. *See* Appellee's Br. at 4-6. In *Demapan*, we found no plain error where the trial court's instructions accurately tracked the relevant criminal statute and held that the instructions were sufficient to inform the jury of the necessary elements. 2004 Guam 24 ¶ 20. Like the instant case, *Demapan* also involved a crime where specific intent was an essential element.[6] *See id.*

[20] The People posit that this case is controlled by *Demapan*, and analogize *Demapan* to the case at hand in several respects. First, the People argue that Kanistus and Demapan both argued

on lesser offenses of aggravated assault as to Kanistus). However, the instructions on lesser offenses were not associated with Kanistus's Fifth Charge of attempted murder. Rather, the instructions were tied to a separate charge for aggravated assault. For Nathan, the instructions on lesser offenses were associated with Nathan's attempted murder charge. *See id.* at 200-07.

[6] The defendant in *Demapan*, 2004 Guam 20, was charged and convicted of the crime of burglary, a specific intent crime.

that the trial court committed plain error in failing to instruct the jury on the requisite element of specific intent for a specific intent crime. Appellee's Br. at 4.

[21] Next, the People point out that the trial court in *Demapan*, as here, instructed the jury on the general definition of intent as defined in Guam law. *Id.*; *see Demapan*, 2004 Guam 24 ¶ 24; *see also* Tr. at 209-10 (Jury Trial, July 17, 2015). Third, the People point out that the trial court in *Demapan* and the trial court in this case instructed their juries on "knowledge or intent" using the exact same instruction.[7] That instruction reads:

> Knowledge and intent involve the state of a person's mind . . . . Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does: his words, his actions, and his conduct as of the time of the occurrence of certain events.
>
> The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than by words or explanation of the act uttered long after its occurrence. Accordingly, intent and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred or the events took place and the reasonable inferences to drawn from them.

Tr. at 209 (Jury Trial, July 17, 2015); *see also Demapan*, 2004 Guam 24 ¶ 24. After reviewing these jury instructions, which are identical to the ones given here, the *Demapan* court held:

> Although the trial court did not expressly instruct the jury that they had to find that Demapan had the specific intent to commit the crime . . . , in the totality of the instructions, the jury was adequately instructed that they had to make a finding that Demapan desired certain criminal consequences, or objectively desired a specific result to follow his act.

Demapan, 2004 Guam 24 ¶ 26 (quoting 21 Am. Jur. 2d *Criminal Law* § 128 (2004)) (internal quotation marks omitted); *see also* 9 GCA 4.30(e); Appellee's Br. at 5. Thus, the *Demapan* court concluded that the jury was sufficiently instructed that it must find the requisite *mens rea* of specific intent to convict the defendant. However, in *Demapan*, we advised that, in the future,

[7] The jury instruction was entitled 5D in *Demapan*, but is entitled 5B in this case.

trial courts should instruct the jury on the underlying crime in a burglary charge in order to avoid potential confusion. *See Demapan*, 2004 Guam 24 ¶ 16 nn.3, 4.

[22] We distinguish *Demapan* from the case at hand. *Demapan* involved jury instructions regarding two distinct crimes—burglary and possession of a controlled substance—that were brought against a single defendant. Here, there are multiple defendants and multiple, related charges. The complexity of the case and the length of the jury instructions increased the likelihood of juror confusion.

[23] Moreover, in this case, general knowledge/intent instructions were given to the jury along with other overlying jury instructions as to both Kanistus and the co-defendant, who were individually charged with separate crimes. Then, the trial court read the Fifth Charge against Kanistus without making it obvious that specific intent was a required element of the charge, leaving it to the jury to make the nebulous connection themselves. Based on these circumstances, we find the possibility of jury confusion from the instructions untenable, and we are compelled to find error, as the specific intent language was not obviously attached to the language in the jury instructions for the specific intent crime.

[24] Accordingly, because of the trial court's failure to provide sufficient jury instructions as to Kanistus's specific intent crime, and the likelihood of jury confusion from the instructions, we find error.

B. Whether the Error was Clear or Obvious Under Current Law

[25] Having found the trial court erred, we then proceed to consider whether the trial court's error was clear or obvious under current law. *See Gargarita*, 2015 Guam 28 ¶ 20. We have held:

> [A] determination of whether an error is "clear" for purposes of the plain error analysis does not require the existence of precedent exactly on point. . . . "[T]he 'plainness' of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking." This rule is particularly appropriate for our jurisdiction, [which is still young]. It would be unfair to require defendants to demonstrate plain error with a case directly on point given that many issues have not yet been resolved by this court.

People v. Perry, 2009 Guam 4 ¶ 32 (internal citation omitted).

[26] The law is clear that jury instructions are to relay to a jury that it must find all elements of a crime beyond a reasonable doubt in order to find a defendant guilty. In a jury trial, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* ¶ 12 (quoting *United States v. Guadin*, 515 U.S. 506, 522-23 (1995)); *see also* U.S. Const. amends. V, XIV. Under Guam law, "[n]o person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." 8 GCA § 90.21(a) (2005). The United States Supreme court has held:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction *except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged*.

In re Winship, 397 U.S. 358, 364 (1970) (emphasis added). By virtue of the Organic Act, the Due Process Clause of both the Fifth and Fourteenth Amendments to the United States Constitution apply equally to Guam defendants. 48 U.S.C.A. § 1421b(u) (Westlaw through Pub. L. 115-90 (2017)).

[27] Having found that the trial court erred by not meeting this mandate, we find that its error was clear and obvious under current law.

C. Whether the Error Affected Substantial Rights

[28] We now address whether the trial court's error affected Kanistus's substantial rights. We have previously held that errors do not affect substantial rights when the prosecution presented overwhelming evidence of guilt regarding the issue or element affected by the claimed error. *See Perry*, 2009 Guam 4 ¶¶ 43, 46, 49. Kanistus argues that "a review of the instructions show that the jury could have convicted Kanistus of attempted murder based only on his act of [choking the victim] without a finding that he possessed the shared intent of his co-defendants." Appellant's Br. at 13. To support this argument, he notes that when the jury was asked, regarding the Seventh Charge of attempted murder, "whether they believed Kanistus intentionally or knowingly attempted to cause the death of the victim," the jury found him not guilty. *Id.* at 14. In essence, then, Kanistus argues that had the jury understood that specific intent was also a required element of the Fifth Charge, it would have found him not guilty on this charge as well. Kanistus asserts, therefore, that he was prejudiced so as to affect his substantial rights.

[29] To counter Kanistus's arguments, the People again rely on *Demapan*. *See* Appellee's Br. at 7-8. In *Demapan*, we stated:

> Although the trial court did not expressly instruct the jury that they had to find that Demapan had the 'specific' intent to commit the crime of theft, in the totality of the instructions, the jury was adequately instructed that they had to make a finding that Demapan 'desired certain criminal consequences, or objectively desired a specific result to follow his act.'

Demapan, 2004 Guam 24 ¶ 26 (quoting 21 Am. Jur. 2d *Criminal Law* § 128). We reached this conclusion after finding that the "jury may infer specific intent from the circumstances surrounding the entry by the accused." *Id.* ¶ 25 (citation omitted). In *Demapan*, we found the fact that the defendant had two prior convictions and was found with the property that was earlier reported stolen sufficient for a jury to infer specific intent. *Id.* Here, the People argue that the

surrounding circumstances in Kanistus's case are just as compelling as the circumstances surrounding the defendant in *Demapan*. *See* Appellee's Br. at 7-8.

[30] To support their argument, the People point out that Kanistus began choking the victim before the machete strikes, continued to choke the victim even after the victim was struck several times with machetes, only stopped choking the victim after someone intervened, and left together with the other co-defendants in the same vehicle, which they also used to run over the victim who remained unconscious on the ground. *Id.* at 8. Based on these facts, the People argue Kanistus "cannot meet his burden of demonstrating that a lack of an instruction on specific intent prejudiced his substantial rights" because "[t]he evidence that Kanistus possessed the requisite specific intent to cause the death of the victim is overwhelming." *Id.* (citing to *Gargarita*, 2015 Guam 28 ¶ 23 (holding that defendant-appellant bears the burden of demonstrating prejudice by showing that the error constitutes a mistake so serious that but for it the defendant probably would have been acquitted)).

[31] Having examined the entire record before us, we conclude that the erroneous instruction given by the trial court did not affect Kanistus's substantial rights. The correction of plain errors affecting substantial rights is left to the sound discretion of appellate courts, and that discretion should not be exercised unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1985) (citation omitted); *People v. Guerrero*, 2017 Guam 4 ¶ 42 (quoting *People v. Mendiola*, 2010 Guam 5 ¶ 14). The error must be proven prejudicial, and it is the defendant who bears the burden of proof and persuasion on this issue. "[Courts] have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error . . . had an unfair prejudicial impact on the jury's deliberations." *Young*, 470 U.S. at 16 n.14.

[32] While a jury might infer that Kanistus meant only to cause great bodily injury, a jury might also infer that Kanistus meant to cause death through his actions. We find, however, that Kanistus has not met his burden of demonstrating that the trial court's failure to directly tie an instruction on specific intent to the jury instructions regarding the Fifth Charge prejudiced his substantial rights.

[33] Kanistus relies on the fact that the jury found him not guilty of the Seventh Charge, where they were instructed on specific intent. We find that this reliance is misplaced. On the Fifth Charge, the jury found Kanistus "did with intention of promoting or assisting in the commission of attempted murder . . . induce and aid [his co-defendants] to commit attempted murder by restraining Saul Sos while [his co-defendants] struck [Sos] with a machete." Tr. at 225 (Jury Trial, July 17, 2015). On the Seventh Charge, the jury found Kanistus did not "knowingly and unlawfully possess and use a deadly weapon, that is, an automobile in the commission of a felony, that is, attempted murder . . . ." *Id.* at 227-28. These jury instructions show that the Fifth Charge focused on Kanistus's intent in restraining the victim during the machete attack, whereas the Seventh Charge focused on Kanistus's intent during the automobile attack. While we cannot speculate as to a jury's reasoning regarding its finding of a defendant's guilt or innocence, here, we find that the factual bases of the Fifth Charge and Seventh Charge were sufficiently distinct for a jury to conduct separate intent analyses and reach different conclusions as to each.

[34] Accordingly, we find that the error did not affect Kanistus's substantial rights. Having found that Kanistus's substantial rights were not affected, we need not address the fourth element of the plain error test.

V. CONCLUSION

[35] Under the plain error analysis, the trial court erred and the error was clear and obvious. However, the error did not affect Kanistus's substantial rights. Accordingly, we **AFFIRM** Kanistus's conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice