IN THE SUPREME COURT OF GUAM

MARK BAMBA ANGOCO,
Petitioner-Appellee

vs.

EDUARDO C. BITANGA,
Director of Corrections, Government of Guam
Respondent-Appellant

Supreme Court Case No. CVA99-024
Superior Court Case No. SP0039-98

OPINION

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Argued and submitted on December 10, 1999
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, RICHARD H. BENSON, and JOHN A. MANGLONA, Designated Justices.

CRUZ, CJ.:

[1] The Government appeals from the trial court's grant of a writ of *habeas corpus* to Petitioner-Appellee on the ground of ineffective assistance of counsel during the appeal of Angoco's conviction. We affirm the judgment of the trial court and further hold that in jury trials commenced after the filing of this opinion, the trial courts shall instruct juries as to any included offenses having a rational basis in the evidence without regard to whether such instructions were requested or objected to by the prosecution or defense.

I.

[2] Mark Bamba Angoco ("Angoco") was charged with felony aggravated murder, premeditated aggravated murder, first degree robbery, burglary, theft, special allegations of use of a deadly weapon, and hindering apprehension or prosecution of murder. At the end of the jury trial, counsel did not argue that Angoco was entitled to an instruction on the lesser-included offense of negligent homicide within the felony aggravated murder charge and the trial court did not *sua sponte* provide the instruction. The jury found Angoco guilty of felony aggravated murder and of hindering apprehension. *People v. Angoco*, CF0428-94 (Super. Ct. Guam May 24, 1995). The jury acquitted Angoco of the robbery charge and the other offenses. *Id*. Angoco was sentenced to life imprisonment without eligibility for parole. *Id*.

[3] Angoco, represented by his trial counsel, appealed the conviction, but it was affirmed. *People v. Angoco*, Crim. No. 95-00094A, 1996 WL 875777 (D. Guam App. Div. Oct. 16, 1996). Through new (and present) counsel, Angoco appealed the decision of the Appellate Division to the Ninth Circuit Court of Appeals. At the Ninth Circuit, Angoco, among other arguments, complained that his prior counsel failed to argue, on appeal to the Appellate Division, that the trial court committed reversible error by not instructing the jury *sua sponte* on lesser included offenses to the aggravated felony murder charge. The Court of Appeals affirmed the Appellate Division's decision without prejudice as to any claims of ineffective assistance of appellate counsel. *People v. Angoco*, 131 F.3d 147 (9th Cir. 1997).

[4] Angoco thereafter initiated the case at bar by filing a Petition for Writ of *Habeas Corpus* on the basis of ineffective assistance of appellate counsel. The trial court granted the writ. *People v. Angoco*, SP0039-98 (Super. Ct. Guam June 11, 1999). This appeal followed.

II.

[5] We have jurisdiction over this appeal pursuant to Title 7 GCA § 3107 (1994).

[6] While a denial of *habeas* relief cannot be appealed, pursuant to 8 GCA § 135.74, the government may appeal a grant of *habeas* relief. *See Borja v. Bitanga*, 1998 Guam 29, ¶ 12. A court's decision to grant a writ of *habeas corpus* is reviewed *de novo*. *McKinney v. Rees*, 993 F.2d 1378, 1380 n.1 (9th Cir. 1993).

[7] A claim of ineffective assistance of counsel is properly brought on a petition for writ of *habeas corpus*. *People v. Ueki*, 1999 Guam 4, ¶ 5; *People v. Perez*, 1999 Guam 2, ¶ 33.

Although this court has stated that such a claim is a question of law to be reviewed *de novo*, *People v. Camacho*, 1999 Guam 27, ¶ 16; *People v. Kintaro*, 1999 Guam 15, ¶ 10; *Ueki*, 1999 Guam 4, at ¶ 5; *Perez*, 1999 Guam 2, at ¶ 33; *People v. Reyes*, 1998 Guam 32, ¶ 9; *People v. Quintanilla*, 1998 Guam 17, ¶ 8, the two-prong test we adopted from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), by necessity requires review of both fact and law. Thus, to clarify the standard, we adopt that set forth by the Ninth Circuit Court of Appeals: "[a] claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*." *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986).

III.

[8] A claim of ineffective assistance of trial counsel is evaluated under the *Strickland v. Washington* two-prong test. *Strickland*, 466 U.S. 668, 104 S.Ct. 2052. The first prong requires that a defendant demonstrate that his trial counsel's performance was deficient, and the second prong requires that a defendant must prove the deficient performance prejudiced his defense. *Camacho*, 1999 Guam 27 at ¶ 22; *Kintaro*, 1999 Guam 15 at ¶ 11; *Ueki*, 1999 Guam 4 at ¶ 6; *Perez*, 1999 Guam 2 at ¶ 33; *Reyes*, 1998 Guam 32 at ¶ 9; *Quintanilla*, 1998 Guam 17 at ¶ 8. A claim of ineffective assistance of counsel during an appeal is also evaluated under the *Strickland* two-prong test. *See Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 764 (2000); *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2667 (1986); *Evitts v. Lucey*, 469 U.S. 387, 393-96, 105 S.Ct. 830, 834-836 (1985). Under the first prong of *Strickland*, a defendant must show that "counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052 at 2064. Under *Strickland's* second prong, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. Accordingly, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. 466 U.S. at 694, 104 S.Ct. 2052 at 2068.

[9] Previously, this court noted that there are no specific rules to govern counsel's conduct and that much deference must be given when such conduct is reviewed. *See Quintanilla*, 1998 Guam 17 at ¶ 9 ("[A] court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"); *see also Kintaro*, 1999 Guam 15 at ¶ 17 (stating that the nature of such review is deferential). In rendering effective assistance, counsel is not required to put forth every conceivable argument "regardless of merit." *Evitts*, 469 U.S. at 394, 105 S.Ct. at 834-835 (citation omitted). The process of weeding out weak arguments and focusing on those more likely to prevail "far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Murray*, 477 U.S. at 535-36, 106 S.Ct. at 2667 (citations omitted). Where counsel consciously decides to omit a defense or pursue a certain argument, such conduct is deliberate strategy, and a choice of strategy that backfires is not the equivalent of ineffective assistance of counsel. *People v. Carbullido*, Crim. No. 93-0078A, 1994 WL 129722, at *2 (D. Guam App. Div. Mar. 15, 1994) (citing *Well v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993)).

[10] At the hearing for *habeas* relief, appellate counsel explained why he did not raise the issue of the trial court's allegedly reversible error:

> Never crossed my mind. There – in the Appellate Division, there was seven issues raised. In an appeal it's important you limit your issues to the most viable ones that an appellate court can review. And quite frankly, the issue of a Lesser-Included Offense to Felony Murder just never even crossed my mind.

Transcript vol. --, p. 12 (Writ of *Habeas Corpus* Dec. 31, 1998). Appellate counsel further stated at the *habeas* proceeding that, in retrospect, he believed the omitted instruction argument was Angoco's best argument for reversal. Transcript vol. --, p. 13 (Writ of *Habeas Corpus* Dec. 31, 1998) Thus, by his own admissions, counsel shows unequivocally that his failure was not tactical or trial strategy, but that he never even considered the instruction. Thus, we must find that his performance was sufficiently deficient to satisfy *Strickland's* first prong.

[11] To find whether Angoco's appeal was prejudiced pursuant to *Strickland's* second prong requires a determination of whether there is a reasonable probability that the omitted argument could have resulted in a reversal of his conviction. This in turn requires an inquiry into whether Angoco was entitled to the instruction in the first instance.

[12] In *People v. Perez,* 1999 Guam 2, this court provided the test for whether a defendant is entitled to an instruction on a lesser-included offense. "[T]he defendant must demonstrate that (1) the lesser offense is within the offense charged, and (2) based on the evidence presented at trial, a rational jury could find the defendant guilty of the lesser offense but not the greater." *Id.* at ¶ 24 (citing *United States v. Wagner*, 834 F.2d 1474, 1487 (9th Cir.1987)). A rational basis for the verdict on the lesser offense exists if there is substantial evidence supporting the verdict. *People v. Breverman*, 77 Cal.Rptr.2d 870, 882, 19 Cal.4th 142, 162,

960 P.2d 1094, 1106 (1998) (affirming that "a trial court errs if it fails to instruct, *sua sponte*, on all theories of a lesser included offense which find substantial support in the evidence.").

[13] We begin with the definition of lesser-included offense as provided by 8 GCA § 105.58:

> Guilt of Included Offense Permitted: Defined.
> (a) The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is included in that with which he is charged.
> (b) An offense is included under Subsection (a) when:
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Title 8 GCA § 105.58 (1993). Accordingly, we review the statutory definitions of felony aggravated murder and negligent homicide. Felony aggravated murder is criminal homicide committed during the commission or attempt to commit a felony. Title 9 GCA § 16.30(a)(2) (1993). Negligent homicide is criminal homicide committed by criminal negligence. Title 9 GCA § 16.60(a) (1993). Both crimes share the element of criminal homicide which is defined by 9 GCA § 16.20:

> Criminal Homicide Defined.
> (a) A person is guilty of criminal homicide if he causes the death of another human being:
> (1) intentionally and with premeditation; or
> (2) intentionally; or
> (3) knowingly; or
> (4) recklessly; or
> (5 by criminal negligence.

Title 9 GCA § 16.20 (1993). Thus, the elements of felony aggravated murder are: (1) causing the death of another; (2) either intentionally and with premeditation, intentionally, knowingly, recklessly, or by criminal negligence; and (3) during the commission or attempt to commit a felony. Further, the elements of negligent homicide are: (1) causing the death of another; and (2) by criminal negligence.[1] But for the underlying felony, negligent homicide shares the same elements with felony aggravated murder. If the second element of felony aggravated murder is based on criminal negligence, then negligent homicide would be a lesser-included offense. In the instant case, the felony aggravated murder charge in the indictment of Angoco read as follows:

> SECOND CHARGE
>
> On or about the 29th day of October, 1994, in the Territory of Guam, MARK BAMBA ANGOCO and JOHN JUNIOR PANGELINAN, **with criminal negligence**, caused the death of another human being, that is, Darwin Datuin, during the commission of the felony of robbery as alleged in the Third Charge below, an offense set forth under 9 G.C.A. Chapter 40, in violation of 9 G.C.A. §§ 16.30(a)(2), 16.30(b) and 4.60.

Respondents' Excerpts of Record Part. I at Tab 1 (Indictment p. 2) (emphasis added). Therefore, we must conclude that, under 8 GCA § 105.58(b)(1), negligent homicide is a lesser-

[1] The Guam Code Annotated defines criminal negligence.

> A person acts with criminal negligence, or is criminally negligent, with respect to attendant circumstances or the result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or that his conduct will cause the result and his failure to be aware of the risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

Title 9 GCA § 4.30(d) (1993).

included offense of felony aggravated murder as charged against Angoco.

[14] Turning to the second part of the *Perez* test, a trial court is required to issue an instruction when there is a rational basis for acquitting the defendant of the offense charged and convicting him of the included offense. *Perez*, 1999 Guam 2 at ¶ 24. Specifically, the statute provides: "When there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of an included offense, the court shall charge the jury with respect to the included offense." Title 8 GCA § 90.27 (1993). Thus, the issue becomes whether the jury could have rationally acquitted Angoco of the felony aggravated murder charge and convicted him of the negligent homicide charge. The ultimate factual dispute is whether the criminal homicide took place during the commission of a felony. More specifically, if there is substantial evidence that the robbery did not occur, then there would be a rational basis for the jury to conclude that Angoco was not guilty of felony aggravated murder but that he was guilty of negligent homicide. *See Breverman*, "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." *Id*. 77 Cal.Rptr.2d at 882, 19 Cal.4th at 162, 960, P.2d at1106.

[15] Turning therefore to the evidence, in our *de novo* review of this case, the voluminous transcripts of the criminal trial submitted in this appeal plainly show that Angoco was indicted for robbery and theft along with the murder and other charges. The government provided much witness testimony to show that the victim was killed in order to rob him of money, drugs or guns. However, the record also contains evidence Angoco did not commit a robbery during the alleged killing:

1. Testimony of a police officer that the body of the victim was found with his watch and wallet containing $4.00 cash. Transcript vol. VI, pp. 84-86 (Jury Trial April 12, 1995);

2. Testimony of the victim's wife that he did not have guns or large amounts of cash or drugs. Transcript vol. IV, pp. 108-121 (Jury Trial April 10, 1995);

3. Testimony of two of the victim's friends that the victim did not have drugs or large amounts of cash. Transcript vol. V, pp. 20-21, 57 (Jury Trial April 11, 1995);

4. Testimony that the victim was killed because Angoco owed someone a favor. Transcript vol. IX, p. 130 (Jury Trial April 18, 1995); and

5. Testimony that the victim was killed simply to get him out of the picture. Transcript vol. X, pp. 109-110 (Jury Trial April19, 1995).

6. Testimony of Rickey Macintosh admitting that he entered the victim's house using keys that John Pangelinan gave him and took a CD player, money, fake drugs and a brief case which contained guns. Transcript vol. X, pp. 120-143 (Jury Trial April19, 1995).

7. Testimony of Rickey Macintosh admitting that he pled guilty to burglary of the house and theft money, briefcase, guns and CD player. Transcript vol. X, p. 146. (Jury Trial April19, 1995).

[16] Thus, although it is clear that there is a great deal more evidence that a robbery had been planned and attempted than not, there is also substantial evidence that Angoco did not commit a robbery during the homicide. We find therefore that the jury rationally could have found that the homicide did not occur during a robbery and thus acquitted Angoco of the felony aggravated murder charge.[2] The resulting prejudice to Angoco indicates plain error by the trial court in not *sua sponte* issuing the lesser-included offense instruction to the jury despite the

[2]The fact that the jury acquitted Angoco of the robbery charge is irrelevant to this analysis. Had the jury found Angoco guilty of robbery, our result here would not change.

trial attorney's failure to object or request the instruction. *See Perez*, 1999 Guam 2 at ¶ 21 ("When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. Plain error is a highly prejudicial error affecting substantial rights. Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." (citations omitted)).

[17] Moreover, in the context of the appellate counsel's error, there would have been a reasonable probability that the District Court Appellate Division would have reversed the trial court had the omitted lesser-included offense argument been raised. *See People v. Lastimoza*, Crim. No. 82-0017A, 1983 WL 29940, at *4 (D. Guam App. Div. Aug. 16, 1983) (reversing a conviction where there was evidence upon which the trial court could have based instructions on lesser included offenses and the court failed to *sua sponte* issue such instructions). The fundamental fairness of the appeal and the reliability of the appellate court's decision are thereby called into question. Thus, appellate counsel's admission satisfies the second prong of the *Strickland* test, that "the deficient performance prejudiced the defense."

[18] The method of selecting jury instructions, with one party or the other, or even the trial court itself, suggesting or objecting to lesser-included jury instructions is problematic. Such a system no doubt is the root cause of the ineffective assistance claim in this case. Recently, the Supreme Courts of California and Hawaii addressed this issue and issued bright-line rules requiring their trial courts to issue jury instructions on lesser-included offenses when the evidence supports verdicts on such offenses and despite any objections from the parties. *People v. Breverman*, 77 Cal.Rptr.2d 870, 19 Cal.4th 142, 960 P.2d 1094 (Cal. 1998); *State v.*

Haanio, 16 P.3d 246, 248 (Haw. 2001).

[19] The administration of justice can only be accomplished if the jury has before it the full range of possible verdicts thus ensuring that the most accurate judgment is rendered. *See Breverman*, 77 Cal.Rptr.2d at 876-877, 19 Cal.4th at155, 960 P.2d at 1101. Elimination of the all-or-nothing jury instruction strategy serves the interests of the criminal justice system because "[j]ust as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." *Id.* 77 Cal.Rptr.2d at 877-878, 19 Cal.4th at 155, 960 P.2d at 1101. Its elimination would prevent ignorance and mistake and encourage "a verdict . . . no harsher or more lenient than the evidence merits." *Id*.

[20] Moreover, a defendant has no constitutional or substantial right to hold from the jury instructions on lesser included offenses. *Haanio*, 16 P.3d at 255-256.

> Our courts are not gambling halls but forums for the discovery of truth. . . . A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

Id.

[21] We agree fully with the Hawaii and California Supreme Courts and hold that trial courts must issue lesser-included offense instructions if there is a rational basis for such as shown by substantial evidence, without regard to whether such instructions were requested or objected

to by the parties. Guam's own lesser-included statute does not give discretion to the trial courts in this regard. "[T]he court **shall** charge the jury with respect to the included offense." 8 GCA § 90.27 (emphasis added). Thus, our rule fully comports with the law and advances the interests of justice.

IV.

[22] The failure of Angoco's counsel to raise the omitted instruction argument in his appeal to the Appellate Division was prejudicial error. The trial court's decision granting Angoco *habeas corpus* relief is **AFFIRMED**.

RICHARD H. BENSON
Designated Justice

JOHN A. MANGLONA
Designated Justice

BENJAMIN J.F. CRUZ
Chief Justice