IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

ALBERT IRIARTE EVARISTO
Defendant-Appellant

OPINION

Supreme Court Case No. CRA98-012
Superior Court Case No. CF0184-96

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Appeal from the Superior Court of Guam
Submitted on August 9, 1999
Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice; ALBERTO C. LAMORENA, III[1], Designated Justice.

CRUZ, CJ:

[1] On March 18, 1998, Appellant Albert Iriarte Evaristo was convicted of one count of murder and the special allegation of possession and use of a deadly weapon in the commission of a felony; and of one count of attempted aggravated assault and the special allegation. The court sentenced Evaristo to life in prison for murder, twenty-five (25) consecutive years for the special allegation, and three (3) years for aggravated assault.

[2] Evaristo raises three issues on appeal. First, whether the trial court erred in admitting, over the Appellant's objections, evidence of prior bad acts. Second, whether the Attorney General's comments during the closing arguments were improper and amounted to prosecutorial misconduct which deprived the Appellant of his right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. Finally, whether the trial court erred in submitting special allegation instructions and verdicts to the jury.

FACTUAL AND PROCEDURAL BACKGROUND

[3] On April 13, 1996, Karen Evaristo ("Karen"), Appellant's wife, was killed. The Appellant, Albert Iriarte Evaristo ("Evaristo"), was married to Karen for approximately fifteen (15) years before she began an affair with another man, Gil Barcinas ("Barcinas"). Evaristo knew about his wife's involvement with Barcinas and was upset. When the two men met by chance, they generally would exchange hostile words and posture menacingly toward one another. Eventually, the tensions led to the events of April 13, 1996.

[1]Appointed Designated Justice by Chief Justice Cruz.

[4] On the evening of April 13, 1996, Karen met with Evaristo to talk. After her meeting with Evaristo, Karen went to Barcinas' home. Evaristo also drove to Barcinas' apartment and parked approximately a block away from Barcinas' home. Evaristo got out of his vehicle whereupon he encountered Barcinas walking toward him. Beyond this, the facts surrounding the attack are largely in dispute. Witnesses described Evaristo, as the "man in the pants," who attacked Barcinas, the "man in the shorts."[2] Undisputed is that the two men began to fight. The fight led to the infliction of knife wounds to both Karen and Barcinas. Witnesses testified that Evaristo turned the knife on himself when Evaristo realized Karen was badly hurt.[3]

[5] Evaristo was indicted on April 25, 1996. He was indicted on two charges: Attempted Aggravated Murder with a Special Allegation of Possession and Use of a Deadly Weapon and Aggravated Murder with a Special Allegation of Possession and Use of a Deadly Weapon.

ANALYSIS

[6] This court has jurisdiction over the matter pursuant to 7 GCA sections 3107 and 3108 (1994) and 48 U.S.C. section 1424-1(b) (1984). Evaristo first argues that the trial court committed reversible error in rejecting his Motion *In Limine* to Disclose Bad Acts or Suppress under Rule 404(b) (1995). The admission of evidence of prior similar bad acts under 6 GCA section 404(b) is reviewed for abuse of discretion. *United States v. Santiago,* 46 F.3d 885, 888 (9th Cir. 1996). The court's application of Rule 403 to this evidence is also reviewed for an abuse of discretion. *United States v. Houser,* 929 F.2d 1369, 1373 (1990). This court has defined an abuse of discretion as that "exercised to an end not justified

[2]Transcript, vol. X pp. 140-142, 156 (Jury Trial, March 12, 1998).

[3]Transcript, vol. X pp. 144-145, 150, 168 (Jury Trial, March 12, 1998).

by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *People v. Quinata,* 1999 Guam 6, ¶ 17 (citations omitted).

[7] The source for Guam's Rule 404(b) is FRE 404(b).[4] In 1991, the Federal Rules of Evidence ("FRE"), 404(b) was amended to include a general notice provision.[5] Therefore, because Guam derived its 404(b) Rule from the Federal rules, Evaristo urges this court to find that the admissibility of bad acts is predicated upon notice first being given.[6]

[8] This court is aware that Guam has not, to date, adopted such a notice provision. Accordingly, the People are not required to serve a defendant with notice of their intention to introduce evidence of prior bad acts. Notwithstanding the absence of such a rule, Evaristo was in fact given notice of the People's intention to introduce 404(b) evidence of prior bad acts.

[9] During the hearings on Evaristo's Motion to Exclude 404(b) Evidence, the People detailed on the record the prior bad acts evidence intended to be introduced at trial-- a stabbing incident two days prior to the death of Karen; threats to kill her; a possible raping at knife-point; and an incident where Evaristo

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[4] **404(b) Other crimes, wrongs, or acts.** Evidence 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. 6 GCA § 404(b) (1995).

[5] In 1991, Congress amended FRE 404(b) to include a notice provision, "the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Federal Rules of Evidence 404(b), 28 U.S.C. A. (1991).

[6] The defense counsel admits at a pretrial hearing that there is no statutory basis requiring the People to provide the defense with such notice. Transcript, vol. IV, Part B, p. 12 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998).

burned all of her clothes.[7] The People stated the factual basis as well as identified potential witnesses.[8] Additionally, the lower court offered defense counsel more time to review the 404(b) information. The defense counsel responded "Well, I'm prepared to argue those, Your Honor."[9] Therefore, the actual events belie Evaristo's assertion that he was denied notice.

[10] Under 6 GCA section 404(b), evidence of other crimes, wrongs, or acts are admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In this case, the People introduced the evidence to show intent, and the court received it solely for that purpose.[10]

[11] The Ninth Circuit held that, to be admissible under Rule 404(b), "evidence of prior bad acts and crimes must: (i) prove a material element of the crime currently charged; (ii) show similarity between the past and charged conduct; (iii) be based on sufficient evidence; and (iv) not be too remote in time." *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994) (citation omitted). Upon review of the record, the lower court's admission of the 404(b) evidence satisfies the four prongs of the *Hinton* test.

[12] As to prong one, intent is clearly an element of the charge of aggravated murder. *See* 9 GCA § 16.30 (a)(1) (1993). It is the People's burden to prove all the elements of a crime beyond a reasonable doubt. *See* 8 GCA § 90.21(1993). In *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991), the defendant was charged with the death of his infant daughter. To prove that the death did not occur by

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[7]Transcript, vol. IV, Part B, pp. 7-11 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998). After weighing the arguments, the lower court decided that the prosecution could present only the evidence -- that two (2) nights prior to Karen's death, Evaristo: (1) threatened to kill her; (2) threatened her; and (3) stabbed the door of their residence. Transcript, Vol. IV, Part C, pp. 112-115 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998).

[8]Transcript, vol. IV, Part B, pp. 7-11 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998).

[9]Transcript, vol. IV, Part B, p. 13 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998).

[10]Transcript, Vol. IV, Part C, pp. 112-115 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998).

accident, the prosecution sought to introduce evidence of battered child syndrome. *Id* at 68-69; 112 S.Ct. at 479-480. The defendant objected to the prosecutor's proffer of evidence, arguing that he had not asserted that the death was accidental. *Id.* The Supreme Court ruled that the evidence was relevant to show intent. *Id.* at 70, 112 S.Ct. at 481. A defendant's tactical decision to not formally assert the defense of a lack of intent did not relieve the government of their burden of proof. *Id.* at 69; 112 S.Ct. at 480. Therefore, evidence that went to prove the element of intent was properly admitted in the prosecution's case-in-chief. *Id.*

[13] Here, similar to the defendant in *Estelle*, Evaristo did not present a case on his affirmative defenses per se. Instead, Evaristo relied upon the belief that the People failed to prove its case-in-chief. Evaristo's counsel presented the defenses of provocation, self-defense, and a failure to prove the necessary elements of the crime through cross-examination and in both the opening and closing arguments.[11] Therefore, the admission of the 404(b) prior bad acts evidence was intended both to weaken the assertion of such defenses as well as establish the element of intent to commit the alleged crime. Accordingly, this court finds that the purpose for which the evidence was used satisfies the first prong of the *Hinton* test.

[14] As to the second prong, similarity, the prior bad act in the case at bar was similar to the crime charged. The evidence showed that only two days previous to the date of the incident, Evaristo stabbed the door of the home he shared with Karen repeatedly.[12] The crime charged involved the stabbing death of Karen by Evaristo. We find that the acts are similar enough that this prong is satisfied.

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[11]Transcript, vol. IX pp. 15-20, 24-25 (Motion *In Limine* to Exclude 404(b) Evidence, February 25, 1998); Transcript, vol. X pp. 52, 68 (Jury Trial, March 12, 1998).

[12]Transcript, vol. X pp. 87-90; 114 (Jury Trial, March 11, 1998).

[15] The third prong, sufficient evidence, was satisfied by the testimony of two witnesses, Isabel Melanson and Ronald Toves. Each witness observed portions of the incident and identified Evaristo as the person stabbing the door with a knife. In *Hinton*, the defendant objected to the introduction of the 404(b) evidence based upon the testimony of one eye witness. 31 F.3d at 823. The *Hinton* court found the testimony of one witness was sufficient to satisfy the low threshold required under this part of the test. *Id.* In the case at bar, there are two eyewitnesses who both observed the incident, which satisfies this prong.

[16] Finally, with regard to the fourth prong, proximity in time, the prior bad act was committed only two days before Karen's death. *See United States v. Hadley,* 918 F.2d 848, 851 (9th Cir. 1990) (allowing the admission of evidence of prior conduct over ten years [old], the court found that the "similarity of the prior act to the offense charged outweighs concerns regarding remoteness.") Here, only two days had passed between the prior act and the incident at issue. Accordingly, this court finds that the prior act was not too remote in time. Therefore, under the facts of this case, this court finds that the lower court made its decision based upon the evidence presented and did not commit an abuse of discretion in determining that the 404(b) evidence was admissible.

[17] We must now address whether the evidence should have been excluded as being substantially more prejudicial than probative. Under Rule 403,[13] it is the court's duty to "weigh the factors explicitly." *United States v. Johnson,* 820 F.2d 1065, 1069 and n.2 (9th Cir. 1987). The 404(b) evidence here was probative on the issue of intent particularly so given the similarity between the prior incident of stabbing the door and the incident giving rise to the charged offense. While the 404(b) evidence was obviously prejudicial, it was not unfairly so, in light of the trial court's giving the jury the limiting instruction for the use

[13]**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 6 GCA § 403 (1995).

of such evidence. The trial court instructed the jury regarding the limiting instruction both after the presentation of the evidence and again at the close of the trial. Accordingly, we find that the lower court did not abuse its discretion in admitting the prior acts evidence.

[18] Next, Evaristo argues he was the victim of several instances of prosecutorial misconduct during his trial. Evaristo first states that during closing arguments, the People made an improper remark that, in itself, warrants a reversal of the judgment. The "harmless error" standard of review is applicable to the prosecutorial comments to which the defendant objected. *United States v. Chavez-Vernaza,* 844 F.2d 1368, 1377 (9th Cir. 1988). Reversal under the harmless error standard is warranted when it is more probable than not that the misconduct affected the jury's verdict. *Id.* at 1377-1378.

[19] During the People's closing argument, the People asked the jurors to "imagine this knife being stuck into your wife".[14] Evaristo argues that this comment violated the "golden rule. The "golden rule" argument suggests that jurors place themselves in the position of a party or victim. *Puckett v. State,* 918 S.W. 2d 707, 711 (Ark. 1996). This type of argument is impermissible because it tends to encourage the jurors to view the matter as a party in the case. *Id.* Consequently, the jurors' ability to objectively exercise their duty to weigh the evidence may be compromised. *Id.* The People concede that this comment was a violation of the "golden rule." Thus, the question here is whether the People's comment was used in such a way that the conviction was based upon passion, bias or sympathy, rather than impartially.

[20] In order for a petitioner to succeed on a claim of prosecutorial misconduct, he must show that the "prosecutors' 'comments' so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The fact that the People's remarks to a jury may have been "undesirable or even universally condemned" is not

[14]Transcript, vol. XI, p. 14 (Closing Arguments, March 13, 1998).

tantamount to a constitutional violation. *Id.*

[21] Looking to the record, we find that the remark was made almost at the very beginning of the People's closing argument.[15] Immediately after the People made the remark, counsel for the defense objected and the trial court sustained the objection, instructing the jury to "disregard the particular argument to imagine this knife going into . . . your wife."[16] A trial judge may cure the effect of improper prosecutorial comment by giving appropriate curative instructions to the jury. *United States v. Endicott,* 803 F.2d 506, 513 (9th Cir. 1986). Additionally, the trial judge instructed the jury after closing arguments, that "[s]tatements made by the attorneys during trial are not evidence."[17] This court is not convinced that the comment influenced the jury to the extent that the jury's conviction was not arrived at objectively, nor is there any proffer of such by Evaristo.

[22] Moreover, when the jury rendered its decision, Evaristo was acquitted of the Aggravated Murder charge, but was found guilty of the lesser charge of Murder. The court finds that the jury was able to weigh the evidence, not rushing to convict Evaristo of the crimes as charged. A verdict acquitting the defendant of some of the charges against him is "indicative of the jury's ability to weigh the evidence without prejudice." *United States v. Koon*, 34 F. 3d 1416, 1446 (9th Cir. 1994), *rev'd in part on other grounds, Koon v. United States,* 518 U.S. 81, 116 S.Ct. 2035 (1996).

[23] Evaristo also argues that the People made comments calculated to inflame the jury. The "plain error" standard of review is applicable to prosecutorial comments to which defendant failed to raise an objection. *People v. Ueki*, 1999 Guam 4, ¶ 17. Reversal under the plain error standard is only

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[15]Transcript, vol. XI pp. 13-14 (Closing Arguments, March 13, 1998).

[16]Transcript, vol. XI pp. 14-15 (Closing Arguments, March 13, 1998).

[17]Appellee's Supplemental Excerpt of Record at 2.

warranted for errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id*.

[24] The reviewing court's discretion to reverse for plain error should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Ueki,* 1999 Guam 4 at ¶ 17 (quoting *Young,* 470 U.S. at 15, 105 S.Ct. at 1046 (1985)). Reversal for plain error is warranted if Evaristo shows (1) there was an error; (2) the error was plain; and (3) substantial rights were affected. *Id.* (citing *United States v. Olano,* 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993)).

[25] Specifically at issue, was the People's use of the phrases such as "slashed," "gushing blood," "bleeding," and "stabbing the door with a knife" during the prosecutor's summation.[18] While all graphic words, the record reflects that these phrases were introduced into evidence by the presented testimony[19]. Evaristo has not shown that it was erroneous for the prosecutor to recount the evidence that the jury had already heard. The comments were made for the purposes of summarizing the evidence in a graphic and forceful manner.

[26] Even should this court find that the prosecutor went beyond the bounds of appropriate advocacy that would not automatically entitle Evaristo to a reversal. The court would still have to be convinced that it was a plain error that affected substantial rights. Once a plain error has been found, the burden lies with the defendant to demonstrate that the error that occurred was prejudicial. *Ueki,* 1999 Guam 4, at ¶ 23. Evaristo has failed to make such a showing.

[27] Evaristo also argues that the prosecutor used the 404(b) evidence beyond the court's limiting instruction. As discussed above, the 404(b) evidence, of stabbing the door, was admitted to show an

[18]Transcript, vol. XI pp. 15, 20-23 (Closing Arguments, March 13, 1998).

[19]Transcript, vol. VI pp. 15, 30 (Jury Trial, March 6, 1998); Transcript, vol. X pp. 90-91, 114 (Jury Trial, March 12, 1998).

element of the charge, intent. Since Evaristo did not present a case on any affirmative defenses, Evaristo argues that the evidence was used to show a criminal propensity. However, the record evinces that in Evaristo's opening and closing arguments, affirmative defenses were asserted.

[28] Moreover, throughout the cross-examination of the People's witnesses, Evaristo tried to present Barcinas as the aggressor[20] and demonstrates that Evaristo did not possess the culpable mental state to commit the crime. Evaristo introduced a love letter written on the day of the incident, and asked a witness if the letter evidenced a person with the intent to kill his wife.[21] The People did not argue that the evidence tended to prove that Evaristo had the propensity to commit violent acts. The People used the evidence to show that Evaristo possessed the requisite intent. Therefore, this court does not find that the 404(b) evidence was improperly used.

[29] Lastly, with respect to the issue of prosecutorial misconduct, Evaristo argues that the prosecutor improperly vouched for government witnesses. Again, no objection was made to such statements during the trial, therefore, the plain error standard of review applies. *Ueki,* 1999 Guam 4, at ¶ 17. In *Ueki*, this court stated that vouching occurs when the government either (1) suggests that the government is aware of evidence not presented to the jury which would tend to support a particular witness' testimony; or (2) places the "prestige of the government behind the witnesses through personal assurances of their veracity . . . ." *Id.* at ¶ 19 (citing *United States v. Molina,* 934 F.2d 1440, 1445 (9th Cir. 1991)).

[30] Evaristo cites extensively to the record for instances of alleged vouching. The prosecutor made the following comments:

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[20]Transcript, vol. IX pp. 24-25 (Jury Trial, March 11, 1998); Transcript, vol. X pp. 52, 68 (Jury Trial, March 12, 1998).

[21]Transcript, vol. IX pp. 15-20 (Jury Trial, March 11, 1998).

> Albert's version of what happened doesn't add up. Doesn't add up not only to Gil's testimony. Good. Gil is a victim in this case, too, and Gil was in love with Karen. But it also doesn't add up to the three eyewitnesses who were there that night. **They came in and they testified and their story wasn't challenged, really**. Their story shows, even without Gil's statements, show that Albert killed his wife. (emphasis added).[22]

> Mr. Taijeron said that that pickup screeched to a stop, and the defendant got out, and Gil is already coming down the street. We know that. And it's the operator of that pickup truck that we know to be Albert Evaristo who chases Gil Barcinas. Mr. Taijeron and Mr. Pangelinan both stated to you that it was the person in jeans, not the shorts, who is the attacker. **They have nothing to do with this case other than the fact they were there. They don't know the victim or the defendant. They're not involved in anything surrounding Gil and Karen's relationship. They just happened to be there, and they both saw the defendant attacking Gil**, chasing them down the street, and then Gil turns around. Gil doesn't attack the defendant. And they both state that it look like he's punching Gil because at that point in time, they haven't seen the knife. (emphasis added).[23]

[31] This court found in *Ueki* that direct bolstering of a witness' testimony can be misleading to the jury. *Ueki,* 1999 Guam 4 at ¶ 22. While the prosecutor here did not appear to directly assert her personal opinion of any witnesses' credibility, it would appear that certain of the comments could be regarded as indirectly explaining or bolstering the credibility of witnesses. If this court finds that there was no vouching, the analysis ends. However, if the court decides that these types of comments bordered on vouching, and therefore were improper, the court then must consider whether such an error affected substantial rights.

[32] The court considers the following factors in determining the effect of the prosecutor's vouching on the outcome of the case: " (1) the form of the vouching; (2) the extent of the personal opinion asserted; (3) the extent to which a prosecutor's statements exhibited extra record knowledge supporting a witness'

[22]Transcript, vol. XI p. 26 (Closing Arguments, March 13, 1998).

[23]Transcript, vol. XI p. 27 (Closing Arguments, March 13, 1998).

veracity; and (4) the testimony's import viewed in the context of the case as a whole." *Id.* at ¶ 24 (citation omitted).

[33] Here, the court finds that the vouching, if it occurred at all, was done indirectly. The prosecutor did not personally give support to any witness's testimony, nor did she intimate that she had extra record knowledge supporting any witness' veracity. Moreover, Evaristo does not argue that absent the bolstering of witnesses' testimony, the jury would have decided differently than it did.

[34] Upon review of the record, it would appear that the jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses. As noted above, the jury did not decide to convict Evaristo of the more serious charge of aggravated murder, suggesting its ability to weigh the evidence objectively. This court finds that upon consideration of the matter, whatever vouching may have occurred, it was harmless and did not unfairly influence the jury so as "to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Ueki,* 1999 Guam 4 at ¶ 31 (citing *Young,* 470 U.S. at 16, 105 S.Ct. at 1047 (1985)).

[35] The final challenge, is whether the trial court erred in submitting the Special Allegation, Title 9 GCA section 80.37 (1996). While Evaristo states the issue and cites to one case, he then fails to address the matter beyond these preliminary steps. He does not analyze why it is that the trial court committed an error in submitting the matter to the jury. Furthermore, he does not present any type of argument as to why the applicability of the special allegation should have remained within the domain of the judge to decide. With respect to the sole case cited, Evaristo does not discuss how it is applicable to facts presented in this appeal.

[36] This court has previously determined that where an issue is presented, but with no argument, citation to authority or analysis, the issue is considered abandoned. *People v. Quinata,* 1999 Guam 6,

¶ 25. There having been no real argument advanced, the court finds the matter abandoned and of no aid to Evaristo's appeal.

CONCLUSION

[37] The evidence and arguments do not support a finding that the trial court abused its discretion in allowing the 404(b) evidence to be introduced for the limited purpose in which it was used. Moreover, while Evaristo argues that the prosecutor committed a host of prosecutorial errors that prevented him from receiving a fair trial, the whole of the record does not support such a conclusion. Although Evaristo raises the question of whether the trial court erred by submitting a Special Allegation jury instruction, he fails to provide support for such an argument. Therefore, the argument is rendered abandoned.

[38] Accordingly, the trial court conviction is hereby **AFFIRMED** in its entirety.

PETER C. SIGUENZA
Associate Justice

ALBERTO C. LAMORENA, III
Designated Justice

BENJAMIN J. F. CRUZ
Chief Justice