IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

ANTHONY SAN NICOLAS SALAS
Defendant-Appellant

OPINION

Filed: January 14, 2000

Cite as: 2000 Guam 2

Supreme Court Case No. CRA98-020
Superior Court Case No. CF0520-97

Appeal from the Superior Court of Guam
Argued and submitted on November 12, 1999
Hagåtña, Guam

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

Cruz, C.J.:

[1] Anthony San Nicolas Salas (hereinafter "Salas") was convicted of First Degree Criminal Sexual Conduct, Second Degree Criminal Sexual Conduct, and Child Abuse. He was sentenced to life imprisonment for Count One, fifteen years for Count Two, and one year for Count Three. Counts Two and Three are to run consecutively with Count One. He appeals his conviction based upon two claims. First, he argues that the trial court prejudiced his case by allowing the Government to make two amendments to its pleadings during the trial. Second, he argues that the medical diagnosis offered by the doctor who treated the alleged victim was inadmissible hearsay and a violation of the Confrontation Clause. Based upon the following analysis, the court upholds the trial court's holdings and therefore affirms Salas' convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In late 1994 or early 1995, Salas began living with T.C., his girlfriend. T.C. is the mother of two daughters, N.R. and T., who were eleven years-old and three years-old, respectively, at the time this case went to trial. T.C. often works long hours during the night and leaves her children with Salas. In the fall of 1997, N.R. began spending time after school with her biological father, a fact that potentially helps to frame the time in which alleged crimes occurred.

[3] According to N.R., she was in her family's living room watching television on November 5, 1997. Salas entered the room and began French-kissing her. He ordered her to take off her clothes. Then he took off his clothes. He placed his penis inside her vagina "just a little bit."

Transcript, vol. I, p. 75 (Jury Trial, May 19, 1998). Afterward, he warned her, "If you tell anyone, I'll do something bad." Transcript, vol. I, p. 75 (Jury Trial, May 19, 1998). This was the last incident of seven similar incidents allegedly beginning around October 1, 1997.

[4] On November 8, 1997, N.R. asked her mother if she and her sister could be taken to their aunt's house. When her mother said no, N.R. began crying. She confessed for the first time, "Dad did it with me. . . .Dad had sex with me." Transcript, vol. I, p. 135 (Jury Trial, May 19, 1998). She declared that this was not the first time it had happened. Soon after, T.C. took N.R. to the emergency room and introduced her to Officer Scott Wade.

[5] From the emergency room, N.R. was taken to the Seventh Day Adventist Clinic where she met with Dr. William Paul Vercio. Dr. Vercio conducted a physical examination on N.R. which lasted about two hours. As part of this inspection, Dr. Vercio examined N.R.'s genital area. N.R. cried uncontrollably throughout the exam. Afterward, N.R. was interviewed by Officer Wade.

[6] On November 18, 1997, the Government filed an indictment against Salas. In Count One, Salas was charged with knowingly engaging in sexual penetration with N.R. on November 5, 1997. In Count Two, he was charged with intentionally engaging in sexual contact with the eleven year-old on November 5, 1997. Finally, in Count Three, he was charged with knowingly subjecting a child to cruel mistreatment from October 1, 1997 to November 4, 1997.[1]

[7] At the trial, Dr. Vercio testified about physically examining N.R. and inquiring about what had happened to her. Salas' counsel objected to the doctor's testimony, but the trial court overruled

[1]These counts were in the alleged violation of Title 9 GCA §§ 25.15(a)(1) and,(b), (1996); Title 9 GCA §§ 25.20(a)(1) and (b), (1996); and Title 9 GCA §§ 31.30(a)(1) and (b), (1994), respectively. Defendant-Appellant's Excerpts of the Record at 1-2.

the objection. Transcript, vol. II, p. 11 (Continued Jury Trial, May 20, 1998). Dr. Vercio recounted that N.R. cried uncontrollably during the medical examination. He said it was normal for young girls to be embarrassed when having their genitals examined, but that N.R.'s reaction was far from the norm. Transcript, vol. II, pp. 12-13 (Continued Jury Trial, May 20, 1998). He stated that he took two vaginal swabs from N.R. and that neither sample contained any sperm. Transcript, vol. II, pp. 15-16 (Continued Jury Trial, May 20, 1998). When examining her vagina, Dr. Vercio noticed a small white scar on the vaginal wall. Transcript, vol. II, p. 17 (Continued Jury Trial, May 20, 1998). The Government asked if the medical evidence led him to believe N.R.'s comments and Dr. Vercio answered affirmatively. Transcript, vol. II, p. 20 (Continued Jury Trial, May 20, 1998).

[8] After Dr. Vercio's testimony, defense counsel brought a motion for judgment of acquittal. Transcript, vol. II, p. 55 (Continued Jury Trial, May 20, 1998). The trial court denied the motion. Transcript, vol. II, p. 62 (Continued Jury Trial, May 20, 1998). Around the time that Salas' counsel requested an acquittal, the trial court raised two concerns it had with Count Three of the indictment. The first concern involved the dates of the charge and the second involved the phrase "continuing course of penetration and/or conduct." Transcript, vol. II, pp. 55, 63-64 (Continued Jury Trial, May 20, 1998). Consequently, the Government submitted an amended indictment on May 21, 1998. In the amendment, the Government changed the alleged time frame of the crimes from "between October 1, 1997 and November 4, 1997" to "between September 1, 1997 and November 4, 1997". It also changed the allegation from "a continuing course of sexual penetration or contact" to "seven (7) separate acts of sexual penetration or contact." *Compare* Defendant-Appellant's Excerpts of the Record at 2 *with* Plaintiff-Appellee's Excerpts of the Record at 3. Salas' counsel objected to the amendment twice, claiming that it would prejudice the defendant. Transcript, vol. II, pp. 81, 90

(Continued Jury Trial, May 20, 1998). After hearing both sides discuss the matter on more than one occasion, the trial court ruled that it would allow the amendment. Transcript, vol. III, pp. 11, 13 (Closing Arguments and Jury Instructions, May 21, 1998). Salas was eventually convicted of all charges.

II. ANALYSIS

[9] The court has jurisdiction based upon 48 U.S.C. § 1424-1(b) (1984) and Title 7 GCA §§ 3107-08, (1994).

[10] Salas argues two points in this appeal. First, Salas contends that the trial court abused its discretion in granting the motion to amend two defects in Count Three of the indictment. We review the Government's amendment of the indictment *de novo*. *United States v. Morlan*, 756 F.2d 1442 (9th Cir. 1985).

[11] Next, Salas also argues that the trial court erred in allowing Dr. Vercio's testimony which he claims is beyond the medical diagnosis hearsay exception, thus violating the Confrontation Clause. We review matters concerning the Confrontation Clause and hearsay evidence *de novo*. *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992).

A. Amending Indictments.

[12] Title 8 GCA § 55.20, (1993) states:

> **Amending Indictment or Information.** The court may permit an indictment or information to be amended upon the application of the prosecuting attorney at any time before verdict or finding if no additional [or] different offense is charged and if substantial rights of the defendant are not prejudiced.

Salas maintains that he was prejudiced by the two alterations in the charges. He believes he was not given time to properly cross-examine witnesses or develop his own defense. He especially deems it problematic that the trial court initiated this change rather than requiring the prosecutor to work diligently on finding this flaw. The Government, on the other hand, asserts that the alterations did not substantially affect Salas' defense. Given that the amendments were done before the verdict was given, the Government argues that it followed this law precisely.

[13] Cases from Guam's courts suggest that this rule is not a high hurdle to overcome. 8 GCA § 55.20 provides the court with a flexible tool to allow parties to change easily small errors in their pleadings. Guam courts have followed this law verbatim. Unless a judge has been able to point to an added charge of which the defendant and his or her counsel had no knowledge or a substantial way in which a defendant has been prejudiced, judges have consistently allowed the prosecution to make this amendment. *People v. Hilton*, D.C. Crim. Appeal No. 8200055A, 1984 WL 55539, at **4-5 (D. Guam Ap. Div. Apr. 18, 1984); *People v. Manibusan*, D.C. No. 81-00053A, 1983 WL 29943, at *3 (D. Guam Ap. Div. May 5, 1983). This is especially so if the amendment would require the prosecutor to prove the case at a higher burden. *People v. Quidachay*, Crim. No. 82-00022A, 1983 WL 29954, at *4 (D. Guam Ap. Div. Nov. 8, 1983).

[14] Generally, Salas was on notice that N.R. accused him of raping her in the fall of 1997 on repeated occasions. He never effectively demonstrates why the amendments in this case were more prejudicial than the ones in Guam case law concerning 8 GCA § 55.20. Though Salas refers to and numerous relevant cases cite *Guam v. Ojeda*, 758 F.2d 403, 406 (9th Cir. 1985), for its holding that California evidence cases are persuasive in Guam because both Guam and California have evidence rules based upon the Federal Rules of Evidence, Salas cites no California case that could lead this court to favor his position.

[15] During the trial, there was some confusion about when the alleged assaults began. N.R. stated that the assaults began before her birthday on September 14, 1997, while her mother stated that they began two weeks afterward. Appellee's Brief at 9. The Government wanted to include the entire month in its charges in order to be thorough. Transcript, vol. II, p.80 (Continued Jury Trial, May 20, 1998). Salas contends that by changing these dates in the middle of the trial, he was not allowed to properly cross-examine witnesses about these dates and thus he was prejudiced.

[16] When the parties debated this matter in a bench conference during the trial, the Government referred to *People v. Atoigue.* Transcript, vol. II, p.90 (Continued Jury Trial, May 20, 1998). In *Atoigue*, a defendant appealed his conviction for criminal sexual conduct alleging prosecutorial misconduct and inadmissible hearsay evidence. *People v. Atoigue*, 1994 WL 477518 (9th Cir. 1994). In his many arguments, he asserted that there was insufficient evidence because the victim could not assign specific dates to the alleged assaults. *Id.* at *5. The court disagreed saying that time was not an essential factor when the victim could point to the time frame in which she was repeatedly raped. *Id.* at *6. The court refused to allow the lack of specificity as to dates in some of the counts to override the conviction. *Id.* at *5. In *People v. Vitug,* this same holding as to time is used to affirm

a § 55.20 amendment. *People v. Vitug*, Crim. No. 90-00081A, 1991 WL 336914, *2 (D. Guam Ap. Div. June 13, 1991). *See, e.g., United States v. Laykin*, 886 F.2d 1534, 1543 (9th Cir. 1989); *Arnold v. United States*, 336 F.2d 347, 353 (9th Cir. 1964); *Lelles v. United States*, 241 F.2d 21, 25 (9th Cir. 1957) (Ninth Circuit cases which state that not alleging a specific time in which the crime or crimes occurred does not invalidate an indictment).

[17] Salas argues that extending the time frame of the crime is unreasonable. Since his claim is that N.R. is just trying to retaliate against him for no longer allowing her to make visits to her biological father's house, Salas implies that the date in which she began making those visits is an important part of the case. We are not convinced that the amendments enacted in this case worked to prejudice his case nor do we find that any substantial rights were affected thereby. Salas was on notice that the alleged rapes began sometime in this period. He does not explain how extending the time frame by one month signifies that he did not molest N.R. on multiple occasions. He makes no assertions that the trier of fact would be more biased against him if the alleged rapes occurred one month earlier than originally pled. Most importantly, the Government noted at trial that Salas did not intend to offer an alibi as a defense. Changing the time frame would not have altered his argument in anyway. Thus, we find no abuse of discretion where the time frame was amended.

[18] Salas contends that he has been prejudiced by the amendment from "continuing" child abuse to "seven separate acts" because rather than addressing the assault allegations generally, he must now contest each individual alleged act. He does not agree with the trial court's idea that the Government is now required to do extra work due to the amendment. *See* Transcript, vol. III, p. 12 (Closing Arguments and Jury Instructions, May 21, 1998). In objecting to the change, Salas refers to Title 8 GCA § 55.10, (1993) requiring that pleadings be "clear, concise and definite." He takes issue with

the trial court's proposing and enacting the amendment and argues that the Government should have sought such a change earlier in the case.

[19] In order to bolster his argument, Salas cites *People v. Muna* which states:

> Guam law is thus in accord with well-established case law, which holds that an indictment is sufficient if 1) it contains the necessary elements of the crime alleged, 2) it informs the defendant of the crime charged with sufficient clarity to allow him to adequately defend against the charges, and 3) it is stated with sufficient clarity to bar subsequent prosecution for the same offense.

People v. Muna, Crim. No. 94-00075A, 1996 WL 104532, at *3 (D. Guam Ap. Div. Mar. 6, 1996). Unfortunately, Salas omits the fact that the district court reiterated this three-part test in order to explain why they would allow an altered pleading to take effect. *See id.* As in the cases concerning § 55.20, the courts seem to find that defendants who have general notice are not prejudiced by slight changes in wording.

[21] Salas' contention fails especially given the facts at trial. In a bench conference, the trial court questioned whether "continuing" signified consecutive, repeated acts in one assault or several, similar acts over the course of a period of time. Transcript, vol. II, pp. 76-77 (Continued Jury Trial, May 20, 1998). Later, the trial court stated that it thought "continuing" differed from several separate acts and asked both parties whether they knew anything different. Transcript, vol. II, p. 154 (Continued Jury Trial, May 20, 1998). At that time, Salas' counsel said nothing in response to the trial court's request. Salas cites no case or law here that emphasizes any difference between "continuing" versus separate acts.[2] In fact, the crime in contention for which Salas was convicted,

[2]Title 10 GCA § 10.60, (1993) states, "An offense is committed...if a legislative purpose to prohibit *a continuing course of conduct* plainly appears." (Emphasis added.) Neither the parties nor the trial court mentioned this rule specifically in their discussions. The three laws that Salas was convicted of breaking do not mention language regarding continuing courses of conduct.

9 GCA § 31.30, has no language requiring that "continuing" acts be part of the crime.

[22] Based upon the aforementioned discussion, this court agrees with the finding of the trial court on its decision to allow the amended indictment. Salas has not convinced us that this change burdened him in any grossly unfair manner.

B. The Medical Evidence Hearsay Exception.

[23] Usually, when a witness repeats statements by others made out-of-court and not under oath, the court will exclude the comments as inadmissible hearsay. *See* Title 6 GCA §§ 801(c) and 802, (1994). However, there are numerous exceptions to this rule. The parties disagree about the application of the hearsay exception for statements made about medical treatment to Doctor Vercio's recollection of N.R.'s examination. Title 6 GCA § 803(4), (1994) specifically provides as an exception to the rule against hearsay:

> **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[24] Salas believes that Dr. Vercio's testimony was inconclusive and that the only effect his statements had were to corroborate N.R.'s claims. He contends that Dr. Vercio made several statements about N.R. and her allegations that had nothing to do with her medical condition. The Government, on the other hand, maintains that each of the doctor's statements were well within this hearsay exception. For the following reasons, we favor the Government's position.

Nevertheless, laws such as 10 GCA § 10.60, demonstrate why the trial court had concerns about the wording in the original indictment.

[25] Salas argues that allowing Dr. Vercio's comments about the cause of N.R.'s injuries violated his rights under the Confrontation Clause. Salas admits that the Confrontation Clause does not bar all hearsay evidence. Appellant's Brief at 17. However, he believes that his rights to confront any accuser has been damaged by the admission of Vercio's testimony.

[26] The principle case that Salas cites to support his contentions about Vercio's testimony contradicts his claims. In *People v. Ignacio*, a man convicted of sexually assaulting his three year-old niece argued that hearsay statements from the victim's examining doctor should not have been admitted. *People v. Ignacio*, 10 F.3d 608 (9th Cir. 1993). The court ruled that the medical treatment exception to hearsay evidence is a firmly rooted principle and it recalled that the Supreme Court considered statements admitted under a firmly rooted hearsay exception to satisfy the reliability requirements of the Confrontation Clause because they are so trustworthy that adversarial testing would add little to their reliability. *Id.* at 612 (citing *White v. Illinois*, 502 U.S. 346, 355 n.8; 112 S. Ct. 736, 741 n.8 (1992) and *Idaho v. Wright*, 497 U.S. 805, 821; 110 S. Ct. 3139, 3149 (1990)).

[27] Despite arguing to the contrary, Salas' counsel had the opportunity to question his accusers. She cross-examined both N.R. and Dr. Vercio about their testimonies. Still, Salas insists that if Dr. Vercio's comments are to be admitted, they should have been limited to the results of his physical examination of N.R. On the contrary, *Ignacio*, held that the identity of the abuser is significant in treating sexual abuse. *Id.* at 613. A doctor can repeat a victimized patient's comments because courts can trust that a person seeking effective medical treatment would speak truthfully about what happened to them. *Id.* Thus, it seems reasonable that the trial court allowed Dr. Vercio to recall that N.R. cried uncontrollably and claimed that Salas had molested her.

[28] Moreover, the court in *Ignacio* opined that out-of-court statements were often needed in child

sexual abuse cases as the victim and the alleged assailant are usually the only parties who witnessed the crime firsthand. *Id.* at 612. Additionally, Guam allows a defendant to be convicted based upon the victim's testimony without corroboration. *Atoigue*, 1994 WL 477518 at *2; *see* Title 9 GCA § 25.40, (1996); *accord Vitug*, 1991 WL 336914 at *3 (holding that a witness cannot bolster a victim's testimony in a child sex abuse case, but affirming the verdict due to harmless error).

[29] As a result, it is important that this court look precisely at what Dr. Vercio said in the trial court. The gist of the doctor's statement was not verbal proof that Salas raped N.R. Dr. Vercio testified that based upon the physical evidence he observed, he believes what N.R. had told him about being assaulted. Transcript, vol. II, p. 20 (Continued Jury Trial, May 20, 1998). Salas considers Dr. Vercio's testimony to be inconclusive. However, the trier of fact has the responsibility of making that determination. Because Salas is not arguing that the evidence is insufficient, the court has no legitimate reason to reverse the matter on hearsay grounds.

]III. CONCLUSION

[30] In this case, we have been presented with no evidence or argument that would move us to reverse the trial court's decision in this matter.

[31] The trial court's ruling is **AFFIRMED.**

ALBERTO C. LAMORENA, III
Designated Justice

PETER C. SIGUENZA
Associate Justice

BENJAMIN J.F. CRUZ
Chief Justice