IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,	)	Supreme Court No. **CRA97-012**
	)	Superior Court No. **CF0016-94**
Plaintiff-Appellee,	)	
	)	
vs.	)	**OPINION**
	)	
JAMES EVANGELISTA REYES,	)	
	)	
Defendant-Appellant.	)	
	)	

Filed: December 21, 1998

Cite as: **1998 Guam 32**

Appeal from the Superior Court of Guam

Argued and Submitted on 05 October 1998

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, and JOAQUIN C. ARRIOLA, SR., Associate Justices.

WEEKS, J:

[1] Appellant James E. Reyes appeals his conviction on two counts of Murder (As a 1st Degree Felony) and two counts of a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of the Murder counts. Appellant argues for a reduction of his conviction from murder to manslaughter. He also contends that he was denied effective assistance of counsel at trial. We affirm, but remand for re-sentencing on the double convictions.

I.

[2] On 21 September 1994, a rosary was held at the residence of a neighbor of the Appellant's mother. Appellant and his brother, Antonio Reyes, had been drinking beer in the back of their mother's residence. After the rosary, Appellant and Antonio Reyes moved to the parking lot in front of their house. An argument occurred between the Reyeses and several men of Belauan ancestry. As a result of conflicting evidence, it is uncertain as to how the argument actually started, but Appellant claims that the Belauan men took some of their beer without permission. During the argument a shotgun was introduced into the fray. It was also unclear as to how and who brought out the weapon, but the evidence showed that the Appellant gained control of it. Appellant admits that he swung the weapon around, "using it as a bat" to stave off the Belauans. At that time, there was a multitude of people around who had attended the rosary. Several shots were fired, the first of which dispersed the crowd. Appellant himself ran with the shotgun in hand. One of the shots killed the victim, Jesse Balatico. Appellant claims that the first two shots went off accidentally while he

was struggling for control of the weapon, and that the next shot was a warning shot into the air; but Appellant could not explain how the victim was shot. The victim's wife, however, testified that the Appellant stood over the body of her husband after the victim was shot.

[3] On 28 January 1994, Appellant was indicted on two counts of Murder (As a 1st Degree Felony); to wit, "knowing" murder and "reckless" murder, the latter being committed under circumstances manifesting extreme indifference to the value of human life, and two counts of the Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony. Antonio Reyes was indicted on the charge of Hindering Apprehension (As a 3rd Degree Felony). On 03 October 1996, a jury convicted the Appellant on all counts, while his brother was acquitted of the Hindering Apprehension charge. On 17 June 1997, Appellant was sentenced to concurrent life sentences on the murder counts with the possibility of parole after 15 years, and to concurrent sentences of 10 years on the Special Allegations.

II.

[4] Appellant raises the following issues:

1. Whether there was insufficient evidence at trial for this court to reduce the level of the conviction from murder to manslaughter.

2. Whether the Appellant was denied effective assistance of counsel based upon the following:

   a) failure to move for a reduction of the charges at the close of the People's case;

   b) failure to assert an affirmative defense based on 9 GCA § 16.50(a)(2) (1993);

   c) failure to move for a severance so that Appellant be tried separately from his brother, Antonio; and

d) failure to request permission to give closing argument after the closing argument of counsel for Antonio Reyes.

III.

[5] This court has jurisdiction pursuant to 7 GCA §§ 3108 and 3108 (1994) and 48 U.S.C. § 1424-3(d) (1984), 8 G.C.A. § 130.15 and 130.60 (1993).

IV.

[6] Appellant argues that there was insufficient evidence of a culpable mental state to maintain the murder conviction under 9 GCA § 1640(a),[1] and asks this court, pursuant to 8 GCA § 130.60,[2] to reduce the level of his conviction from murder to manslaughter under 9 GCA § 16.50(a) (1993), which defines manslaughter as a homicide which is committed recklessly or under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.

[7] The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 303, 318, 99 S.Ct. 2781, 2788-89 (1979).

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[1] 9 GCA § 16.40(a) (1993) reads:
Murder Defined. (a) Criminal homicide constitutes murder when:
(1) it is committed intentionally or knowingly; or
(2) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

[2] 8 GCA § 130.60 (1993) reads:
Actions Permitted of Appellate Court. The appellate court may reverse, affirm or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

When 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. *People v. Gill*, Crim. No. 92-00099A, 1994 WL 150934, at *6 (D. Guam App. Div. April 15, 1994), citing *U.S. v. Necoechea*, 986 F.2d 1273 (9th Cir. 1993). "The Ninth Circuit has noted that this is a highly deferential standard." *Id.*, citing *U.S. v. Rubio-Villareal*, 967 F.2d 294 (9th Cir. 1992) (en banc).

[8] The evidence shows that Appellant had possession of the shotgun before and after the shots were fired. All of the witnesses put the weapon in the Appellant's hands he admitted to swinging the shotgun "as a bat" and running with the gun. Appellant was the sole person in possession of the weapon. There were no other firearms used. By Appellant's own account, there were more than twelve people in the area who were in attendance of the rosary when the argument between Appellant, his brother Antonio, and the three Belauans started. Two witnesses, Marjorie and Lisa Medder, who were inside their residence, testified that they looked out their window and saw the Appellant running with the shotgun, trip and fall, and then fire the weapon, before seeing the victim lying on the ground. Another witness, Juliet Balatico, the wife of the victim, testified that she saw Appellant stand over the body of her husband after the victim had been shot. The People argue that although no one saw Appellant shoot the victim, the evidence was sufficient for the jury to reasonably infer that the Appellant possessed the requisite mental state and to disbelieve his testimony, despite other inconsistencies in the witnesses' testimony, and that the jury was in the best position to determine credibility and weigh the significance of any inconsistencies. We agree. We find that sufficient evidence was elicited from the various witnesses for the jury to infer that

Appellant knowingly and recklessly, under circumstances manifesting extreme indifference to the value of human life, committed the crimes charged. Therefore, we decline to exercise our authority under 8 GCA § 130.60 to reduce the conviction from murder to manslaughter.

V.

[9] Whether a defendant has received ineffective assistance of counsel is a question of law. *People v. Quintanilla*, 1998 Guam 17, ¶ 8, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This court reviews questions of law *de novo*. *Camacho v. Camacho*, 1997 Guam 5, ¶ 24. Under *Strickland*, a convicted defendant must show, first, that counsel's performance fell below an objective standard of reasonableness, and second, that defense counsel's deficient performance must have so prejudiced the defendant as to result in the denial of a fair trial. 466 U.S. at 687, 104 S.Ct. at 2064.

[10] Appellant argues that he was denied effective assistance of counsel on the following grounds: A) failure to move for a reduction of the charges at the close of the People's case; B) failure to assert an affirmative defense based on 9 GCA § 16.50(a)(2); C) failure to move for a severance so that Appellant be tried separately from his brother Antonio; and D) failure to request permission to give closing argument after the closing argument of counsel for Antonio Reyes. We examine each in turn.

A. Failure to move for a reduction of charges at the close of the people's case.

[11] Appellant asserts that the lack of evidence on the murder charge should have led trial counsel to move for a reduction of charges at the close of the People's case, as well as to argue a charge of

manslaughter under 9 GCA § 16.50(a)(2).[3] Appellant claims that had trial counsel argued 9 GCA § 16.50(a)(2) to the court or the jury or requested an instruction thereon, the maximum sentence Appellant could have received for manslaughter, as a first offender, would have been fifteen years. *See* 9 GCA § 80.31(a) (1993). The failure to request an appropriate jury instruction may be ineffective assistance of counsel where there is no strategic justification for doing so. *U.S. v. Span*, 75 F.3d 1383 (9th Cir. 1996). Appellant argues that this was not a part of trial counsel's strategy; rather, Appellant asserts that trial counsel simply missed the relevant law.

[12] In *U.S. v. Chambers*, 918 F.2d 1455 (9th Cir. 1990), the court determined that "[t]rial counsel's conduct was not deficient merely because he chose to pursue a different line of defense than appellate counsel would have pursued." *Id.* at 1461. In this case, trial counsel's closing remarks that "James Reyes is not criminally responsible for the death of Jesse Balatico, bottom line. Not homicide, manslaughter, criminal negligence. Nothing! He did not break the law. . .", Transcript, Vol. VIII, p. 82, Oct. 3, 1996, make clear trial counsel's tactical decision to pursue the defense that his client had not committed any crime. The *Chambers* court, supra, stated that it will not "second-guess counsel's strategic decision to present or to forego a particular theory of defense when such decision was reasonable under the circumstances." 918 F.2d at 1461. Here, Appellant testified that the first two shots went off accidentally in the struggle for control of the weapon, and that he fired

[3] 9 GCA § 16.50(a)(2) (1993) reads:

> (2) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as he believes them to be. The defendant must prove the reasonableness of such explanation or excuse by a preponderance of the evidence.

another shot into the air as a warning, and did not know how the victim got shot. Transcript, Vol. VII, pp. 57-58, 60, Oct. 1, 1996. Although trial counsel's strategy of the "all-or-nothing" approach proved unsuccessful for the Appellant, we think it was nevertheless a reasonable theory to pursue, in light of the Appellant's testimony and the inconsistencies in the testimony of other witnesses.

B. Failure to assert an affirmative defense based on 9 GCA § 16.50(a)(2)

[13] Appellant contends that trial counsel could have raised three possible theories of defense based on Section 210.3 of the Model Penal Code, from which 9 GCA § 16.50(a)(2) is adopted. These are the defenses of: 1) provocation; 2) diminished responsibility; and 3) imperfect self-defense.

1. Provocation

[14] Four elements must exist for passion/provocation manslaughter to arise: a) provocation must be adequate; b) there must not have been time for defendant to cool off between provocation and slaying; c) defendant must have actually been impassioned by provocation; and d) defendant must not have actually cooled off before slaying. *State v. Darrian*, 605 A.2d 716 (N.J. Super. Ct. App. Div. 1992). To maintain such a defense, the emotional state must actually have dominated the slayer at the time of the homicidal act, and it must have been entertained toward the person slain, and not toward another. 40 AM. JUR. 2D *Homicide* § 57 (1968).

[15] Appellant claims that the argument with the Belauans provided the provocation which produced the homicide. The events in this case happened quickly. However, a review of the cases submitted by Appellant where the court has reduced the charge from murder to manslaughter based on provocation bear little similarity to the instant case. For example, in *State v. Bishop*, 543 A.2d

105, 106 (N.J. Super. Ct. App. Div. 1988), the provocation involved a mob scene of 15 to 20 people engaged in a brawl, the court found that defendant might have been acting in defense of his nephew. In this case, we have no evidence that the Appellant acted out of defense for his brother Antonio. The *Bishop* court addresses the denial of the defendant's request for a jury instruction on manslaughter based on provocation and passion. Here, however, trial counsel chose neither to assert the defense nor to request the appropriate jury instruction. In *State v. Washington*, 538 A.2d 1256 (N.J. Super. Ct. App. Div. 1988), the court held that the defendant was entitled to a manslaughter instruction based on the provocation defense because the victim, in his struggle with defendant, showed him a knife. In the instant case, the victim had neither known nor confronted the Appellant before he was fatally shot. Appellant was the only person in control of the shotgun, the only weapon, while the shots were fired. We do not find sufficient evidence to sustain this defense.

2. Diminished responsibility

[16] Appellant next argues that trial counsel should have argued diminished responsibility because there was evidence of heavy drinking before the shooting. This concept permits the trier of fact to regard the impaired mental state of the defendant in mitigation of the punishment or degree of the offense even though the impairment does not qualify as insanity under the prevailing test. BLACK'S LAW DICTIONARY 412 (5th ed. 1979).

[17] In *People v. Conley*, 64 Cal.2d 310, 411 P.2d 911 (1966), the California Supreme Court found the defendant lacked the "malice aforethought" necessary for first degree murder because defendant had been taking medications for a back injury and an ulcer and had been drinking continually for over three days before the homicides. The *Conley* court stated that "[I]f because of

mental defect, disease, or intoxication, however, the defendant is unable to comprehend his duty to govern his actions in accord with his duty imposed by law, he does not act with malice aforethought and cannot be guilty of murder in the first degree." *Id.* at 322, 411 P.2d at 918. In the instant case, the uncontradicted evidence of drinking yields only one witness, Jerry Balatico, brother of the victim, who testified that he thought "they were all drunk", Transcript, Vol. IV, p. 80, September 18, 1996, but later changed his testimony by stating that he really didn't know, but guessed by the way they were yelling. Transcript, Vol. IV, p. 107, September 18, 1996. The Appellant himself testified that he was not drunk. Transcript, Vol. VII, p. 68, October 1, 1996. We therefore find no evidence of excessive drinking to support a diminished responsibility defense.

3. Imperfect self-defense

[18] The third possible defense that trial counsel could have raised, Appellant claims, is imperfect self-defense. This arises when a defendant believes that self-defense or defense of property is necessary but is reckless or negligent in acquiring that belief. MODEL PENAL CODE § 210.3 commentary at 6 (1962). We find, however, that the insufficiency of argument on the record before us precludes us from making any further determination on this issue.

C. Failure to move for a severance so that Appellant be tried separately from his brother.

[19] Appellant further claims that trial counsel's failure to move for a severance[4] from his brother

[4] 8 GCA § 65.35 (1993) reads:

When Severance Allowed. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Antonio's trial prejudiced him. This argument is based upon the closing argument of Antonio Reyes's attorney, wherein the attorney states that the Appellant's statements were inconsistent. Appellant's concerns revolve around the following closing remarks:

> In fact, the widow, Juliet Balatico, she said 'He prevented him from shooting Clint.' I think that was her point. Transcript, Vol. VIII, p. 87, October 3, 1996.
>
> In fact, his own brother testified that, of course he asked him, I think — I can just sum up James' whole testimony, 'Is this a bad dream?' I would say, 'No.' Let's go back. Transcript, Vol. VIII, p. 88, October 3, 1996.
>
> Consistency, consistency, consistency. Not supported by his own brother, the other Reyes.
>
> Transcript, Vol. VIII, p. 89, October 3, 1996.

[20] Statements and arguments of counsel are not evidence and are not to be considered as such. *U.S. v. Baker*, 10 F.3d 1374, 1416 (9th Cir. 1993), *cert. denied*, 513 U.S. 934, 115 S.Ct. 330 (1994). "[I]mproprieties in counsel's arguments to the jury do not constitute reversible error unless they prejudice the defendant and that prejudice has not been remedied by the trial judge." *U.S. v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992), *cert. denied*, 506 U.S. 989, 113 S.Ct. 504 (1992). We are not convinced that the above closing remarks rise to the level of prejudice against Appellant, much less to have actually prejudiced him. While the trial court may *sua sponte* under 8 GCA § 65.35 "grant a severance of defendants or provide whatever other relief justice requires", we find no evidence to justify a severance.

D. Failure to request permission to give closing argument after the closing argument of counsel for Antonio Reyes

[21] Appellant faults trial counsel for electing to close first, thereby not having the opportunity to rebut such statements made by counsel for Antonio Reyes. According to Appellant, the failure

of trial counsel to do so amounted to ineffective assistance of counsel. In his closing argument, Appellant's trial counsel states:

> Ladies and gentlemen of the jury, I'll try to make this brief, but, as you know, I have a very heavy responsibility to my client. And I would ask that you stay with me on this, as I do have to meet my obligations; and these are very serious charges against James, which is the reason why I'm going first, as far as the closing argument is concerned.

Transcript, Vol. VIII, p. 42, October 3, 1996. Trial counsel made this choice based on tactical considerations. Appellant is once again raising an issue of trial strategy of counsel, and nothing more.

[22] In any case presenting an effectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065. In the instant case, we cannot say otherwise. The record shows an active trial counsel engaged in rigorous cross-examinations and objections. Appellant has not proven under *Strickland* that, first, trial counsel's performance fell below an objective standard of reasonableness, and second, that counsel's deficient performance so prejudiced the defendant as to result in the denial of a fair trial. *Id.* at 687, 104 S.Ct. at 2064. Trial counsel chose to follow a line of defense that would acquit Appellant, that would show that Appellant was not guilty of any criminal action. 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. *Id.* at 689, 104 S.Ct. at 2052. Therefore, Appellant's ineffective assistance of counsel argument must fail.

VI.

[23] One final issue, raised *sua sponte* by this court, is the number of felony convictions received

by Appellant. Here there was one murder, charged on two different theories, and a Special Allegation of knowingly and unlawfully possessing and using a deadly weapon (shotgun) in the commission of a felony (Murder), also charged on two counts, to accompany the two different theories of the murder charge. Yet, Appellant was convicted on all counts, amounting to four felony convictions, for which he received four punishments, two of which ran concurrently with the other. "If only a single offense has been committed, though it is charged in different counts, only one sentence may properly be imposed." 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 527 (2d ed. 1982). Appellant's sentencing is in violation of the double jeopardy clause[5] of the U.S. Constitution, made applicable to Guam through the Organic Act.[6] Because the concurrent punishments amount to double punishments for one offense, remand is necessary for the sole purpose of re-sentencing. Moreover, a reading of 9 GCA § 80.37 (1996),[7] upon which the

[5]The double jeopardy clause provides: [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

The double jeopardy clause of the Federal Constitution's Fifth Amendment [as applied to the states through Fourteenth Amendment] prohibits successive prosecution or multiple punishment for the same offense; "the language of the double jeopardy clause protects against more than the actual imposition of two punishments for the same offense", and by the terms of the clause, "it protects a criminal defendant from being twice put in jeopardy for such punishment. (citation omitted). That is, the clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense" (citation omitted); thus, under the double jeopardy clause, courts may not impose more than one punishment for the same offense, and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Witte v. U.S., 515 U.S. 389, 115 S.Ct. 2199 (1995).

[6]The Guam Organic Act, 48 U.S.C. 1421b (d) (1950) provides:
(d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

[7]**§ 80.37. Deadly Weapons Used in Felonies; Sentence.** Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years. . . The sentence shall include a special parole

Special Allegation counts are based, states that the punishment shall not run concurrently with any term of imprisonment imposed for the commission of any other felony. Therefore, the concurrent sentence on the second count of the Special Allegation is inconsistent with the statute and should not have been imposed. Appellant should be convicted on one count of murder and one count of the Special Allegation, for which he should receive sentencing.

VII.

[24] The holding of the trial court is AFFIRMED. However, the case is remanded for the limited purpose of re-sentencing on the concurrent double convictions for findings consistent with this opinion.

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA, SR.
Associate Justice

PETER C. SIGUENZA
Chief Justice

term of not less than three (3) years in addition to such term of imprisonment. No person convicted and sentenced hereunder shall be eligible for parole or probation until he shall have served at least five (5) years in prison. No person convicted or sentenced hereunder shall be eligible to participate in any work release program until he shall have served at least five (5) years. **The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commission of any other felony.** (Emphasis added.)