IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

ROBERT EDWARD CAMPBELL,
Defendant-Appellant

Supreme Court Case No.: CRA05-006
Superior Court Case No.: CF 0518-03

OPINION

Filed: October 24, 2006

Cite as: 2006 Guam 14

Appeal from the Superior Court of Guam
Argued and submitted on July 5, 2006
Hagåtña, Guam

For Defendant-Appellant:
George N.P. Valdes, *Esq.*
Assistant Alternate Public Defender
Alternate Public Defender
Suite 902 Pacific News Bldg.
238 A.F.C. Flores St.
Hagåtña, GU 96910

For Plaintiff-Appellee:
Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
General Crimes Div.
287 W. O'Brien Dr.
Hagåtña, GU 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellant Robert Edward Campbell appeals his conviction by a jury of six counts of First Degree Criminal Sexual Conduct (As a First Degree Felony), six counts of Second Degree Criminal Sexual Conduct (As a First Degree Felony), and one count of Third Degree Criminal Sexual Conduct (As a Second Degree Felony). Campbell argues that: (1) there was insufficient evidence to uphold each conviction regarding minor victim J.L. because there was evidence that the alleged crimes did not occur on the dates as specified in the indictment; (2) there was insufficient evidence that the minor victims N.L.N., A.M., and J.L. were under the age of fourteen, and that minor victim B.S. was at least fourteen but less than sixteen years of age, at the time of the offenses; (3) he received ineffective assistance of counsel due to counsel's failure to move for judgment of acquittal at the close of all the evidence and after the jury verdict of guilty was returned; and (4) the trial court erred in denying his motion for judgment of acquittal at the close of the People's case-in-chief.

[2] We hold, first, that while there was no specific evidence that the acts against J.L. occurred during the time frame alleged in the indictment, there was sufficient evidence that the acts occurred in the year 2001, and such evidence is sufficient to uphold the convictions regarding J.L. Second, we hold that each victim's testimony of her age is sufficient to sustain the conviction. Third, we hold that because the case was properly submitted to the jury for its consideration, Campbell suffered no prejudice and therefore, his claim of ineffective assistance of counsel fails. Finally, we find no error in the trial court's denial of Campbell's motion for judgment of acquittal. Accordingly, we affirm.

I.

[3] This criminal case arises from Campbell's alleged criminal sexual offenses involving four female minors: J.L., N.L.N., A.M., and B.S.

[4] The People filed a Magistrate's Complaint on October 29, 2003 at the Superior Court of Guam. On November 6, 2003, the grand jury indicted Campbell on three charges of Criminal Sexual Conduct. The case went to trial. At the close of the People's case-in-chief, Campbell's trial counsel moved for a judgment of acquittal, arguing that the People failed to provide sufficient evidence for any reasonable jury to convict on the charges alleged. The trial court denied the motion. The motion was not renewed at the close of all the evidence.

[5] The jury returned a verdict of guilty on all counts[1] and charges submitted to it, to wit:

> FIRST CHARGE
>
> First Count
>
> On or about October 16, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on N.L.N. (DOB: 11-05-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).
>
> Second Count
>
> On or about October 16, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on A.M. (DOB: 11-27-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).
>
> Third Count
>
> On or about October 19, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on N.L.N. (DOB: 11-05-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).
>
> Fourth Count
>
> On or about the period between June 1, 2001 to July 31, 2001, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).

[1] Count 2 of Charge 3, Third Degree Criminal Sexual Conduct(As a Second Degree Felony), was subsequently dismissed with prejudice.

Fifth Count

On or about the period between June 1, 2001 to July 31, 2001, but on a date different from that alleged in the Fourth Count above, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by causing his finger to enter the vagina of J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).

Sixth Count

On or about the period between June 1, 2001 to July 31, 2001, but at a time different from that alleged in the Sixth Count (sic) above, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.15(a)(1) and (b).

SECOND CHARGE

First Count

On or about October 16, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact with another, to wit: by causing his mouth to touch the vagina of N.L.N. (DOB: 11-05-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

Second Count

On or about October 16, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact with another, to wit: by causing his mouth to touch the vagina of A.M. (DOB: 11-27-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

Third Count

On or about October 19, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact with another, to wit: by causing his mouth to touch the vagina of N.L.N. (DOB: 11-05-89), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

Fourth Count

On or about the period between June 1, 2001 to July 31, 2001, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact, to wit: by causing his mouth to touch the vagina of J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

Fifth Count

On or about the period between June 1, 2001 to July 31, 2001, but on a date different from that alleged in the Second Charge Fourth Count above, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact, to wit: by causing his finger to touch the vagina of J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

> Sixth Count
> On or about the period between June 1, 2001 to July 31, 2001, but at a time different from that alleged in the Second Charge Sixth Count (sic) above, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual contact, to wit: by causing his month to touch the vagina of J.L. (DOB: 12-29-90), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).
>
> THIRD CHARGE
> First Count
> On or about October 16, 2003, in Guam, ROBERT EDWARD CAMPBELL, did intentionally engage in sexual penetration with another, to wit: by performing cunnilingus on B.S. (DOB: 09-30-89), who is at least fourteen (14) years of age and less than sixteen (16) year of age, in violation of 9 GCA §§ 25.25(a)(1) and (b).

Defendant-Appellant's Excerpts of Record ("ER"), at 5-8 (Indictment, Nov. 6, 2003).

[6] Campbell's trial counsel did not move for a judgment of acquittal after the return of the guilty verdict. The trial court entered the Judgment on the docket on June 2, 2005.[2] Campbell's appeal followed.

II.

[7] We have jurisdiction over an appeal from a final judgment of conviction pursuant to 48 U.S.C. 1424-1(a)(1), 7 GCA §§ 3107 and 3108 (2005), and 8 GCA §130.15(a) (2005).

III.

A. Sufficiency of the Evidence: The Date of the Alleged Crime Against J.L.

[8] The first issue we address is whether there exists sufficient evidence to support the jury's conviction of charges regarding J.L., in particular, whether there was evidence that such acts occurred "[o]n or about the period between June 1, 2001 to July 31, 2001." ER, at 5-8 (Indictment, Nov. 6, 2003). The gist of Campbell's argument under his claim of insufficiency of the evidence regarding the dates as alleged in the indictment is that there was a failure of proof – what he terms

[2] The Judgment does not refer to the jury's conviction of six counts of the second charge of Second Degree Criminal Sexual Conduct (As a First Degree Felony). We presume this is because, pursuant to *People v. Moran*, 463 P.2d 763 (Cal. 1970), the conviction of six counts of First Degree Criminal Sexual Conduct (As a First Degree Felony) is controlling over the lesser-included charges of Second Degree Criminal Sexual Conduct.

a variance in the evidence – because the indictment alleges that the offenses occurred in the period of June 1 to July 31, 2001, whereas the trial evidence, including the stipulation of fact, established that the offense occurred in June of 2002.

[9] Claims of error based on variance are treated as an attack on the sufficiency of the evidence. *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986) (treating a variance as "one form of challenge to the sufficiency of the evidence"); *United States v. Messino*, 382 F.3d 704, 709 (7th Cir. 2004) ("Claims of fatal variance, such as this one, are treated as an attack on the sufficiency of the evidence."). Whether characterized as a question of variance or sufficiency of the evidence, the issues are the same. *See, e.g.*, *United States v. Arbelaez*, 719 F.2d 1453, 1457-58 (9th Cir. 1983).

1. Standard of Review Governing Sufficiency of the Evidence

[10] The inquiry on review of the sufficiency of the evidence to support a criminal conviction is "whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Maysho*, 2005 Guam 4 ¶ 8 (citing *People v. Guerrero*, 2003 Guam 18 ¶ 13). The evidence is sufficient to support a conviction if, in reviewing the evidence in the light most favorable to the People, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. *Maysho*, 2005 Guam 4 ¶ 8 (citing *Guerrero*, 2003 Guam 18 ¶13); *see also United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984); *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998). "This is a highly deferential standard of review." *Sangalang*, 2001 Guam 18 ¶ 20 (citing *Reyes*, 1998 Guam 32 ¶ 7).

[11] Campbell failed to object to any evidence or testimony admitted which varied from the dates as alleged in the indictment. By failing to object to evidence of acts occurring outside of June 1 to July 31, 2001, Campbell has waived this allegation of error. *See Hobson v. State*, 495 N.E.2d 741, 746 (Ind. Ct. App. 1986) (where defendant claimed insufficiency of evidence because of *two year variance* in date alleged and date proved at trial, the trial court held: "By failing to object to this

evidence at trial, [the defendant] has [] waived this allegation of error."). Thus, we review the sufficiency of the evidence for plain error. *United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979). We have stated that under plain error review, we "will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) a miscarriage of justice would otherwise occur." *People v. Jones*, 2006 Guam 13 ¶ 24 (citing *Jung*, 2001 Guam 15 ¶ 50); *see also* 8 GCA § 130.50 (2005).

2. Variance

[12] "The general rule [is] that allegations and proof must correspond . . . ." *Berger v. United States*, 295 U.S. 78, 82 (1935); *see also United States v. Stirone*, 361 U.S. 212 (1960). The purpose of such rule is twofold: it ensures that a defendant is given proper notice of the charges so that he may present a defense, and it protects a defendant against the possibility of being prosecuted again for the same offense. *See Berger*, 295 U.S. at 82. As explained by the United States Supreme Court:

> The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Id.

[13] With respect to a variance between the date of the offense as alleged and the date of the offense as proved at trial, a number of jurisdictions hold that while time is an important part of an indictment for sexual offenses, it is not generally considered a substantive part of the charging document. *See State v. McGriff*, 566 S.E.2d 776, 780 (N.C. Ct. App. 2002); *Tingley v. State*, 549 So. 2d 649, 649-50 (Fla. 1989); *State v. Fears*, 659 S.W.2d 370, 374 (Tenn. Crim. App. 1983); *Marn v. People*, 486 P.2d 424, 427 (Colo. 1971); *Faulkner v. State*, 390 S.W.2d 754 (Tex. Crim. App. 1965); *Lear v. Commonwealth*, 77 S.E.2d 424, 427 (Va. 1953); *State v. Amy*, 223 P.2d 69, 71 (Cal.

Dist. Ct. App. 1950). Rather, "[t]ime is a material element of an offense only if made so by statute." *United States v. Laykin*, 886 F.2d 1534, 1543 (9th Cir. 1989).

[14] In this case, in order to prove First Degree Criminal Sexual Conduct, there must exist evidence of the following elements: (1) defendant engaged in sexual penetration with another; and (2) the victim is under fourteen (14) years of age. 9 GCA §25.15(a)(1) (2005).

[15] To prove Second Degree Criminal Sexual Conduct, there must exist evidence of the following elements: (1) defendant engaged in sexual contact with another; and (2) the other person is under fourteen (14) years of age. 9 GCA §25.20 (a)(2) (2005).

[16] A review of the above statutory sections reveals that time is in fact not a material element of the offense of First Degree Criminal Sexual Conduct (First Charge, Counts 4, 5, 6), nor is it a material element of the offense of Second Degree Criminal Sexual Conduct (Second Charge, Counts 4, 5, 6).

[17] Nonetheless, while time is not an element of criminal sexual conduct, a conviction may be attacked if the evidence at trial demonstrates that the date proved was not "reasonably near" the date alleged in the indictment. *People v. Atoigue*, DCA No. CR 91-95A, S.C. No. CF0023-91, 1992 WL 245628, at *7 (D. Guam App. Div. Sept. 11, 1992). The Appellate Division of the District Court of Guam has held, in applying Guam's criminal sexual conduct statute, that "[s]ince time is not an element of criminal sexual conduct (9 G.C.A. § 25.15(a)), 'it is sufficient if the evidence demonstrates *a date reasonably near* the date alleged in the indictment. · · · [P]roof of any date before the return of the indictment and within the statute of limitations is sufficient.'"[3] *Id.* at *7

[3] Here, we find that the proof presented at trial indicated dates that fell within the relevant statute of limitations, and before the return of the indictment. First, the dates proved at trial (the year 2001 and June of 2002) are dates prior to the return of the indictment. Second, J.L. was a minor who had not reached the age of consent – both in 2001 and 2002, and thus such dates fall within the statute of limitations. *See* 8 GCA § 10.15 (2005) (providing for a three-year statute of limitations after the minor reaches the age of consent). However, we must still overcome the requirement that the proved date, if a variance, is a date that is "within reasonable limits" or "reasonably near."

(emphasis added) (quoting *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986)). "As long as a defendant is neither surprised nor hampered in preparing his defense, there can be a variance between the dates proved at trial and those alleged in an indictment or information." *Tingley*, 549 So. 2d at 650; *see also United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997).

a. Stipulation re: Lease Agreement

[18] Campbell points this court to the evidence that the alleged acts occurred against J.L. two weeks "after she moved into Rosie's apartments." Appellant's Brief, at 12 (Mar. 9, 2006). Campbell then concludes that the only reliable and credible evidence presented at trial as to the date that J.L. and her mother moved into Rosie's Apartments is the lease agreement that indicates that the lease term began on June 1, 2002. Campbell then argues that, because the People stipulated to the admission of the lease agreement into evidence, the People "essentially agreed that [J.L.] moved into the complex on the date indicated on the lease." Appellant's Brief, at 12 (Mar. 9, 2006). As a result, Campbell argues, that the jury could not have found that the acts occurred as alleged in the indictment, which was one year earlier.

[19] However, an extensive review of the trial record reveals that the parties stipulated only to the *admission* of Defense Exhibits D and E, which were the lease agreements of J.L.'s mother with Rosie's Apartments complex. Transcript ("Tr.") at 45 (Jury Trial, Sept. 21, 2004). The parties did not, as Campbell argues, stipulate as to J.L.'s move-in date. The relevant dialogue between counsel and the trial court is as follows:

> Mr. Teker: Your Honor, Mr. Flores is present.
>
> The Court: Okay. Before we call him in, can we ask the Jury to come in, Mr. Cruz, please?
>
> Ms. Moton: Your Honor, we'll stipulate to the admission of the lease agreement and the fact that they moved in in June of 2002.

Mr. Teker: That being said, Your Honor, if they'll stipulate to that being admitted, then the evidence, all I would request at this time is that we publish it to the Jury and that we can excuse Mr. Flores.

The Court: Okay, very well.

Mr. Teker: And I do have the copies of two lease agreements that I gave to the government. And I guess we can mark this one as Defense Exhibit D, I think; and this would be E.

Ms. Moton: Your Honor, I think it would be more appropriate instead of including the entire lease agreement, just to prepare a written stipulation that they lived in Rosie's Apartment from June 2002 through whatever the lease agreement, the ending date is.

Mr. Teker: Well, I don't see – I don't see how that's any different than the lease agreement. But I mean, a stipulation that says that [J.L.] and her mother moved into Rosie's Apartment June 2nd, 2002.

Ms. Moton: June 1st, 2002?

Mr. Teker: June 1st, 2002. And that [J.L.] and her mother were there. Excuse me, Your Honor, just so I can peruse this for a second?

(Pause for Defense Counsel)

The Court: I can't keep the Jury waiting at the gates here, Counsel.

Mr. Teker: Yes, Your Honor, I apologize. Then I would just – they said they would stipulate to have those entered. I would just ask that those be entered at this time.

The Court: Call the Jury in.

(Pause for Jury to be Called)

The Marshal: Please rise for the Jury.

(Pause for Jury to be Seated)

The Marshal: Please be seated.

The Court: Welcome back, ladies and gentlemen of the Jury. We'll continue on with the Defense calling their witness. Mr. Teker?

Mr. Teker: Yes, Your Honor. The government – or, the Defense was going to call Mr. Flores. He's the Custodian for Calvo's and Rosie's Apartment. Your Honor, a stipulation has been entered into. We've

stipulated to admitting an exhibit into evidence; I think it's Defense Exhibits D and E. So, with that being said, Your Honor, I would like to publish that to the Jury. And if we could go ahead and excuse Mr. Flores outside?

The Court: Okay, ladies and gentlemen of the Jury, this is a stipulation – meaning an agreement – between the Prosecutor and Defense. And they're agreeing to allow a certain piece of evidence come in without any objections from both sides, and that would be the lease agreement to Rosie's Apartment. Is that correct?

Mr. Teker: That's correct, Your Honor.

The Court: And Mr. Flores is the building manager. And he's requesting the Court to release him because he was going to testify to the contents of the lease agreement. Right?

Mr. Teker: And then this is just the [J.L.] lease agreement.

The Court: Make them look at it.

Mr. Teker: Yes, Your Honor.

The Court: And that would be Defense Exhibit E and D. Okay, there being no objections, the Court is going to admit this into evidence.

Mr. Teker: Thank you, Your Honor. May I publish it to the Jury?

The Court: Yes, it may be published to the Jury. "Published" means we're going to show it to you. Okay? It's just like what we had published earlier in other matters. And Mr. Flores is excused.

Tr. at 44-46 (Jury Trial, Sept. 21, 2004).

[20] We find nothing in the record, inclusive of the dialogue above, to indicate that the parties stipulated that J.L.'s move-in date was June 1, 2002. Accordingly, Campbell's reliance on such purported stipulation, as the primary basis of his argument that a one-year impermissible variance exists in this case, is misplaced. Rather, the lease agreement and its contents, including the lease agreement date of June 1, 2002, is but another form of evidence presented to the jury for its consideration.

[21] Because our inquiry here today is whether, looking at the evidence in the light most favorable to the jury verdict, there exists sufficient evidence that the offense occurred on the dates as alleged in the indictment, we now turn to examine such evidence.

b. Evidence of acts occurring on or about the period between June 1, 2001 and July 31, 2001

[22] The charges pertaining to J.L. allege that the offenses occurred on or about the period between June 1, 2001 to July 31, 2001.

[23] Viewing in the light most favorable to the jury verdict, J.L. testified that the acts occurred about one or two weeks after she had moved into Rosie's Apartments. After refreshing her memory by reading her written statement to the police, J.L. testified that she had moved into the apartment either in 2000 or 2001. Also, the police statement was dated October 2003, and J.L. stated in such written statement that she met Campbell when she first moved into the apartment two years before, which would indicate that she moved into the apartment in 2001. J.L. further testified that the incident occurred when she was 10 or 11. Thus, this would have been either in 2000 or 2001.

[24] However, while we find that there was sufficient evidence that the offenses occurred in 2001, we are also faced with the fact that there exists no evidence that such offenses occurred in any particular month in 2001, including the months of June and July, as alleged in the indictment.

[25] Nonetheless, we find that no fatal variance exists in this case because evidence that the offense occurred some time in the year 2001 is a "date reasonably near" to June 1 to July 31, 2001. In other words, had there been proof that the offenses occurred, for example, in January 2001 or at the end of the year, December 2001, such variance measuring five or six months at the most has been held to be "reasonably near" enough to uphold a conviction. *See United States v. Covington*, 411 F.2d 1087, 1088 (4th Cir. 196) (six-month variance was not fatal); *United States v. Harrell*, 737 F.2d 971, 981 (11th Cir. 1984) (conviction was upheld where there was a variance of four to five months – specifically, alleged date in indictment was February, but evidence showed that the crime

was committed in the summer); *United States v. Odom*, 736 F.2d 104, 118 (4th Cir. 1984) (upholding conviction despite variance of one to two months).

[26] Moreover, we find that Campbell has failed to establish that he was substantially prejudiced as a result. "Variance in the proof is grounds for reversal only when it affects the defendant's 'substantial rights.'" *United States v. Flaherty*, 668 F.2d 566, 582 (1st Cir. 1981) (quoting *Berger*, 295 U.S. at 82); *see also United States v. Cina*, 699 F.2d 853, 858-59 (7th Cir. 1983) (holding that, where the defendant did not argue that the difference between the allegation and proof prejudiced his ability to provide a defense, the variance was harmless). Accordingly, under our plain error review of the sufficiency of the evidence in this case, we hold that sufficient evidence exists to support the jury's verdict of guilty as to Counts 4 through 6 of Charge 1, and Counts 4 through 6 of Charge 2.

[27] This result is consistent with case law in the area of child sexual abuse, where it is held that despite a lack of specific proof as to the date of the offense, a conviction may be upheld as long as the child victim is able to testify as to a general time period and, more importantly, the specific sexual acts which occurred, so as to allow the defendant to adequately prepare a defense and not incur surprise at trial.

[28] In *State v. Wood*, 319 S.E.2d 247, 249-50 (N.C. 1984), the child victim was unable to testify with any certainty as to the date that the sexual offenses occurred, and could only testify that it happened on a weekend some time before Memorial Day weekend and that she was still in school. Upholding the conviction, the court observed: "We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence." *Id.* at 249 (citing *State v. Effler*, 309 S.E.2d 203 (N.C. 1983); *see also State v. King*, 123 S.E.2d 486 (N.C. 1962); *State v. Sills*, 317

S.E.2d 379 (N.C. 1984)). Thus, the court held that "[n]onsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense." *Wood*, 319 S.E.2d at 249.

[29] Also, in *People v. Harp*, 798 N.Y.S.2d 235, 236 (N.Y. App. Div. 2005), the defendant claims that the prosecutor did not present proof of the specific dates of each individual act of sexual contact. However, the court found that "[a]ny inconsistencies or vagueness regarding dates, times and details of the victims' encounters with defendant did not render their testimony incredible as a matter of law." *Id.* Accordingly, the convictions were upheld.

[30] In addition, the cases relied upon by Campbell are distinguishable from the case at bar. In *Tsinhnahijinnie*, the main issue was not whether the date on the indictment was reasonably near to the date proved at trial, but whether there was sufficient evidence to prove the crime for which the defendant was indicted. *See Tsinhnahijinnie*, 112 F.3d at 992. Unlike the prosecutor in *Tsinhnahijinnie*, wherein he did not present evidence that the crime occurred on the dates stated in the indictment, the prosecutor in this case proved that the crime may have occurred on the dates stated in the indictment. Moreover, unlike the victim in *Tsinhnahijinnie*, who plainly testified that she did not remember sexual abuse occurring on the year stated in the indictment, we find that J.L. in this case testified that the incident possibly occurred on the year stated in the indictment. J.L. testified that the incident occurred when she was 10 or 11 years old. Thus, this would have been either in 2000 or 2001. Although there was some conflicting evidence that J.L. may have moved into the apartments in 2002, the duty to weigh the evidence lay within the jury. The important point is that the prosecutor in this case, unlike the prosecutor in *Tsinhnahijinnie*, presented evidence that showed that sexual abuse had occurred on the date stated in the indictment. Accordingly, we find that the jury weighed the evidence presented at trial and found beyond a reasonable doubt that the incident occurred in 2001.

[31] In *United States v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996), the evidence presented was without contradiction, that the defendant at all times, during the period in question, was locked up in one place, and the weapons were locked up in another place, both under government control. *Id.* Unlike *Casterline*, in which evidence was not contradicted and thus would have been clearly impossible for a jury to find against the defendant, this case has conflicting evidence that would have allowed the jury to decide which evidence to believe. First, J.L.'s statement to the police and her testimony during trial shows that the offenses occurred either in 2000 or 2001. Second, J.L. also testified that she did not remember the exact year and that it could have been in 2000, 2001, or 2002. Third, Officer Meno testified that J.L. told him she had moved into the apartment in 2002. Fourth, Campbell testified that he had met J.L. in March or April of 2002. Accordingly, while we find that there was evidence showing that the incident may have occurred in 2002, we also find that there was evidence showing that the incident possibly occurred in 2001, which is the year that was used in the indictment. Thus, similar to *Casterline* and *Tsinhnahijinnie*, the issue was not what a "reasonably near" date was, but whether there was sufficient evidence beyond a reasonable doubt—in this case, the jury found that there was—to prove that the sexual abuse occurred in 2001.

[32] Having found that there was sufficient evidence that the offenses occurred in the year 2001, that any variance in this case is immaterial, and that Campbell was not prejudiced by the lack of evidence in regards to a specific month in 2001, we now turn our discussion to another of Campbell's argument: whether the trial court failed to provide the jury with an instruction in regards to the definition of a stipulation of fact.

c. Jury instruction on the definition of stipulation

[33] Campbell argues that the trial court did not provide a jury instruction defining a stipulation of fact. Campbell believes that this lack of jury instruction contributed to the jury's confusion and its obvious disregard of the stipulated evidence. Campbell supports this contention by citing *United*

States v. Houston, 547 F.2d 104, 107 (9th Cir. 1976), in which the court found that when parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. We hold that while the jury may be so instructed, the trial court is not obligated to make such instruction, especially if the defense failed to request for such jury instruction. *See* 8 GCA § 90.19 (2005). "[N]o party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection." *See* 8 GCA § 90.19 (c). We find that Campbell not only failed to request for an instruction regarding the stipulation, but he also failed to object to the instruction given to the jury for lack of a definition of stipulation of fact. Therefore, we hold that Campbell cannot argue now that the jurors were confused in regard to the stipulated evidence because no instruction was ever made to the jury on the definition of what stipulation of fact is.

[34] Further, "when there is no objection to the jury instructions at the time of [the] trial, 'an appellate court' will review only for plain error." *Perez*, 1999 Guam 2, ¶ 21 (citing *United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995); *see also People v. Demapan*, 2004 Guam 24 ¶ 5; *People v. Jung*, 2001 Guam 15 ¶ 28. "Plain error is a highly prejudicial error affecting substantial rights." *Perez*, 1999 Guam 2 ¶ 21 (citing *United States v. Payne*, 944 F.2d 1458, 1463 (9th Cir. 1991)). "Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. " *Perez*, 1999 Guam 2 ¶ 21 (citing *Ponce*, 51 F.3d at 830). We find that the trial court's lack of instruction regarding the stipulation did not result in a miscarriage of justice because the jury was informed by the court regarding the definition of a stipulation of fact during trial. *See* Tr. at 45 (Jury Trial, Sept. 21, 2004) ("[L]adies and gentlemen of the Jury, this is a stipulation – meaning an agreement – between the Prosecution and Defense. And they're agreeing to allow a certain piece of evidence come in without any objections from both sides, and that would be the lease agreement to Rosie's Apartment."). In addition, 3F of the jury

instruction instructs the jury to consider evidence presented during the course of the trial, including "any facts to which all lawyers have agreed or stipulated" to. *See* Tr. at 13 (Jury Trial, Sept. 23, 2004) ("The evidence from which you are about to decide what the facts are, consist of: (1) sworn testimony of witnesses, both on direct and cross-examination regardless of who called the witness; (2) the exhibits which have been received into evidence; (3) any facts to which all the lawyers have agreed or stipulated; and (4) any judicially noticed facts."). Because the jury was aware of the stipulation of fact regarding the lease agreement and considered it as part of the evidence during its deliberation, we hold that there was no miscarriage of justice, nor was the integrity of judicial process compromised.

[35] Thus, Campbell's insufficiency of evidence in regards to J.L. is without merit. We find that there was sufficient evidence in the record that could reasonably support a finding of guilt beyond a reasonable doubt as to the charges regarding J.L.–First Charge (First Degree Criminal Sexual Conduct, Counts 4, 5, 6) and Second Charge (Second Degree CSC, Counts 4, 5, 6). First, as a threshold matter, we find that Campbell has waived his argument on this issue because of his failure to object to evidence of acts occurring outside of dates alleged in the indictment. Second, time is not a material element of First or Second Degree Criminal Sexual Conduct. Third, while there was no specific evidence that the acts against victim J.L. occurred during the time frame alleged in the indictment, there was sufficient evidence that the acts occurred in the year 2001, and such evidence is sufficient to uphold the convictions regarding victim J.L. Finally, we hold that Campbell failed to establish that his defense was hampered or that he was taken by surprise at trial because of the variance in evidence.

B. Sufficiency of the Evidence: Evidence of Age

[36] The next issue we address is whether there was sufficient evidence to support all charges wherein it is alleged that N.L.N., J.L., and A.M. were under the age of fourteen and B.S. was at least

fourteen but under the age of sixteen at the time of the offense. We hold that there was sufficient proof of the victims' ages.

[37] Guam law requires the People to prove every element of the crime beyond a reasonable doubt. *People v. Palisoc*, 2002 Guam 9 ¶ 12. To prove First Degree Criminal Sexual Conduct, the following relevant elements must be met: (1) the person engages in sexual penetration with the victim, and (2) the victim is under fourteen (14) years of age. 9 GCA § 25.15(a)(1). To prove Second Degree Criminal Sexual Conduct, the following relevant elements must be met: (1) the person engages in sexual contact with another, and (2) the other person is under fourteen (14) years of age. 9 GCA § 25.20(a)(1). To prove Third Degree Criminal Sexual Conduct, the following relevant elements must be met: (1) the person engages in sexual penetration with another person, and (2) the other person is at least fourteen (14) years of age and under sixteen (16) years of age. 9 GCA § 25.25(a)(1).

[38] Campbell contends that the element of age was not supported by sufficient competent evidence because the only evidence provided during trial was the testimony of each victim regarding her age, and there was no other evidence provided to support such testimony, such as a birth certificate, passport, driver's license, or other such documentation to establish their respective ages. Campbell argues that the People could have called the victims' parents (citing *State v. Hemmenway*, 120 N.W.2d 561, 565 (S.D. 1963), or the doctors who delivered each victim at birth to testify regarding the victims' respective ages (citing *State v. Palmberg*, 97 S.W. 566, 572 (Mo. 1906)). Although the courts in *Hemmenway* and *Palmberg* indicated that a parent's testimony or a doctor's testimony, respectively, was sufficient evidence to prove a victim's age, we find that neither of these courts indicated that a parent's or a doctor's testimony, in addition to a victim's testimony, is necessary to prove the victim's age.

[39] Campbell, citing *People v. Meraviglia*, 73 Cal. App. 402, 408 (1925), also contends that a victim's testimony regarding her age is sufficient if this fact is not disputed. Campbell contends that because his trial counsel disputed each victim's age by asking each victim for proof of her age other than just her testimony during the trial, the People was obligated to provide additional evidence that would have proved each victim's age. We note, however, that the *Meraviglia* court based its ruling on *People v. Elgar*, 178 P. 168 (Cal. Dist. Ct. App. 1918) and *People v. Pribnow*, 214 P. 475(Cal. Dist. Ct. App. 1923). In both of these cases, California's District Court of Appeal indicated that the defendant offered no testimony contradicting the testimony of a witness in regards to the victim's age. Similarly, Campbell in this case did not offer any testimony to contradict the testimony of each victim regarding her age. Therefore, we find that Campbell's merely asking each victim for a passport or a birth certificate and the victim's failing to carry such documents during trial do not contradict each victim's testimony of her age.

[40] Under Guam law, "direct evidence of one witness who is entitled to full credit is sufficient proof of any fact," except in some situations not relevant here. *People v. Muna*, No. CR94-00075A, 1996 WL 104532, at *4 (D. Guam App. Div. Mar. 6, 1996), *rev'd* on other grounds by *Guam v. Muna*, 110 F.3d 69, 1997 WL 143782 (9th Cir. Mar. 27, 1997) (unpublished memorandum opinion); 6 GCA § 2501 (2005). Specifically, 8 GCA § 25.40 (2005) provides the following: "the testimony of a victim need not be corroborated in prosecutions under" §§ 25.15, 25.20 and 25.25. *People v. Salas*, 2000 Guam 2 ¶ 28; *People v. Flores*, 2004 Guam 18 ¶ 31.

[41] Guam is not unique in taking this approach, because these Guam statutes and case law also are supported by other jurisdictions. For example, in *Barger v. State*, 587 N.E. 2d 1304 (Ind. 1992), the court stated that a victim's uncorroborated testimony is sufficient to convict a defendant in a child molestation case. *Id.* at 1308 (citing *Baxter v. State*, 522 N.E. 2d 362 (Ind. 1988)); *see also People v. Bolden*, 598 N.Y.S.2d 603, 605 (N.Y. App. Div 1993) ("The [victim's] testimony

regarding her date of birth was sufficient to establish that she was under the age of 11 at the relevant times testimony."); *Commonwealth v. Wright*, 799 N.E. 2d 1263, 1264-65 (Mass. App. Ct. 2003) (victim's testimony regarding her age, although equivocal, was sufficient to support conviction). *Cf. Gay v. Sheriff, Clark County*, 508 P.2d 89 1, 2 (Nev. 1973) (holding that a victim's statement regarding her age is insufficient unless it was made under oath).

[42] As we have just discussed, Guam law considers each victim's testimony, without corroborating evidence, to be sufficient to prove the age element beyond a reasonable doubt. Here, we find that each victim did indeed testify under oath as to her respective age and birth date. Accordingly, we hold that N.L.N, J.L., and A.M.'s testimony regarding their age was sufficient to meet the age element of First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct. We also hold that B.S.'s testimony was sufficient to meet the age element of Third Degree Criminal Sexual Conduct.

[43] Further, Campbell argues that the jury's confusion with how to determine age and its request for documents to prove the victims' ages illustrate insufficient evidence in regard to proof of age. We disagree with Campbell's conclusion and hold that the jury's inquiry does not prove insufficient evidence. Rather, the jury's inquiry merely shows that the jury was not clear on the jury instructions and, thus, requested for assistance in deciphering about 40 pages of instructions. In response to the jury's inquiry of (1) whether or not proof of the victim's testimony is enough and (2) whether or not it can have additional evidence or proof of their ages, the court responded with the following:

> The *testimony of the victim need not be corroborated* in prosecution of criminal sexual conduct. No corroboration of the victim's testimony is necessary if the victim is believed beyond a reasonable doubt.
>
> The evidence from which you are about to decide what the facts are consist of (1) the sworn testimony of the witnesses both on direct and on cross-examination regardless of who called the witness; (2) the exhibits; (3) any facts to which all layers have agreed or stipulated to; and (4) any judicially noted facts.

Tr. at 45-46 (Jury Trial, Sept. 27, 2004). Campbell's trial counsel did not object to these instructions. Based on these instructions, the jury went back to deliberations and found that based on the victim's testimony alone, without corroboration, the jury found beyond a reasonable doubt that the victims' ages met the element of age in the First, Second, and Third Degree Criminal Sexual Conduct charges.

[44] Accordingly, we hold that there was sufficient competent evidence that proved the victims' ages. Based on Guam law and the jury instructions that a testimony of a witness does not need to be corroborated, the jury found beyond a reasonable doubt that the ages of the victims met the age element of the crimes charged against Campbell.

C. Ineffective Assistance of Counsel: Failure to Renew the Judgment Notwithstanding the Verdict

[45] We next address whether trial counsel's failure to move for a judgment of acquittal at the close of all the evidence, and after the return of a guilty verdict, deprived Campbell of his right to effective assistance of counsel.

[46] The issue of "[w]hether a defendant has received ineffective assistance of counsel is a question of law." *People v. Root*, 1999 Guam 25 ¶ 11 (citing *People v. Quintanilla*, 1998 Guam 17 ¶ 8). However, if the inquiry turns "significantly on the facts of a particular case, the issue also becomes a question of fact." *Root*, 1999 Guam 25 ¶ 11 (citing *People v. Kintaro*, 1999 Guam 15 ¶ 10). "Appellant's claim of ineffective assistance of counsel [is] reviewed *de novo*." *Root*, 1999 Guam 25 ¶ 11 (citing *Quintanilla*, 1998 Guam 17 ¶ 8); *see also Ueki*, 1999 Guam 4 ¶ 5; *Perez*, 1999 Guam 2 ¶ 33.

[47] While an ineffective assistance of counsel claim may be heard on direct appeal, this court has previously ruled that it is more properly brought as a writ of habeas corpus because the trial record often lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what,

if any, prejudice resulted. *People v. Aguirre*, 2004 Guam 21 ¶ 36; *Ueki*, 1999 Guam 4 ¶ 5; *Root*, 1999 Guam 25 ¶ 14; *see also United States v. Quintero-Barraza*, 78 F.3d 1344, 1347 (9th Cir. 1995); *Perez*, 1999 Guam 2 ¶ 33. The inverse of this general rule is that the merits of an ineffective assistance claim may be appropriate for direct review if the record is sufficiently complete to make a proper finding. *Aguirre*, 2004 Guam 21 ¶ 36; *see also Ueki*, 1999 Guam 4 ¶ 5; *Root*, 1999 Guam 25 ¶ 14; *Quintero-Barraza*, 78 F.3d at 1347; *Perez*, 1999 Guam 2 ¶ 33.

[48] To prove ineffective assistance of counsel, the defendant must show, first, that the "counsel's performance was deficient," and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Root*, 1999 Guam 25 ¶ 12 (citing *Quintanilla*, 1998 Guam 17 ¶ 8); *see also Strickland v. Wash.*, 466 U.S. 668 (1984).

[49] However, we need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697. Rather, if an ineffectiveness claim may be disposed of on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

[50] To establish that defendant was prejudiced by counsel's ineffective assistance, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Quintanilla*, 1998 Guam 17 ¶ 15. "An appellant must affirmatively prove actual prejudice in order to support a claim for ineffective assistance." *Quintanilla*, 1998 Guam 17 ¶ 16. Most importantly for the case *sub judice*, a defendant suffers no prejudice for counsel's failure to renew a motion for a judgment notwithstanding the verdict where the case is properly submitted to the jury for its consideration in the first instance. *People v. Guerrero*, 2001 Guam 19 ¶ 20.

[51] In this case, Campbell's trial counsel moved for judgment of acquittal at the close of the People's case-in-chief. The trial court denied the motion. Counsel did not renew the motion at the close of all the evidence, or upon the return of the jury verdict. Campbell contends that the failure to renew such motion resulted in an ineffective assistance of counsel because the trial court was deprived of the opportunity to determine whether there was sufficient evidence presented to the jury that the acts against J.L. occurred on the dates as alleged in the indictment, particularly in light of the evidence of the lease agreement. He argues further that the trial court also lacked the opportunity to determine whether there was sufficient evidence presented to the jury regarding the age of each of the victims.

[52] In light of our holdings with respect to each of these evidentiary issues raised by Campbell, we are compelled to find that Campbell suffered no prejudice by counsel's failure to renew the motion for judgment of acquittal pursuant to 8 GCA §§ 100.10 and 100.30. In other words, because we find that there was sufficient evidence presented regarding the date of the acts against J.L., and further, that there was sufficient evidence presented regarding the age of each of the victims, the case was properly submitted to the jury for its consideration. As previously stated, where, as here, a charge is properly submitted to the jury, no prejudice may result by the failure of trial counsel to renew a motion for judgment notwithstanding the verdict. Accordingly, absent a showing of prejudice, Campbell's claim of ineffective assistance of counsel fails.

D. Trial Court's Failure to Reference Specific Evidence in Denying Motion for Acquittal at Close of People's Case-in-Chief

[53] Finally, we address whether the trial court erred in denying Campbell's motion for judgment of acquittal at the close of the People's case-in-chief, where the court failed to cite to specific evidence in the trial record to form its basis of denial. We find that the trial court's denial of Campbell's motion for judgment of acquittal was proper.

[54] Guam criminal procedure statutes provide in part the following language for motion for acquittal:

> The court on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

8 GCA § 100.10 (2005). Decisions made pursuant to this rule are reviewed *de novo*. *Jung*, 2001 Guam 15 ¶ 21 (citing *People v. Quinata*, 1999 Guam 6 ¶ 9); *People v. Cruz*, 1998 Guam 18 ¶ 8; *Root*, 1999 Guam 25 ¶ 4. "In conducting this review, courts apply the same test as that used to challenge the sufficiency of the evidence." *Jung*, 2001 Guam 15 ¶ 21 (quoting *Quinata*, 1999 Guam 6 ¶ 9); *Root*, 1999 Guam 25 ¶ 4; *see also Cruz*, 1998 Guam 18 ¶ 9. The standard of review for sufficiency of the evidence as discussed above, in *de novo*.

[55] Campbell first contends that the trial court erroneously denied the defense counsel's motion for judgment of acquittal because the trial court did not cite or make reference to any specific evidence that warrants a denial of the motion. However, we find that Campbell failed to cite any authority to support this contention. Because the trial court denied the motion after the People's case-in-chief, the trial court made its ruling based on the testimony of the People's witnesses: the four victims; the victims' friend Preciosa Petrus; and Guam Police Department officers Apuron, Lizama, and Dodd. In addition, the trial court also based its ruling on exhibits and materials admitted into evidence during the People's case-in-chief. Further, as argued by the People, the trial court, in denying the motion, based its decision on "all the evidence that was introduced to this court," in the light most favorable to the People and from which a rational trier of fact could find sufficient evidence beyond a reasonable doubt.

[56] Campbell then contends that even if the trial court had made reference to specific evidence, the trial court erred in denying the motion because the People failed to prove the victims' ages. In

viewing the evidence in the light most favorable to the People, we find that there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that the victims' ages are what each victim claims it to be.

[57] Accordingly, we hold that the trial court did not err in denying the defense counsel's motion for judgment of acquittal after the People's case-in-chief because the People provided sufficient evidence in regards to the victims' ages.

IV.

[58] We hold that while there was no specific evidence that the acts victim J.L. occurred during the time frame alleged in the indictment, there was sufficient evidence that the acts occurred in the year 2001, and such evidence is sufficient to uphold the convictions regarding J.L. We further hold that each victim's testimony of her age is sufficient to sustain the convictions. We also hold that the claim of ineffective assistance of counsel was without merit because Campbell was not prejudiced. Lastly, we hold that because there was sufficient evidence, the trial court did not err in denying Campbell's motion for judgment of acquittal at the close of the People's case-in-chief. Accordingly, the trial court judgment of conviction is **AFFIRMED.**