IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

JIMMY CEDINO PALISOC
Defendant-Appellant.

Supreme Court Case No. CRA00-008
Superior Court Case No. CF0263-98

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on December 10, 2001
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice, F. PHILIP CARBULLIDO, Associate Justice, and FRANCES TYDINGCO-GATEWOOD, Associate Justice[1].

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellant Jimmy Cedino Palisoc (hereinafter "Palisoc") appeals from his conviction arising from the theft of four separate automobiles. Specifically, Palisoc contends that the trial court committed three errors: (1) improperly admitting prior bad act evidence under Guam Rules of Evidence Rule 404(b); (2) imposing consecutive sentencing for his convictions of theft and theft by receiving; and (3) imposing consecutive sentencing for his convictions of arson and criminal mischief. We find the trial court committed harmless error in admitting prior bad act evidence for purposes of establishing identity, common plan or scheme, and motive, but no error in admitting the evidence for the purpose of establishing intent. We further find that the trial court did not err in consecutively sentencing Palisoc for arson and criminal mischief. However, the trial court did err in convicting Palisoc for both theft and theft by receiving. We therefore reverse Palisoc's convictions for the theft by receiving and remand the matter for re-sentencing.

I.

[2] Palisoc was indicted on fifteen charges that included theft of a motor vehicle, theft by receiving a motor vehicle, criminal mischief, arson, and unauthorized used of a motor vehicle. The charges related to several automobiles that were stolen and damaged between June 9, 1997 to April 10, 1998. During trial,

[1] At the time this matter was considered, Associate Justice Frances Tydingco-Gatewood was a judge in the Superior Court of Guam, and was appointed Justice *Pro Tempore* on the case. On February 8, 2002, Justice Gatewood was sworn-in as a full time Associate Justice of the Guam Supreme Court.

the prosecution called four separate witnesses to testify about a theft on August 10, 1997 of a 1993 Toyota pickup.[2] Palisoc had been previously charged and acquitted of this theft.

[3] The trial court admitted the evidence of the August 10th theft under Title 6 GCA § 404(b) (1995). The court held that the evidence was relevant to prove identity, motive, intent, and a common plan or scheme by Palisoc to commit the crimes charged. The court also found that there was sufficient evidence to prove Palisoc committed the act, that the incident was relatively close in time to the crimes charged, and that the prior theft was similar enough to the present charges to warrant admission under Rule 404(b). Finally, the court considered Rule 403, and held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion, or delay.

[4] After trial, the jury convicted Palisoc on ten of the thirteen submitted charges.[3] The court ordered the sentences for unauthorized use of a motor vehicle to run concurrent to the other sentences. All other sentences were set to run consecutively, for a total term of imprisonment of fourteen years.

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[2] The four witnesses included Paul Chaco, the owner of the vehicle, and three officers.

[3] The trial court ordered an entry of a judgment of acquittal as to Charges 14 and 15 of the indictment. Charges 1 through 13 were submitted to the jury. As to those charges, Palisoc was convicted and sentenced as follows:

1992 Nissan Sentra (green)	Charge 2: Theft by Receiving of a Motor Vehicle (2 years)
1996 Nissan Sentra (gold)	Charge 5: Theft of a Motor Vehicle (2 years)
	Charge 6: Theft by Receiving of a Motor Vehicle (2 years)
	Charge 7: Criminal Mischief (1 year)
	Charge 8: Unauthorized Use of a Motor Vehicle (6 months)
1990 Nissan pickup (red)	Charge 9: Theft of a Motor Vehicle (2 years)
	Charge 10: Theft by Receiving a Motor Vehicle (2 years)
	Charge 11: Arson (2 years)
	Charge 12: Criminal Mischief (1 year)
	Charge 13: Unauthorized Use of a Motor Vehicle (6 months)

II.

[5] This court has jurisdiction over final judgments of the Superior Court pursuant to Title 7 GCA §§ 3107 and 3108(a) (1994).

III.

[6] Palisoc challenges the trial court's decision to admit evidence of his prior bad act under Rule 404(b). He further challenges his sentence, arguing that consecutive sentencing for theft and theft by receiving, and arson and criminal mischief, violates double jeopardy.

A. Rule 404(b)

[7] We review the trial court's admission of prior bad act evidence under Rule 404(b) for an abuse of discretion. *People v. Quintanilla*, 2001 Guam 12, ¶ 9; *People v. Evaristo*, 1999 Guam 22, ¶ 6. An abuse of discretion occurs when the court makes a judgment that clearly goes against the logic and effect of the facts. *Quintanilla*, 2001 Guam 12 at ¶ 9 (citing to *People v. Tuncap*, 1998 Guam 13, ¶ 12). However, the trial court's determination of whether the evidence falls within the scope of Rule 404(b) is reviewed *de novo*. *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993).

[8] Guam's Rule 404(b) is derived from the Federal Rules of Evidence Rule 404(b). *Evaristo*, 1999 Guam 22 at ¶ 7. Rule 404(b) provides:

> 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). In order for evidence of a prior bad act to be admissible under Rule 404(b), the Government bears the burden of establishing that the evidence: (1) proves a material element of the crime currently charged; (2) is similar to the charged conduct; (3) is based on sufficient evidence; and (4) is not too remote in time. *Evaristo*, 1999 Guam 22 at ¶ 11 (citing to *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994)); *see also Arambula-Ruiz*, 987 F.2d at 603 (placing the burden on the Government of proving that the evidence meets all of the four requirements). A fifth and final consideration that the court must address is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Title 6 GCA § 403 (1995); *see also Evaristo*, 1999 Guam 22 at ¶ 17.

1. Relevance

[9] Rule 404(b) sets forth several grounds for which prior bad act evidence may be admitted. In this case, the trial court found that the evidence of Palisoc's prior theft was relevant to establish intent, identity, common plan or scheme, and motive. Palisoc argues that the evidence shows only his propensity to commit the crime of auto theft and is not probative on any of the grounds allowed by the trial court. Thus, it was not relevant to prove any material fact and was improperly admitted under Rule 404(b).

a. Intent

[10] We turn first to the issue of intent. Palisoc defended against his charges on the ground that he did not commit the thefts and not that the thefts were committed without the requisite intent. It is Palisoc's contention that because he did not put his intent at issue, evidence admitted to establish his intent is not relevant. We disagree.

[11] First, in arguing its Rule 404(b) motion, counsel for Palisoc indicated to the court that duress may be raised as a defense. Specifically, counsel stated, "My client did make a statement, and on one statement he did admit to a couple of incidences, but he stated that he was held at gunpoint . . . . So, Your Honor, we will be bringing out the defense of duress . . . ." Transcript vol. IV, p. 5 (Continued Jury Trial, July 25, 2000). Furthermore, when the court sought to confirm that Palisoc's state of mind may be an issue, Palisoc's counsel answered, "That's correct." Transcript vol. IV, p. 5 (Continued Jury Trial, July 25, 2000). The above statements made by Palisoc's counsel clearly put his intent at issue.

[12] Even assuming that Palisoc did not place his state of mind at issue, this does not render intent irrelevant. In *People v. Quintanilla*, 2001 Guam 12, this court ruled that evidence of a prior bad act can be admitted to prove intent in a case even if the defendant does not dispute the intent element of the offense. *See Quintanilla*, 2001 Guam 12 at ¶ 13 (finding that evidence of a prior possession charge was relevant to prove intent for a current possession charge). While recognizing that there exists a split among jurisdictions with respect to this issue, we continue to adhere to the rationale as expressed in *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990):[4]

[4] The Eighth and Tenth Circuits follow the approach of the Ninth Circuit, holding that since intent is still an element of the crime that the prosecution must prove, it is not necessary for "the defendant to have raised the issue of intent for it to be an issue in the case where, as in this case, the crime for which the defendant is charged requires proof of specific intent." *United States v. Engleman*, 648 F.2d 473, 478-79 (8th Cir. 1981); *United States v. Franklin*, 704 F.2d 1183, 1188 & n.3 (10th Cir. 1983). The Fifth and Sixth Circuits have similarly recognized the prosecution's burden, but the crux of their inquiries is whether intent is inferable from the nature of the criminal act. *See United States v. Webb*, 625 F.2d 709, 710 (5th Cir. 1980); *see also United States v. Ring*, 513 F.2d 1001, 1007 (6th Cir. 1975). The Second Circuit appears to have adopted a similar position, stating that the question of intent is generally not an issue if the defendant claims he did not commit the alleged act. However, if the evidence of the defendant's connection to the bad act is subject to innocent interpretation, and the defendant does not provide pre-trial assurances that intent is not going to be disputed in the case, then the prosecution may admit prior bad act evidence to establish intent. *See United States v. Williams*, 577 F.2d 188, 191 (2d Cir. 1978); *see also United States v. Manafzadeh*, 592 F.2d 81, 87 (2nd Cir. 1979). One D.C. court took a strong opposing position, holding that "where intent is not controverted in any meaningful sense, evidence of other crimes to prove intent is so prejudicial *per se* that it is inadmissible as a matter of law." *Thompson v. United States*, 546 A.2d 414, 423 (D.C. Ct. App. 1988).

> The government must prove every element of a crime beyond a reasonable doubt. . . . [The defendant] cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. [The defendant's] choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts . . . .

Id. at 852.

[13] Theft, as charged in the instant case, requires proof that Palisoc specifically intended to deprive another of his movable property or to receive property of another knowing or believing that the property was stolen. Title 9 GCA §§ 43.30(a), 43.50(a) (1996). Because intent is an element of the charged offenses, it is a material issue which the prosecution has the burden to prove. Evidence that Palisoc committed a prior auto theft is both a permissible and helpful means of showing that Palisoc committed the current charged thefts with the requisite intent. *See Quintanilla*, 2001 Guam 12, at ¶ 13; *see also Ring*, 513 F.2d at 1008 (noting that with certain crimes, such as receiving stolen property, "intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent."). The fact that Palisoc took a vehicle on a prior occasion, intending to deprive the owner of possession or received a vehicle knowing or believing it was stolen, makes it more probable that he committed the current thefts with the same intent. Thus, evidence of Palisoc's prior theft was relevant to establishing his intent in committing the currently charged thefts.

b. Identity

[14] The trial court further admitted evidence of the prior theft on the ground that it established identity. This was clearly in error, first and foremost because it was not a ground upon which the prosecution sought to admit the evidence, and thus, the prosecution made no showing as to the relevance of the evidence for

identity purposes.

[15] The trial court here failed to require from counsel any sort of statement articulating the government's chain of inferences linking the prior bad act evidence to the charged offenses. The rule is clear that "[i]f the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [an offense] before, he therefore is more likely to have committed this one." *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992); *see also Arambula-Ruiz*, 987 F.2d at 603. Permitting counsel to simply recite the facts of the prior offense and then list for the court proffered purpose without precisely explaining how the evidence goes to show something other than character is error. *Sampson*, 980 F.2d at 888. Moreover, when the trial court admits the evidence, it should place the chain of inferences on the record to establish the relevance of the evidence beyond mere propensity.

[16] Even assuming that the prosecution had attempted to make such a showing, relevancy could not have properly been established in this instance. In order for a prior act to be relevant in establishing identity, the conduct must be "so unusual or distinctive as to constitute [the defendant's] personal 'signature' . . . ." *United States v. Ezzell*, 644 F.2d 1304, 1306 (9th Cir. 1981) (citations omitted); *see also United States v. Beechum*, 582 F.2d 898, 912 n.15 (5th Cir. 1978) ("The physical similarity must be such that it marks the offenses as the handiwork of the accused."). While the prior auto theft and Palisoc's charged offenses are similar in that both involve the stealing of automobiles, "[t]he points of similarity between [them] . . . are so common . . . as to be entirely unhelpful." *Ezzell*, 644 F.2d at 1306. The mere presence or use of a screwdriver in each of the thefts is not "sufficiently distinctive to warrant an inference that the person

who committed the prior offense also committed the offense on trial." *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978) (finding that two offenses which resembled each other only in the fact that large quantities of marijuana were stored in a house insufficient to support an inference of identity). Several witnesses, including officers, testified that "popping" the ignition of a car with a screwdriver is a common way to steal vehicles. Thus, the conduct before the court does not bear the marks of peculiarity or uniqueness as required to establish identity.

c. Common plan or scheme

[17] Admitting the evidence of the prior theft on the ground that it reveals a common plan or scheme was also improper. A common plan or scheme generally refers to a situation in which "the charged and the uncharged crimes are parts of a single series of events." *Virgin Islands v. Pinney*, 967 F.2d 912, 916 (3d Cir. 1992). The August 10th theft and the charged thefts share no attribute or connection that would render evidence of the defendant's involvement in the prior theft helpful in establishing a plan or scheme to steal the automobiles in the charged thefts.

[18] The prosecution bears the burden of proving that evidence of a defendant's prior bad act is being admitted for a purpose other than to show mere propensity. *Arambula-Ruiz*, 987 F.2d at 602-03. Thus, the prosecution "must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). The prosecution here failed to articulate in any manner how the evidence of Palisoc's past theft was linked to the current offenses in a common plan or scheme. The simple occurrence of a prior auto theft by the same defendant does nothing to show that there existed a scheme or plan to commit the later charged

offenses. Thus, the evidence was improperly admitted on this ground.

d. Motive

[19] Motive is defined as "the reason that nudges the will and prods the mind to indulge the criminal intent." *Beechum*, 582 F.2d at 912 n.15 (citation omitted). Evidence relevant to establishing motive must do more than show a general propensity to commit a particular *crime*; rather the evidence must be "relevant to establish an element of the offense that is a material issue." *United States v. Brown*, 880 F.2d 1012, 1014-15 (9th Cir. 1989). For example, the defendant's prior bad act may aid in proving that the charged act occurred, the identity of the actor, or the actor's requisite mental state. *Id.* (citation omitted).

[20] Again, the prosecution failed to articulate, either to the trial court or to this court, the chain of inferences linking Palisoc's commission of the prior theft to his commission of the charged thefts. Absent some showing by the prosecution as to how the prior theft motivated Palisoc to commit the later thefts, it was inappropriate for the trial court to find that the evidence was relevant to Palisoc's motive.

[21] The trial court cited to *United States v. Clark*, 988 F.2d 1459 (6th Cir. 1993), in rendering its order. In *Clark*, the court admitted evidence of the defendant's prior car theft activities on the ground that they established his motive. *Clark*, 998 F.2d at 1465. However, *Clark* is clearly distinguishable from the instant case because the defendant in that case was charged with murder, and it was his effort to prevent the deceased from testifying about his prior thefts that led to the killing. Thus, the prior bad act evidence was offered to prove the identity of the actor. Nothing in the commission of the August 10th theft appears to relate to the commission of any of the later charged thefts. Therefore, the prior bad act evidence does not shed any light on Palisoc's motives.

2. Similarity

[22] Finding that the evidence of the prior theft was relevant for intent purposes, we must now turn to the second prong of the test for admissibility under Rule 404(b). The prosecution must have shown that the prior theft and the charged thefts were sufficiently similar so that evidence of the prior theft would be helpful in establishing the defendant's intent to commit the current offenses. *See Arambula-Ruiz*, 987 F.2d at 603 (recognizing that although similarity is not always required for admissibility under Rule 404(b), it is necessary to prove identity of intent).

[23] Examining the facts of the August 10th theft, testimony revealed that Palisoc stole the car from a residential garage during early morning hours. He neither knew the owner nor had the owner's permission to take the car. The early hour in which the car was taken and the fact that it was removed from outside of someone's home are factors which indicate that Palisoc unlawfully took the vehicle with the intent of depriving the owner of possession. Moreover, an officer testified that when he pulled Palisoc over in the stolen pickup he saw a screwdriver on the dash. Although it appears that Palisoc was able to start the car because the keys had been left inside, the fact that Palisoc was in possession of the screwdriver further evidenced his intent to deprive the owner of possession on that occasion. When approached by police, Palisoc fled, eventually crashing and abandoning the car. His flight and abandonment reveals his knowledge that he was in possession of a stolen vehicle.

[24] The charged thefts share this fact pattern. Testimony revealed that Palisoc stole both the 1996 Sentra and 1990 Toyota under similar circumstances, approaching a residential home late at night or in the early hours of the morning, and using a screwdriver to pop the ignition and start the car. In none of these

cases did Palisoc know or have the permission of owners to use the vehicles. Palisoc was chased in the third vehicle, a 1992 Sentra, and eventually crashed and abandoned the car. Because the charged and uncharged thefts are similar with respect to the facts that shed light on Palisoc's intent, evidence of the prior theft is helpful in establishing the defendant's intent to commit the current offenses.

3. Sufficiency

[25] The third prong that must be satisfied for admissibility under Rule 404(b) is sufficiency of the evidence. We first note that although Palisoc was acquitted of the August 10th theft, the prosecution may still make a showing that there is sufficient evidence that Palisoc was the perpetrator of that prior offense. Acquittal means that a jury found there was reasonable doubt as to whether Palisoc committed the August 10th theft. However, the admission of evidence for Rule 404(b) purposes does not require proof beyond a reasonable doubt. The prosecution only needs to show that a jury could reasonably conclude that the act occurred and the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689, 108 S. Ct. 1496, 1501 (1998). Because admissibility under the sufficiency prong of the *Evaristo* test is governed by a lower standard than that required for a conviction, the prior acquittal of Palisoc does not preclude the court from admitting evidence of that theft for Rule 404(b) purposes. *See Dowling v. United States*, 493 U.S. 342, 348, 110 S. Ct. 668, 672 (1990).

[26] The focus is on whether the prosecution can show that a jury could reasonably conclude both that the August 10th theft occurred and that Palisoc was the thief. *See Huddleston*, 485 U.S. at 689, 108 S. Ct. at 1501. The People provided one witness and three officers who each testified that a theft of a Toyota pickup truck occurred on August 10th and that they saw a photo ID of Palisoc in the front of the stolen

pickup when the vehicle was recovered. Moreover, two of the officers identified Palisoc as the person they saw driving the stolen truck and fleeing from police. The testimony of these four witnesses satisfies the sufficiency prong of the *Evaristo* test. *See Evaristo*, 1999 Guam 22 at ¶ 15 (finding that the testimony of two people that witnessed the prior bad act and identified the defendant as the perpetrator was sufficient evidence to satisfy this prong of the test); *see also Hinton*, 31 F.3d at 823 (noting that the testimony of one witness, even if uncorroborated, is sufficient evidence to satisfy the test).

4. Proximity

[27] The final prong of this four part test, proximity in time, looks to the relative gap between the prior bad act and the charged crimes. Courts have routinely declined to adopt a rigid rule that would act to freeze dates on a time line for purposes of admissibility. *Hadley*, 918 F.2d at 851. Here, approximately eight months spanned the time between the August 10th theft and the last of the charged thefts. We find that eight months is not too remote in time for the admission of Rule 404(b) evidence. *See id.* (allowing evidence of a prior bad act that was over ten years old); *see also United States v. Hinton*, 31 F.2d 817, 823 (9th Cir. 1994) (holding that two years is not too remote in time).

B. Rule 403

[28] Under Rule 403, even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." 6 GCA § 403. The trial court's balancing under Rule 403 is reviewed for an abuse of discretion. *Evaristo*, 1999 Guam 22 at ¶ 6; *Arambula-Ruiz*, 987 F.2d at 603.

[29] As discussed above, the prior bad evidence is probative of Palisoc's intent to commit the charged thefts. While the use of prior bad act evidence is prejudicial, the issuance of the proper limiting instruction can prevent that prejudice from being unfair. *Evaristo*, 1999 Guam 22 at ¶ 17 ("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."); *see also Hinton*, 31 F.3d at 823. The trial judge here instructed the jury on the limited use of the Rule 404(b) evidence, restricting its consideration to proving motive, intent, and plan. However, the limiting instruction was issued only in the court's general charge to the jury. No instruction was provided to jurors at the time the evidence was being admitted, directing them as to the proper and improper purposes for which the prior theft could be considered. We take this opportunity to emphasize that an instruction to the jury limiting the use for which the evidence can be considered should be given both at the time the evidence is offered and during closing jury instructions prior to jury deliberation.

[30] Nevertheless, the lower court did issue a limiting instruction. The court also considered proper factors when considering the admissibility of Palisoc's prior theft, and expressly weighed the probative value of the evidence against the danger of unfair prejudice, finding that the balance favored admissibility. In light of these safeguards, we find no abuse of discretion by the trial court in its admission of Palisoc's prior bad act pursuant to Rule 403.

C. Harmless error

[31] The trial court abused its discretion in admitting evidence of Palisoc's prior theft to show identity, common plan or scheme, and motive, but properly admitted such evidence with respect to intent.

Consequently, the trial court erroneously instructed the jury to consider the evidence for both proper and improper purposes. However, non-constitutional errors by the trial court only require reversal if "it is more probable than not that the erroneous admission of the evidence materially affected the jurors' verdict." *Arambula-Ruiz*, 987 F.2d at 605 (internal quotations omitted). If "other, properly admitted evidence of the defendant's guilt is overwhelming," then it is more likely than not the erroneous admission did not materially affect the jurors' verdict. *Ezzell*, 644 F.2d at 1306.

[32] The prosecution presented three witnesses that participated in the car thefts with Palisoc. Each provided eyewitness testimony identifying Palisoc as the person that stole the 1996 Nissan Sentra and 1990 Nissan pickup truck. Each of these witnesses also testified that Palisoc was the person who set fire to the 1990 Nissan pickup. Two other witnesses placed Palisoc in a third stolen car, identified as a green 1992 Nissan Sentra. These witnesses testified that when they saw Palisoc with the car, it was evident the ignition had been tampered with because wires were visibly hanging from it. Palisoc abandoned the car after being chased by one of the witnesses.

[33] The evidence above, linking Palisoc to each of the convicted offenses, is overwhelming. Moreover, the instructions did include a proper purpose for which the prior acts could be used. Finally, Palisoc's counsel made no objection to the jury instructions. Given these circumstances, we are not convinced that the trial court's improper admission of the evidence and subsequent limiting instruction materially affected the jury's verdict. *See United States v. Johnson*, 27 F.3d 1186, 1194 (6th Cir. 1994); *see also United States v. Townsend*, 924 F.2d 1385, 1416 (7th Cir. 1991) (finding harmless error by the trial court despite a jury instruction that permitted consideration for proper and improper Rule 404(b) purposes).

Thus, we find the trial court's errors were harmless. However, we take this opportunity to echo the concern expressed by the Sixth Circuit in *Johnson*, wherein the court stated:

> The cases in this and other circuits reveal a remarkable willingness in trial courts to readily admit, and in appellate courts to readily approve, other acts evidence without any clear articulation of the specific rationale justifying its admission. To apply Rule 404(b) fairly, the district court must carefully identify, in its instructions to the jury, the specific factor named in the rule that is relied upon to justify admission of the other acts evidence, explain why that factor is material, and warn the jurors against using the evidence to draw the inferences expressly forbidden in the first sentence of Rule 404(b).

Johnson, 27 F.3d at 1194.

D. Consecutive sentencing

[34] The next issue appealed by Palisoc is the trial court's imposition of consecutive sentencing. Specifically, Palisoc argues that the trial court erred in ordering consecutive sentences for his convictions for theft and theft by receiving, and arson and criminal mischief. Palisoc asserts that consecutive sentencing of these crimes violates his rights against double jeopardy.

[35] The Double Jeopardy clause, made applicable to Guam through the Organic Act, precludes courts from imposing multiple punishments for the same offense. 48 U.S.C. § 1421b(d) (1950); *People v. San Nicolas*, 2001 Guam 4, ¶¶ 8, 9. A defendant's claim of a double jeopardy violation is a question of law reviewed *de novo*. *San Nicolas*, 2001 Guam 4 at ¶ 8.

[36] Determining whether a court can punish a defendant under two distinct statutory provisions for offenses arising out of a single act or transaction is a two step analysis. First, the court must look to the legislative branch to determine whether multiple punishments are authorized. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436 (1980). If the legislature has expressly authorized multiple

punishments, the analysis ends. However, absent authorization by the legislature, a presumption arises that the same offense cannot be punished under two separate statutory provisions. *Id.* at 691-92, 100 S. Ct. at 1437-38 ("The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes."). The court must then take the second step in its analysis and employ *Blockburger* to determine whether the two statutes in effect punish the same offense. The test, as set forth in *Blockburger* and as adopted in our jurisdiction in *San Nicolas*, states "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932); *San Nicolas*, 2001 Guam 4 at ¶ 11. If the same offense is in fact being punished under two separate statutory provisions, then there arises a double jeopardy violation.

1. Theft and Theft by Receiving

[37] We first review the trial court's consecutive sentencing of theft of a motor vehicle and theft by receiving a motor vehicle. Title 9 GCA § 43.15 (1996) expressly states that "[c]onduct denominated theft in this Chapter constitutes a single offense." Palisoc argues that this is a clear expression of the legislature's intent that only a single crime of theft may arise out of a single act or transaction. In the face of such language, Palisoc asserts that his two convictions under two separate sections of Chapter 43 were improper, and asks this court to reverse the convictions or strike the sentences he received on those charges.

[38] The language of section 43.15 is derived from Model Penal Code section 223.1(1). A review of the commentary accompanying the MPC section reveals that the purpose behind consolidation of thefts was to aid prosecutors in the *charging* of theft offenses. Because of the technical distinctions that existed between various types of theft offenses, prosecutors were forced to pre-determine precisely which means a defendant utilized to misappropriate property. A defendant, in turn, would seek an acquittal by arguing that "he did not misappropriate the property by the means alleged but by some other means . . . ." MODEL PENAL CODE AND COMMENTARIES § 223.1 cmt. (American Law Inst. 1980) (hereinafter "MPC"). In an effort to avoid such an anomaly, thefts were consolidated into one offense, allowing prosecutors to charge defendants with "theft" generally and then prove the theft was committed by any number of means. *See* 9 GCA § 43.15 ("An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under [Chapter 43], notwithstanding the specification of a different manner in the accusatory pleading, subject only to the power of the court to ensure fair trial . . . ."); MPC § 223.1 cmt.

[39] While the primary purpose of consolidation was to avoid the form and procedural problems encountered in charging a defendant with a theft offense, "[c]onsolidation also has the consequence favorable to the defense by precluding conviction of both [theft and theft by receiving] for the same transaction." MPC § 223.6 cmt. "If the prosecution can prove the requisite state of mind to deprive the true owner of the property, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired the goods from another person who committed the act of taking." *Id.* Implicit in this reasoning is the notion that a defendant found to be in possession of stolen property can be either

the thief or the receiver, but not both.

[40] Guam's theft statute, set forth in Title 9 GCA § 43.30, and theft by receiving statute, set forth in Title 9 GCA § 43.50, are based on Model Penal Code sections 223.2 and 223.6 respectively. Pursuant to section 43.30, "[a] person is guilty of *theft* if he . . . exercises unlawful control over, movable property of another with the intent therein to deprive him thereof." 9 GCA § 43.30. According to the comments that accompany MPC § 223.2, the phrase "exercises unlawful control" is intended to encompass the various means of securing dominion over the property of another, *including* receiving, retaining, and disposing. MPC § 223.3 cmt. Thus, each of the three acts prohibited by the receiving statute are already punished within the theft section. MPC § 223.6 cmt. ("Analytically, the receiver does precisely what is forbidden by Section 223.2(1) - namely, he exercises unlawful control over the property of another with a purpose to deprive.").

[41] Because identical conduct is prohibited under both statutes, it would seem that theft and theft by receiving are intended to reach distinct wrongdoers. In interpreting similar federal statutes, the U.S. Supreme Court reasoned that its receiving statute "was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. . . . [W]e think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Heflin v. United States*, 358 U.S. 415, 419-20, 79 S. Ct. 451, 454 (1959). Several states follow the same logic in interpreting their respective theft statutes, finding that in enacting a receiving statute, the legislature:

> [I]ntended to reach a distinct group of wrongdoers. The class includes those persons who receive, retain, or dispose of property received from another person with the knowledge or reasonable belief that the property has been stolen. The legislative intent was not to expand the offense of theft, but to create a separate crime.

People v. Jackson, 627 P.2d 741, 746 (Colo. 1981) (citing to *Milanovich v. United States*, 365 U.S. 551, 81 S. Ct. 728 (1961)); *see also People v. Jaramillo*, 548 P.2d 706, 709, 129 Cal. Rptr. 306, 309 (1976) (applying this reasoning in reversing dual convictions for theft and theft by receiving of a motor vehicle); *Thomas v. State*, 413 S.E.2d 196, 197 (Ga. 1992); *Pierce v. State*, 627 P.2d 211, 219 (Alaska Ct. App. 1981); *Smith v. State*, 52 N.E. 826, 828 (Ohio 1898); *Commonwealth v. Dellamano*, 469 N.E.2d 1254, 1255 (Mass. 1984). *But see State v. Sardeson*, 437 N.W.2d 473, 481 (Neb. 1989) (refusing to rely on *Heflin* or *Milanovich* because those cases involved issues of federal statutory construction); *State v. Tapia*, 549 P.2d 636, 638 (N.M. Ct. App. 1976).

[42] We agree with this line of cases and find that a defendant cannot be convicted of both theft and theft by receiving because one who is a thief cannot be also be a receiver. *Milanovich*, 365 U.S. at 553-54, 81 S. Ct. at 729; *Jaramillo*, 548 P.2d at 709, 129 Cal. Rptr. at 309 ("one may not be convicted of stealing and of receiving the same property."); David J. Marchitelli, *Participation in Larceny or Theft as Precluding Conviction for Receiving or Concealing the Stolen Property*, 29 A.L.R. 5th 59, §§ 3, 57-62 (1995). Under this rule, Palisoc's dual conviction would be in error, not because the same offense is being punished twice under two separate statutes in violation of double jeopardy, but because the two statutes are intended to reach two distinct groups of wrongdoers and thus the dual convictions are inconsistent.

[43] The trial court erred in failing to instruct the jury that it could not return a verdict of guilty for both the theft and theft by receiving charge. Although Palisoc made no request for such an instruction and did not raise an objection with respect to this error, it was the duty of the court to give such an instruction *sua sponte*. *See United States v. Gaddis*, 424 U.S. 544, 550, 96 S. Ct. 1023, 1027 (1976) ("If . . . the District Judge is satisfied that there is sufficient evidence to go to the jury upon both counts, he must . . . instruct the members of the jury that they may not convict the defendant for both robbing the bank and for receiving the proceeds of the robbery."); *see also People v. Black*, 271 Cal. Rptr. 771, 773, 222 Cal. App. 3d 523, 525 (App. Ct. 1990). Moreover, Palisoc's failure to object will not preclude the court from recognizing plain error. *See McCullough v. United States*, 403 F.2d 1013, 1015 (9th Cir. 1968). However, where, as here, the evidence supporting the taking conviction is overwhelming but no evidence is presented to support the receiving conviction, the court's error can be fully corrected by reversal of only the receiving conviction. *Gaddis*, 424 U.S. at 549, 96 S. Ct. at 1027.

2. Arson and Criminal Mischief

[44] We now consider whether Palisoc may be consecutively sentenced for his arson and criminal mischief convictions. Palisoc argues that Title 9 GCA § 1.22(d) (1993) similarly expresses the legislature's intent that the violation of these two statutory provisions only give rise to a single offense. We disagree. Section 1.22(d) reads:

> [A defendant] may not . . . be convicted of more than one offense if . . . the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct . . . .

9 GCA § 1.22(d). In determining whether two statutes are general/specific counterparts of one another, the court's focus lies on whether the two statutes "seek to redress the same conduct." *State v. Richie*, 960 P.2d 1227, 1242 (Haw. 1998).

[45] Arson, as defined in Title 9 GCA § 34.30 (1996), requires proof that a person "starts a fire or causes an explosion, whether on his own property or another's . . . in reckless disregard of a risk that his conduct will damage or destroy the property of another." 9 GCA § 34.30(2). Criminal mischief, as defined in Title 9 GCA § 34.50(d) (1996), requires proof that a person "intentionally damages the motor vehicle of another." 9 GCA § 34.50. The focus of the criminal mischief statute is to punish the damaging of another's *motor vehicle*. In contrast, the focus of the arson statute is limited to punishing damage caused by *fire or explosion*. Since the "main thrust" of the criminal mischief statute differs from that of the arson statute, the two are not general/specific counterparts of one another. *See Richie*, 960 P.2d at 1242.

[46] Moreover, the elements of these offenses are distinct. Since criminal mischief can occur without means of a fire or explosion, then it is not a particularized version of arson. *See People v. Meyer*, 952 P.2d 774, 778 (Colo. Ct. App. 1997). Likewise, because arson can occur without causing damage to a motor vehicle, it is not a particularized version of criminal mischief. Arson and criminal mischief do not fall within the purview of section 1.22(d). Thus, we lack any expression by the legislature with respect to punishing arson and criminal mischief as separate and distinct offenses. We must therefore turn to *Blockburger* to determine whether the two statutes are punishing the same offense.

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[47] Reiterating the test set forth in *Blockburger*, two statutes can be punished separately if "each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182. Arson requires the prosecution to show that the defendant *started a fire*, an element not required to prove criminal mischief. On the other hand, criminal mischief requires proof that a *motor vehicle was damaged*, an element not necessary for the People to prove their charge of arson. Thus, each statute requires the proof of an additional fact that the other does not - arson requires proof that a fire was started and criminal mischief requires proof that a motor vehicle was actually damaged. *Cf. United States v. Karlic*, 997 F.2d 564, 571 (9th Cir. 1993) (finding that consecutive sentences imposed for use of explosive to commit a felony and for malicious damage to property by use of an explosive did not violate double jeopardy); *United States v. Atcheson*, 94 F.3d 1237, 1247 (9th Cir. 1996) (upholding consecutive sentencing for convictions under two separate statutes because one statute required proof of threat or force, but not proof that the defendant possessed a weapon, and the other statute required proof that the defendant used or carried a weapon, but not proof that the defendant actually used threat or force). Under the *Blockburger* test, the statutes punishing arson and criminal mischief are punishing separate offenses. Therefore, a court can impose separate sentences for a single act or transaction that violated both statutes without running afoul of double jeopardy.

IV.

[48] The trial court erred in admitting the evidence for purposes of establishing identity, common plan or scheme, and motive. However, in light of the overwhelming evidence of Palisoc's guilt, we find the trial

court's error was harmless. The trial court did not abuse its discretion in admitting evidence of Palisoc's prior theft to establish Palisoc's intent to commit the current thefts. As an element of the offense that the prosecution bears the burden of proving, intent was a material issue. Therefore, the trial court's ruling to admit the prior bad act evidence is **AFFIRMED**.

[49] With regards to Palisoc's sentencing, we **AFFIRM** the trial court's imposition of consecutive sentences for arson and criminal mischief. However, Palisoc's dual convictions for the crimes of theft and theft by receiving were in error. Therefore, the convictions for theft of the 1996 gold Nissan Sentra and 1990 red Nissan pickup are **AFFIRMED**. However, the convictions for theft by receiving with respect to those same vehicles are **REVERSED** and the sentences thereunder vacated. The case is **REMANDED** for re-sentencing consistent with this opinion.