IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee

vs.

HENRY T. QUINTANILLA,
Defendant-Appellant

OPINION

Filed: June 12, 2001

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Supreme Court Case No. CRA99-029
Superior Court Case No. CFO0508-97

Appeal from the Superior Court of Guam
Argued and Submitted on February 7, 2001
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice; PETER C. SIGUENZA, JR. and F. PHILIP CARBULLIDO, Associate Justices

CRUZ, C.J.:

[1] Henry T. Quintanilla was convicted for promoting prison contraband, possession of a controlled substance, and possession of a controlled substance with the intent to deliver. Quintanilla appeals his conviction on the grounds the trial court erred in: (1) admitting evidence of prior bad acts; (2) communicating with a juror; (3) refusing to exclude evidence; and (4) denying his motion for acquittal. Upon review of the issues, we hereby reject Quintanilla's arguments and affirm his conviction.

I.

[2] On January 28, 1996, the Department of Corrections conducted a "shakedown" at the Territorial Detention Center ("TDC"). During the search of the cell shared by inmates Henry T. Quintanilla ("Quintanilla") and Cristobal Aguon ("Aguon"), certain contraband items were discovered. Among the items were hot cocoa packets, which contained crystal methamphetamine, found in the pocket of a pair of jeans taken from a pile of dirty clothes in the cell, a lighter, two straws, and a plastic playing-card case which contained a clear rock-like object. During the pat-down of Quintanilla, an aluminum strip cut from a soda can was found in his pocket. Ownership of the contraband was attributed to Quintanilla. This evidence was submitted to the Guam Police Department ("GPD") for custody and testing.

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[3] Quintanilla was indicted on three charges: (1) supplying prison contraband by the unlawful and intentional possession of a Schedule II controlled substance, crystal methamphetamine ("methamphetamine"), in a detention facility in violation of 9 GCA § 58.60(a)(2); (2) unlawful and intentional possession with the intent to deliver a controlled substance, methamphetamine, in violation of 9 GCA § 67.50(a)(1); and (3) unlawful possession of a controlled substance in violation of 9 GCA § 67.52(a) and (b)(1).

[4] In a pretrial motion, the trial court heard the Government's motion to admit evidence of prior bad acts. The trial court granted this motion. This evidence consisted of testimony offered by a Government witness that, during a previous search of Quintanilla's cell conducted in March of 1995, drug residue and drug related items were found.

[5] At the close of the Government's case, Quintanilla made an oral Motion for Acquittal or in the alternative for exclusion of all physical evidence based on the Government's failure to authenticate the evidence because of a break in the chain of custody. The trial court denied the motion. At the close of his case in chief, Quintanilla renewed his motion for acquittal on the same grounds. The court again denied this motion. After the trial court issued the jury instructions, the jury was excused to deliberate. Shortly thereafter, legal counsels for both parties were summoned to the chambers of the trial judge. The judge informed counsels that Juror No. 6 had questions on the closing arguments and the jury instructions. In the presence of counsels, the trial court addressed the juror's concerns. The juror then left to deliberate further. Later that day, counsels were summoned back to court for the pronouncement of the verdict. Just

before the judge asked for the jury's verdict, counsel for Quintanilla approached the bench stated for the record that there had been a discussion between Juror No. 6 and the judge. The jury found Quintanilla guilty as charged.

[6] Quintanilla filed a Motion for New Trial which was denied by the trial court by written decision. The trial court then filed a Judgment after Trial which sentenced Quintanilla to concurrent terms of eight years, five years and three years incarceration on the respective charges. This appeal followed.

II.

[7] This court has jurisdiction over this appeal from a final judgment. Title 7 GCA § 3107, (1994).

III.

A. Prior Bad Acts.

[8] The admission of evidence of prior bad acts is governed by Guam Rule of Evidence 404(b). The Government argues that Quintanilla did not object to the admission of this evidence at the time of the trial. However, review of the transcripts shows that the 404(b) issue was visited at least twice during the trial. First, on June 21, 1999, after the jury had been selected, the court entertained a motion on this issue. Transcript, vol. II, pp. 109-115 (Jury Selection and Jury Trial, June 21, 1999). Quintanilla argued that the prejudicial value of the evidence outweighed the probative value. Transcript, vol. II, p. 111 (Jury Selection

and Jury Trial, June 21, 1999). Over Quintanilla's objection, the trial court ruled that the evidence was admissible. Transcript, vol. III, p. 2 (Jury Trial, June 22, 1999). Second, on day three of the trial, as the Government prepared to call a witness to testify on the 404(b) evidence, Quintanilla objected. Transcript vol. V, p. 5 (Jury Trial, June 24, 1999). The trial court reminded Quintanilla that it had already ruled the 404(b) evidence was admissible. Transcript vol. V, p. 8 (Jury Trial, June 24, 1999). Quintanilla then made a motion to limit the extent of the 404(b) testimony to the facts that a search warrant was executed on the cell occupied by Quintanilla and Pangelinan and drugs and drug paraphernalia were found. Transcript vol. V, pp. 11-12 (Jury Trial, June 24, 1999). The trial court granted Quintanilla's motion and further ruled that evidence of track marks on Quintanilla's arms was not admissible. Transcript vol. V, p. 14 (Jury Trial, June 24, 1999). Quintanilla reiterated his objection to any 404(b) evidence. Transcript vol. V, p. 15 (Jury Trial, June 24, 1999). The Government argues that Quintanilla's motion to limit the extent of the 404(b) testimony serves as a waiver to any objection he had. We do not agree. It appears that when Quintanilla realized the evidence was going to come in over his objection, he successfully attempted to limit the scope of such evidence. Quintanilla's objection to the 404(b) evidence was preserved on the record and is appropriately before this court in this appeal.

[9] The trial court's admission of evidence of prior bad acts under Guam Rule of Evidence 404(b) is reviewed for abuse of discretion. *People v. Evaristo*, 1999 Guam 22, ¶ 6 (citing *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1996)). Under the abuse of discretion standard, Quintanilla must show that the trial court's decision to admit the evidence over his motion is not justified by the evidence and

is clearly against the logic and effect of the facts as are found. *People v. Tuncap*, 1998 Guam 13, ¶ 12 (citations omitted). In this appeal, this court will not substitute its judgment for that of the trial court. *People v. Quinata,* 1999 Guam 6, ¶ 17. Instead, in order to reverse the trial court, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion. *Id.* (citation omitted).

[10] Guam Rule of Evidence 404(b) provides:

> 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.

Title 6 GCA § 404(b) 1995. The prior act of Quintanilla alleged by the Government was the possession of drugs and drug paraphernalia while he was incarcerated. The Government asserts that proof that Quintanilla possessed and used drugs in the past goes to show that he knowingly and intentionally possessed it in the instant case.

[11] The Government provided evidence that drugs and drug paraphernalia, including syringes, were seized in a search of Quintanilla's prison cell in March of 1995, less than one year before the search in the instant case. As a result of the March 1995 search and seizure, charges were brought against Quintanilla and his then-cell mate, Pangelinan. Pangelinan pled guilty, whereas Quintanilla did not. Quintanilla was convicted and he appealed. In that appeal, this court reversed his conviction on the ground of ineffective assistance of counsel who had failed to introduce evidence of Pangelinan's guilty plea. *People v.*

Quintanilla, 1998 Guam 17, ¶ 2. This court found a reasonable possibility that the jury would have found reasonable doubt as to Quintanilla's guilty if it heard the evidence. *Id.* at ¶ 18.

[12] In the instant case, the trial court acknowledged that the prior conviction had been reversed but nonetheless admitted the evidence. Quintanilla argues that admission of evidence of prior bad acts was error. Specifically he claims that the evidence of the syringe was irrelevant and prejudicial and that the evidence was not properly admitted due to insufficiency of proof. In *Evaristo*, this court announced the test for the admissibility of 404(b) evidence. To be admissible under Rule 404(b), evidence of prior bad acts must: (1) prove a material element of the crime currently charged; (2) show similarity between the past and charged conduct; (3) be based on sufficient evidence; and (4) not be too remote in time. *Evaristo*, 1999 Guam 22 at ¶ 11 (citing *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994)). In addition, the evidence must also be examined under Rule 403 and may be excluded if it is more prejudicial than probative. *Id.* at ¶ 17.

[13] With regard to parts one, two, and four of the *Evaristo* test, there is no difficulty in finding that these issues were satisfied. The essential element shared by the three charges is the intentional possession of a controlled substance. The 404(b) evidence consists of Quintanilla's past possession and usage of illegal drugs in prison. The similarity is unmistakable. Thus, it is reasonable to conclude that the possession of methamphetamine by a person at one time may go toward proving he knowingly and intentionally possessed it on a subsequent occasion. Also, the present charged conduct occurred within one year of the past conduct and as such was not too remote in time. *Cf. United States v. Hadley*, 918 F.2d 848, 851

(9th Cir. 1990) (allowing the admission of evidence of prior conduct over ten years old upon a finding that similarity of the prior act to the offense charged outweighs concerns regarding remoteness). Thus, we find that parts one, two, and four of the *Evaristo* test are satisfied.

[14] However, the third part of the *Evaristo* test presents a more difficult question. Quintanilla argues that the evidence was insufficient as it did not directly show that he actually possessed the drugs or syringes found in the March 1995 search. The testimony offered was essentially that drugs and syringes were found in a cell shared by inmates Quintanilla and Pangelinan. Quintanilla's actual ownership of the drugs and paraphernalia was not directly alleged. The jury was left to infer Quintanilla's possession of the drugs. Compounding the problem is the fact prior to the trial in the case at bar, Quintanilla's conviction on the previous possession charge had been reversed by this court and was still pending. However, the trial court, fully aware that the prior conviction had been reversed and remanded, issued the following instruction prior to the introduction of the 404(b) evidence:

> I will give you a limiting instruction. I'd like to have you hear it very closely. You will follow these instructions when you deliberate in the verdict room. The instruction shall read as follows:
>
> Prior Similar Offense. You are about to hear testimony that the defendant, Henry Taitague Quintanilla, was previously indicted for a crime similar to the one charged here. I instruct you that the testimony is being admitted only for the limited purpose of being considered by you on the question of the defendant's intent.
>
> These charges are still pending.
>
> The case for which Mr. Quintanilla was indicted had co-defendants. One of the co-defendants pled guilty to promotion of prison contraband as a second degree felony in Criminal Case No. CF113-95.
>
> The defendant, John Junior Pangelinan, voluntarily, and without coercion or promises apart from this plea agreement, agrees to enter a guilty plea to the charge of promotion of prison contraband as a second degree felony, in violation of 9 GCA

> § 58.60(a)(2), as contained in Count Four of the Fifth Charge of the indictment filed by the prosecutor, pursuant to 9 GCA § 80.30 and § 80.50.
>
> A second degree felonies [sic] carries no less than three years, but not more than ten years, and a maximum fine of $10,000.
>
> The charge for which John Junior Pangelinan pleaded guilty out of the incident occurring on March 7, 1995, which also arises from the same search of this defendant, Mr. Quintanilla.
>
> The facts revealed that officers of the Guam Police Department executed a search warrant of the Territorial Detention Center, a detention facility, in the evening hours of March 7, 1995.
>
> During the search the officer found paraphernalia commonly associated with the intake of methamphetamine, including syringes and plastic packets in the cell of various detainees, including John Junior Pangelinan.
>
> Investigation revealed that defendant Pangelinan smokes methamphetamine, which had been delivered to him through Yvonne B. Cruz and Ramon G. Cepeda, Jr. Inmate Johnny R. Crisostomo said that he had seen Pangelinan sell methamphetamine to other inmates, and had seen Pangelinan in possession of methamphetamine while in his jail cell.
>
> That is the limiting instruction which I want you to consider in light of the testimony of the next witness.

Transcript, vol. V, pp. 35-37 (Jury Trial, June 24, 1999).

[15] The testimony of the Government's witness was that during the search he found contraband in two locations within the cell: (1) directly on Quintanilla's bunk, and (2) near Pangelinan's bunk. Transcript, vol. V, pp. 43-47 (Jury Trial, June 24, 1999). The Government's position herein was that Pangelinan pled guilty only to possession of the contraband near his bunk; not to the contraband that was on Quintanilla's bunk. Transcript, vol. V, p. 18 (Jury Trial, June 24, 1999). We conclude in light of the limiting instruction that the trial court did not abuse its discretion in admitting the testimony and allowing the jury to infer from it whether Quintanilla previously possessed drugs and drug paraphernalia while he was incarcerated. Thus,

we find no error with respect to part three of the *Evaristo* test. *See e.g. Evaristo*, 1999 Guam 22 at ¶ 17 (finding the trial court properly admitted 404(b) evidence in light of the limiting instruction).

[16] Turning next to the examination of prejudice alleged by Quintanilla, Guam Rules of Evidence 403 limits the admission of relevant evidence. This rule states: "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." Title 6 GCA § 403 (1995). The trial court's application of Rule 403 is reviewed for an abuse of discretion. *Evaristo*, 1999 Guam 22 at ¶ 6.

[17] The Government draws attention to the language of Rule 403, that the probative value must be substantially outweighed by unfair prejudice. This court in *People v. Bruneman*, 1998 Guam 24, acknowledged this position stating: "[M]ost evidence presented by the People in a criminal case is prejudicial to a defendant. At issue is whether probative value is outweighed by the danger of ***unfair prejudice*** to a defendant." *Id.* at ¶ 14 (emphasis in original).

[18] The Government asserts that the probative value of the 404(b) evidence is in showing that Quintanilla had the intent to possess the drugs for which he is on trial now. The striking similarity between the past act and the conduct in the instant case leads this court to find that the probative value of the evidence, that Quintanilla intended to possess the illegal drugs, outweighs the inevitable prejudice to him. In *Evaristo*, we reached a similar conclusion. In that case, Evaristo stabbed his wife to death and was convicted of murder. *Evaristo*, 1999 Guam 22 at ¶¶ 1-4. The Government introduced evidence that two

days before the murder, Evaristo threatened his wife and stabbed the door to their residence. *Id.* at ¶ 9 n. 7. This court stated:

> Under Rule 403, 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 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.

Id. at ¶ 17 (emphasis added). Whereas the past conduct in *Evaristo* was clearly similar to the conduct charged; in the present case, the past conduct was nearly identical to conduct charged. The striking similarity leads to our conclusion that the probative value of the evidence clearly outweighs its prejudicial effect.

B. Improper Jury Contact.

[19] The Government contends that Quintanilla made no objection during the in-chambers conference with Juror No. 6. However, in Quintanilla's Motion for a New Trial, he raised the issue of the in-chambers discussion and the trial court addressed it in the Decision and Order on that motion. Thus, we find that the issue is appropriately before this court.

[20] Quintanilla frames the issue as whether the communication of Juror No. 6 with the trial judge amounted to a new instruction for which the judge was mandated to read aloud to the entire jury on the record in Quintanilla's presence. *See Guam v. Marquez*, 963 F.2d 1311, 1314 (9th Cir. 1992) ("It is

therefore essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant."). This is a question of law and as such, review is *de novo*. *See Camacho v. Camacho*, 1997 Guam 5, ¶ 24.

[21] Turning to the merits of the issue, we first note Quintanilla's concern that the in-chambers conference was not on the record and that this court must accept legal counsels' rendition of the events that unfolded. However, from the briefs, it is possible to discern some undisputed facts. After closing arguments were given, the jury retired to deliberate a verdict. Shortly thereafter, legal counsels for Quintanilla and the Government were summoned to the chambers of the trial judge. Counsels were informed that Juror No. 6 wanted to hear the recording of the closing argument given by Quintanilla's counsel, Attorney Arens. The juror was called into the chambers in the presence of the judge and both counsels and informed that her request was denied. The juror was asked to leave the room and in her absence, Attorney Arens suggested to the judge that the juror be advised to review the jury instructions, in particular Jury Instruction No. 1C. The judge agreed and the juror was called back into the chambers. In attempting to clarify Instruction No. 1C, the judge explained to the juror that if an attorney said something contrary to a witness' statement, the juror was to "believe the witness," not the attorney. In addition, Quintanilla's counsel admits that the trial judge used both him and the Government's attorney as examples: "If a witness had testified to a particular fact she was to believe that witness and that she was not to believe Mr. Arens" and "If Mr. Tock stated something in closing arguments and a witness stated something on the stand, she is to believe the witness and not counsel." Appellant's Excerpts of Record,

p. 21 (Arens Decl.). Jury Instruction No. 1C states in relevant part: "In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening and closing arguments, in their objections, or in their questions is not evidence." Appellee's Excerpts of Record, p. 3 (Jury Instruction No. 1C). We are not convinced that the trial court's communication with Juror No. 6 went so far beyond the scope of Jury Instruction No. 1C so as to be a new instruction.

[22] Quintanilla argues that the facts that the in-chambers conference with Juror No. 6 was not placed on the record before the entire jury in his presence created structural defects in the constitutionality of the trial. We do not agree.

[23] The United States Supreme Court has noted that there are some constitutional rights so basic to a fair trial that their infraction can never be harmless error. *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827-828 (1967). Such structural defects are errors that undermine the integrity of the trial mechanism itself. *United States v. Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000) (citations omitted). These errors are so intrinsically harmful that automatic reversal is required without regard to their effect on the outcome. *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 1833 (1999). Thus, in these instances, the error is not subject to harmless error analysis. *See id.; see also United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (ruling on a defective indictment). "Structural errors are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible."*Eslaminia v. White*, 136 F.3d 1234, 1237 n. 1 (9th Cir. 1998).

[24] In the present case, we have already held that the communication was merely a clarification of a jury instruction. Because it was not an instruction, in and of itself, the trial court was not required to read it aloud to the jury in Quintanilla's presence. *See Marquez*, 963 F.2d at 1314. The lack of a record of the conference does not rise to a structural defect. The Supreme Court in *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453 (1983), held that even an ex parte communication between judge and juror can be harmless error. *Id*. 464 U.S. at 117, 104 S.Ct. at 455-456. *Rushen* recognized that the defendant has a fundamental right to be present at all critical stages of the trial, but the Court also recognized society's interest in the administration of criminal justice. *Id.* 464 U.S. at 118, 104 S.Ct. at 455. The Court stated: "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Id.* 464 U.S. at 118, 104 S.Ct at 455-456. In the present case, the trial judge did not meet with the juror until both attorneys were present. The communication involved only a clarification. Thus, there is no constitutional defect.

[25] Moreover, because it was merely a clarification, Quintanilla's presence at the in-chambers conference was not mandatory. The law provides for when a defendant's presence is mandatory:

> (a) The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided by this Section.
>
> (b) The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever he, initially present:

> (1) Voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or
>
> (2) Engages in conduct which is such as to justify his being excluded from the courtroom.
>
> c) A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In a prosecution for an offense not a felony, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.
>
> (3) At a conference or argument upon a question of law.
>
> (4) At a reduction of sentence under § 120.46.

Title 8 GCA § 1.13 (1993).

[26] The clarification was not a stage of trial at which a defendant's presence was mandatory. It was a conference on a question of law. The juror wanted to hear counsel's closing arguments but the trial court denied that request and reiterated, with embellishment, the Jury Instruction No. 1C, that counsels' statements were not evidence. Thus, under section 8 GCA § 1.13(c)(3) we find that Quintanilla's presence was not required.

[27] Quintanilla argues in the alternative that the trial court's communication "believe the witness" is tantamount to a presumption of truth instruction. Presumption of truth issues typically arise when a judge instructs a jury that witnesses are presumed to speak the truth. The danger of such an instruction is the potential to deny a criminal defendant the right to due process by placing the burden of proof upon him.

Cupp v. Naughten, 414 U.S. 141, 145, 94 S.Ct. 396, 399 (1973). In *Cupp*, the United States Supreme Court stated:

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.
>
> In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. While this does not mean that an instruction by itself may never rise to the level of constitutional error, it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

Cupp, 414 U.S. at 146-147, 94 S.Ct. at 400 (citations omitted). Thus, in reviewing to determine whether Quintanilla's due process rights were violated, we must view the jury instructions as a whole.

[28] We are aware that Quintanilla himself did not testify and that the only witnesses who testified were GPD and TDC employees. However, the trial court gave explicit instructions to the jury on the credibility of witnesses: "In deciding what the facts are, you must consider all the evidence. In doing this, you must decide what testimony to believe and what testimony not to believe. You may disbelieve all or any part of any witness' testimony." Record on Appeal, Tab 77, p. 28 (Jury Instruction No. 4B). The trial court further instructed the jury:

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> You have heard the testimony of a law enforcement official. The fact that a witness may be employed by the Government of Guam as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.
>
> At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.
>
> It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

Record on Appeal, Tab 77, p. 30 (Jury Instruction No. 4C). In light of these instructions, while the statement of the trial judge "believe the witness" was inappropriate, it is harmless error and not reversible.

[29] While we are mindful of a trial court's responsibility to eliminate confusion when a jury asks for clarification of a particular issue, *United States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir.1986), cert. denied, 479 U.S. 1086 (1987), we cannot ignore the practice of trial courts in this jurisdiction in painstakingly reviewing the jury instructions word for word with the parties' attorneys, sometimes over the course of several hours or even days. We also note the practice of trial judges to read each written instruction orally to the jury word for word and instruction by instruction. For a trial court to nonchalantly substitute its own interpretation of an instruction after it has been carefully reviewed and approved by the parties is reckless and may invite reversal.

C. Admissibility of Evidence.

[30] The Government alleges that Quintanilla failed to object to the evidence at the time it was entered and that this court's review should be for plain error. However, at the close of the Government's case, and again at the close of his case, Quintanilla made a motion for acquittal or in the alternative, for exclusion of

all the Government's physical evidence. The trial court denied the motions. Thus, while Quintanilla should have objected when the evidence was admitted, the motions preserved the argument for appeal and our review is for an abuse of discretion. *See e.g. Evaristo*, 1999 Guam 22 at ¶ 6; *cf. United States v. Yossunthorn*, 167 F.3d 1267, 1270 n.4 (9th Cir. 1998) ("Because . . . [defendants] argued insufficiency of the evidence to the trial court, they preserved their arguments for appeal and plain error does not apply. *Cf. United States v. Smith*, 924 F.2d 889, 893-894 (9th Cir. 1991) (complete failure to raise insufficiency of the evidence at the district court warrants plain error review)."). The same standard is used to review a trial court's ruling on a chain of custody argument. *United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995).

[31] Under the abuse of discretion standard, Quintanilla must show that the trial court's decision to admit the evidence over his motion is not justified by the evidence and is clearly against the logic and effect of the facts as are found. *Quinata*, 1999 Guam 6 at ¶ 17 (citation omitted). In this appeal, this court will not substitute its judgment for that of the trial court. *Id.* Instead, in order to reverse the trial court, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion. *Id.* (citation omitted).

[32] In presenting the evidence, it is the Government's burden to show that the evidence is in substantially the same condition as when it was seized. *Mata-Ballesteros*, 71 F.3d at 769 (citation omitted). The evidence may be admitted if there is a reasonable probability that the evidence had not been

changed in important aspects. *Id.* It is important to note, however, that a defect in the chain of custody goes to the weight of the evidence, not to its admissibility. *Id.*

[33] Turning to the evidence, Quintanilla argues that the breaks in the chain of custody, discrepancies between the GPD and TDC custody receipts, and six grams of allegedly missing methamphetamine call the integrity of the evidence into dispute. Although he concedes that a break in the chain of custody, in and of itself, does not mean the evidence is inadmissable altogether.

[34] Upon review of the GPD and TDC custody receipts, the breaks in the chain of custody and other discrepancies are painfully obvious. Particularly egregious are an entry showing that Officer Meno received the evidence at 1:00 p.m. on January 28, 1996 and deposited the evidence *that same day at 8:00 a.m.*, and the lack of an entry to account for the exact whereabouts of the evidence after it was retrieved by Officer Castro from Criminalist Ada of the GPD Laboratory on January 28, 1999. Also troubling are the discrepancies in the description of property seized. For example, the TDC custody receipts shows two straws with clear rock-like substance, whereas the GPD custody receipt shows one hand-rolled cardboard straw; and the GPD custody receipt reflects an aluminum strip whereas the TDC custody receipt makes no mention of it.

[35] However, the record is clear that the trial court received much testimony from the TDC and GPD officers regarding the discrepancies in the custody receipts, the alleged breaks in the chain of custody, and the differences in the weight of the methamphetamine at the time of the seizure and at trial. A total of nine witnesses were called by the Government. One testified as an expert and another testified as to the prior

bad acts evidence. The remaining seven witnesses were TDC and GPD officers who were directly involved with the search, seizure, transport, custody and analysis of the evidence. These witnesses testified as to possible reasons or justifications for the discrepancies. For example, Officer Rosalan, the GPD property officer, testified that the evidence was placed into the GPD vault after it was retrieved from the Criminalist Ada. Transcript vol. IV. pp. 43-44 (Jury Trial June 23, 1999). Criminalist Ada, the GPD drug chemist, testified that the difference in weight of the methamphetamine could be attributed to the weight of the packaging holding the substance. Transcript vol. VII(B), p. 81 (Jury Trial July 6, 1999). Officer Santos, the TDC Officer who searched Quintanilla's person in the shakedown, testified that the aluminum strip in evidence was the same one he seized from Quintanilla despite the TDC custody receipts not indicating so. Transcript, vol. X pp. 52-53 (Jury Trial July 9, 1999). Officer Meno, the GPD Officer who transported the evidence from the TDC to GPD, testified that he brought the evidence to the evidence locker the same day he retrieved it from the TDC although the time on the custody receipt was wrong. Transcript vol. IX pp. 53-54 (Jury Trial July 8, 1999). Thus, the Government addressed each of Quintanilla's concerns.

[36] Notwithstanding the alleged breaks in the chain of custody, Quintanilla has failed to present any evidence of tampering. Moreover, he does not dispute that the substance seized was methamphetamine and that the evidence introduced at trial was methamphetamine. Thus, his argument that the evidence was tainted is unconvincing. In the face of the substantial testimony offered by the Government, we find no abuse of discretion by the trial court in admitting the evidence.

D. Motion for Acquittal.

[37] Quintanilla's Motion for Acquittal is based upon the argument that the evidence was insufficient to sustain the conviction. The trial court's decision on a motion for acquittal is reviewed *de novo. People v. Camacho*, 1999 Guam 27, ¶18; *People v. Root*, 1999 Guam 25, ¶ 4; *Quinata*, 1999 Guam 6 at ¶ 9; *People v. Cruz*, 1998 Guam 18, ¶ 8. "In conducting this review, courts apply the same test as that used to challenge the sufficiency of the evidence." *Root*, 1999 Guam 25, at ¶ 4. Accordingly, this court should review the evidence presented against Appellant in a light most favorable to the Government to determine whether, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citations omitted). Our inquiry, however, does not require the court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. *Id.* at ¶ 5. On the contrary, the court's review shall give full play to the responsibility of the jury to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* (citations omitted).

[38] Specifically, Quintanilla argues that the breaks in the chain of custody render the evidence insufficient to sustain the conviction. However, "[a]lthough there were inconsistencies and contradictions in the testimony of the witnesses, the task of determining the weight of the evidence and inconsistencies of testimony lies within the purview of the jury." *Camacho*, 1999 Guam 27 at ¶ 40. Moreover, Quintanilla admits that breaks in the chain of custody go the weight of the evidence. The jury had before it the testimony of the officers who handled the evidence and who explained the discrepancies in the chain of

custody. It was the responsibility of the jury to weigh the evidence. "The record is devoid of any evidence indicative of the jury's failure to meet this responsibility as they concluded that Appellant was guilty beyond a reasonable doubt." *Quinata*, 1999 Guam 6 at ¶ 14. In the light most favorable to the Government, we find that sufficient evidence was presented to the jury to support its decision.

IV.

[39] The trial court did not abuse its discretion in admitting evidence of Quintanilla's prior bad acts. Although the interpretation of a jury instruction by enhancing it may invite reversal, we find that the trial court did not issue a new instruction and the communication with Juror No. 6 does not require reversal. The trial court did not abuse its discretion in admitting the evidence seized in the search of Quintanilla's cell. Lastly, the trial court did not abuse its discretion in denying Quintanilla's Motion for Acquittal. The trial court's conviction of Quintanilla is **AFFIRMED**.

PETER C. SIGUENZA, JR.
Associate Justice

F. PHILIP CARBULLIDO
Associate Justice

BENJAMIN J.F. CRUZ
Chief Justice