IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ALVIN GERARD SAN NICOLAS,
Defendant-Appellant.

Supreme Court Case No. CRA12-016
Superior Court Case No. CF0490-10

OPINION

Cite as: 2013 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted May 13, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant Alvin Gerard San Nicolas appeals his conviction of fifteen counts of First Degree Criminal Sexual Conduct and one count of Second Degree Criminal Sexual Conduct.[1] The trial court, upon discovering a mistake in the indictment during jury selection, ordered Plaintiff-Appellee People of Guam (the "People") to amend the indictment. The People amended, and San Nicolas was found guilty of all charges in the amended indictment. San Nicolas contends that the trial court cannot raise the indictment defect *sua sponte* and does not have the authority to order an amendment to the indictment. For the reasons set forth below, we reverse and vacate the convictions of First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct, and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The grand jury presented an indictment charging Alvin Gerard San Nicolas with fifteen counts of First Degree Criminal Sexual Conduct ("CSC"), one count of Second Degree CSC, and one count of Child Abuse. During jury selection, the trial court, *sua sponte*, raised a potential problem with the indictment, specifically with the First and Second Degree CSC charges. It stated:

> [T]he Court pursuant to its authority under 8 GCA Section 65[.]15(b) is advising you at this time that in review of the Indictment herein, the Court's extremely

[1] San Nicolas was also convicted of one count of Child Abuse. However, his appeal only challenges his convictions of First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct. *See* Appellant's Br. at 3, 15 (Dec. 17, 2012).

> concerned that in reading the elements out loud that the full statutory requirement under 9 GCA 25[.]15(a)[(]2[)] is not noted on the Indictment.

Transcripts ("Tr.") at 2 (Jury Trial, Feb. 2, 2012). Thereafter, the People filed a Memorandum stating that the indictment was sufficient.

[3] In response to the People's Memorandum, San Nicolas filed a Motion for Partial Dismissal of Partially Defective Indictment. That afternoon, the trial court heard argument on the issue. San Nicolas argued that the first charge of the indictment did not charge First Degree CSC, despite the mistitling of that charge, but rather, that it charged Third Degree CSC. He further argued that if the People intended to charge him with First Degree CSC, they must seek leave of court to dismiss the erroneous charge, obtain San Nicolas's consent to do so, and thereafter obtain a new indictment. With respect to the second charge of Second Degree CSC, San Nicolas argued for dismissal because to allow an amendment would impermissibly introduce a new charge. Specifically, as to the first charge, the original indictment stated that San Nicolas

> did commit the offense of *First Degree Criminal Sexual Conduct*, in that he intentionally engage [sic] in sexual penetration with another, to wit: by causing his penis to enter the vagina of *LM.D. (DOB: 04/05/1995)*, a minor at least fourteen (14) but less than sixteen (16) years of age, in violation of 9 GCA §§ 25.15 (a)(2) and (b).

Record on Appeal ("RA"), Indictment at 1-5 (Aug. 20, 2010). Because the alleged victim was at least fourteen years of age but less than sixteen years of age, the court found that 9 GCA § 25.15(a)(2) requires that in order for San Nicolas to be guilty of First Degree CSC, he must be a member of the same household as the victim, be related to the victim by blood or affinity to the fourth degree, or be in a position of authority over the victim and used this authority to coerce the victim to submit. The charge of First Degree CSC in the original indictment did not state any of these elements. Similarly, the trial court found that the charge of Second Degree CSC in the

original indictment also failed to state any of the elements, apart from age of the victim, that are required by 9 GCA § 25.20(a)(2), which are identical to those found in 9 GCA § 25.15(a)(2).

[4] The trial court questioned both sides regarding whether the grand jury heard testimony to support the charges of First Degree CSC or Second Degree CSC. The People answered affirmatively, and, relying on their representation, the trial court orally ruled:

> In light of the information that I have received, the Court is going to order the Government at this time to amend the Indictment to conform to the statute as noted regarding the phrase that I had just used to support your – the charges.

Tr. at 23 (Mot. Hr'g, Feb. 3, 2012).

[5] San Nicolas's counsels stated they did not recollect whether this information was noted during the grand jury proceedings. The court continued to press the People on whether their answer was sufficiently responsive. Upon further questioning by the court, the People replied:

> Your Honor, I listened to [the grand jury recording]; I don't have the transcript; I listened to the CD and I can note the times. I can note that at 10:08 point -- colon 50, they read the entire subsection two of 9 [GCA] Section 25.10 for first degree criminal sexual conduct. And at 10:10 point 06, they started reading 8 -- 9 [GCA] 25.20 second degree criminal sexual conduct, they read the entire subsection two; they -- they read -- proceeded to read the Indictment or -- investigator from the Office of the Attorney General, Juan Salas, was the witness. And they noted at 10:21 that the mother was deployed to Iraq, May of 2009 to February of 2010. At 10:24, they noted that the mother left the daughter in the care of the Defendant and she has been raised by the Defendant since she was two years old.

Id. at 24-25.[2]

[6] The trial court concluded that allowing the People to amend the indictment to add the additional element to each of the criminal sexual conduct charges would not charge a new offense or prejudice the defendant. Subsequently, a written order was issued instructing the

[2] This testimony is not entirely accurate. The People cited to the trial court subsection two of 9 GCA § 25.10 for First Degree CSC; section 25.10 is actually the "Definitions" section of the statute.

People to amend the indictment. The People filed an amended indictment later the same day. The amended indictment alleged in both the first charge and the second charge that San Nicolas was a member of the same household as the victim.

[7] Trial proceeded and the jury convicted San Nicolas of all charges in the amended indictment. San Nicolas timely appealed, arguing that the trial court erred in raising the issue of the defective indictment *sua sponte* and in ordering the People to amend the original indictment. More specifically, San Nicolas argues that the First Degree CSC charge in the original indictment actually charged him with Third Degree CSC, and the Second Degree CSC charge in the original indictment did not charge a crime.

II. JURISDICTION

[8] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-283 (2013)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[9] Whether the trial court has the authority to raise a defect in the indictment is a question of law; the trial court's legal conclusions are reviewed *de novo*. *See People v. Rios*, 2008 Guam 22 ¶ 8. Although "[r]eview of a trial court's decision to permit an amendment to a charging document is one of abuse of discretion,"[3] *People v. Riocne*, 2012 Guam 5 ¶ 4, the underlying question of whether the amendment charged new or different offenses or prejudiced the defendant is reviewed *de novo*, *People v. Diaz*, 2007 Guam 3 ¶ 15.

[3] We note that plain error is not the correct standard in this case. Generally, we review a challenge to the sufficiency of the indictment for plain error when no objections are made. *See Guam v. Jones*, 2006 Guam 13 ¶ 8; *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002). After the issue was raised by the trial court, San Nicolas objected to the defective indictment before trial commenced. *See* RA, Mot. Partial Dismiss. Partially Defective Indictment (Feb. 3, 2012).

IV. ANALYSIS

[10] San Nicolas's arguments can be split into two parts: first, whether the court can raise the issue of a defective indictment *sua sponte*; and second, whether the amendment was proper. San Nicolas argues that the trial court "is supposed to be an unbiased arbiter of the law," and thus violated its "arbiter's role and became an advocate for the Government" by raising the issue *sua sponte* and ordering an amendment over the People's objection. Appellant's Br. at 6 (Dec. 17, 2012). Further, San Nicolas argues, the trial court "overstepped the bounds of providing a fundamentally fair trial and was stripped of impartiality" by ordering a change to the indictment. *Id.* at 8. The People contend Guam law and federal precedent allow the trial court to both raise the issue and order the amendment. Appellee's Br. at 10-13 (Dec. 31, 2012). According to the People, the trial court can raise the issue, and its "order" was given after the People "implicitly represented that an amendment to the Indictment would be the preferred course of action." *Id.* at 13.

A. Role of the Grand Jury

[11] Before addressing San Nicolas's contentions, we first briefly discuss the grand jury's role in the criminal justice system. A grand jury's chief duty is to determine whether the prosecution has established a prima facie case that a crime has been committed and that the accused committed it. *See* 38 Am. Jur. 2d *Grand Jury* § 2 (2013). Further, "a grand jury serves a gatekeeping function by considering the sufficiency of the evidence to support an indictment." *Id.* § 3. Title 8 GCA § 50.54, entitled "Form of Indictment: Standards for Indicting," provides:

> (a) An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a felony *or* a felony and a related misdemeanor.

> (b) The grand jury *shall* find an indictment when from the evidence presented there is reasonable cause to believe that an indictable offense has been committed and that the defendant committed it.

8 GCA § 50.54(a)-(b) (as amended by Guam Pub. L. 29-042:1 (Jan. 2, 2008)).[4]

[12] The indictment serves two essential purposes: it affirms that the grand jury found probable cause[5] for the charges in the indictment, and it gives the defendant notice of the charges. Here, the original indictment did neither.

B. Raising the Issue *Sua Sponte*

[13] San Nicolas argues that the trial court "does not have supervision or control over the conduct of the [prosecuting attorney]" and therefore "is not in a position to raise an issue with regard to the propriety of an indictment . . . ." Appellant's Br. at 8. The People contend that federal precedent and 8 GCA § 65.15(b) permit the trial court to raise the issue of a defective indictment *sua sponte*. *See* Appellee's Br. at 11.

[14] Title 8 GCA § 65.15(b), cited by the trial court as authority for *sua sponte* raising the issue of the defective indictment, states:

> Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following shall be raised prior to trial:

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[4] Case law from both Guam and California discuss the statutes; therefore, both will be included in the discussion. Federal case law, which is very similar, will also be discussed. However, statutory additions to state laws, including California and Guam, have produced specific differences between federal and state laws.

[5] For purposes of this statute, we find that "reasonable cause" and "probable cause" are equivalent in meaning. *See, e.g.*, *People v. Villapando*, 1999 Guam 31 ¶ 36 ("A felony prosecution requires an indictment upon a probable cause determination by a grand jury."); *People v. Brice*, 44 Cal. Rptr. 231, 240 (Ct. App. 1965) ("Reasonable or probable cause to hold a defendant to answer means 'such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused.'" (quoting *People v. Nagle*, 153 P.2d 344, 347 (Cal. 1944))); *Perry v. Superior Court of L.A. Cnty.*, 368 P.2d 529, 533 (Cal. 1962) (holding that "sufficient" cause for a preliminary examination is equivalent in meaning to reasonable or probable cause).

. . .

> (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it *fails* to show jurisdiction in the court or *to charge an offense which objections shall be noticed by the court at any time* during the pendency of the proceedings[.]

8 GCA § 65.15(b) (2005) (emphases added). Similarly, Federal Rules of Criminal Procedure Rule 12(b)(3)(B) reads: "The following must be raised before trial: . . . (B) a motion alleging a defect in the indictment or information . . . ." Fed. R. Crim. P. 12(b)(3)(B). The Third Circuit, in *United States v. Spinner*, held:

> When . . . an indictment fails to allege all elements of an offense, the defect may be raised by the court *sua sponte*. We have held that "[f]ailure of an indictment sufficiently to state an offense is a fundamental defect . . . and it can be raised at any time."

180 F.3d 514, 516 (3d Cir. 1999) (second omission in original) (citations omitted).[6] We agree with the trial court that section 65.15(b) gives it the authority to raise the defective indictment issue *sua sponte*. Moreover, *Spinner* provides persuasive support because it relies on a rule similar to Guam's. *Compare* 8 GCA § 65.15(b), *with* Fed. R. Crim. P. 12(b).

[15] During jury selection, the trial court discovered a substantial defect in the indictment, namely, a missing element of the charge, and raised the issue with both parties. We do not find that the court over-extended its authority or violated its "arbiter's role and became an advocate for the Government," as San Nicolas alleges. *See* Appellant's Br. at 6. We hold, therefore, that the trial court did have the authority to raise the defect in the indictment *sua sponte*.

[6] The People correctly note that *Spinner* is an appellate case and then list three federal cases in which district courts ruled similarly. Appellee's Br. at 12.

C. The Amendment of the Indictment

[16] "An amendment of an indictment occurs when the charging terms of the indictment are altered by the prosecutor or court after the grand jury has passed upon them, and such amendment must be of form and not of substance to be permissible." 42 C.J.S *Indictments* § 259 (2013). "Generally, only the grand jury, not the court or the prosecutor, can materially amend a criminal indictment." *Id.* San Nicolas and the People dispute the effect of the trial court's order for the People to amend the indictment, and whether an amendment is allowable in this situation. San Nicolas argues that amendments must be made "upon application of the prosecuting attorney," and not from the court itself. Appellant's Br. at 6. Further, San Nicolas argues that the court is supposed to be an "unbiased arbiter of the law," and that by ordering the People to amend, it committed structural error. *Id.* The People rebut that the trial court's actions were not an order, but rather, a discussion followed by the People "implicitly represent[ing]" their agreement to amend the indictment. Appellee's Br. at 13-15.

[17] The People's argument is not persuasive. The trial court's statement that "the Court hereby orders the Government [to] amend the indictment" does not appear to us to be a colloquy with an implicit representation by the People that they agree to amend. RA, Dec. & Order at 4 (Feb. 3, 2012).

[18] The trial court, in its Decision and Order, stated:

> But before the Court allows an amendment, the Court is concerned as to whether the Grand Jury received testimony to support the charges that the actor is a member of the same household as the victim . . . . Therefore, the Court requests the Government to produce information that it presented to the Grand Jury facts pointing to the additional element required by statute.

Id. at 3.

[19] The prosecution represented to the trial court that the grand jury did receive testimony that the victim's mother was deployed to Iraq and left San Nicolas to care for the victim. Tr. at 24-25 (Mot. Hr'g, Feb. 3, 2012). However, because we are not privy to the audio recording of the grand jury proceeding, as it is not part of the trial court record on review, all that this court has to consider are those filings and transcripts that are properly before us. *See* Guam R. App. P. 7(a). We cannot speculate whether the law was properly provided to the grand jury, or whether the grand jury meant to find probable cause as to those missing elements, which were not actually charged in the indictment. Nor would we endeavor to treat such a sacrosanct process so indifferently by presuming to divine the grand jury's intentions where those intentions were not expressed in the charging document itself.[7]

[20] The question of whether the amendment in this case charged San Nicolas with new or different offenses is a legal question subject to *de novo* review. *Diaz*, 2007 Guam 3 ¶ 15. We find as a matter of law that the amended indictment in this case, which inserted into charges one and two language that "the actor is a member of the same household as the victim," functioned to create a different offense for the first charge, elevating the alleged crime from Third Degree CSC to First Degree CSC, and to create a new charge for the second charge, creating the crime of Second Degree CSC where no crime was properly charged in the original indictment.

[21] As stated above, the grand jury's role is to find whether probable cause exists for *all* elements of a charged offense. A California appellate court described the indictment process as such:

[7] The government advised the trial court that the indictment was read to the grand jury. Tr. at 24-25 (Mot. Hr'g, Feb. 3, 2012). As previously discussed, the original indictment was flawed.

> An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. The 'offense' referred to is not merely *any* offense, but the offense *charged by the indictment.*

Roads v. Superior Court In & For Cnty. of Siskiyou, 80 Cal. Rptr. 169, 171 (Ct. App. 1969) (emphases added) (citations and internal quotation marks omitted). The key to ensuring that the grand jury system works as it should is to ensure that the grand jury has indicted based on a finding of probable cause for the "offense charged." *See Callan v. Superior Court In & For Cnty. of San Mateo*, 22 Cal. Rptr. 508, 514 (Ct. App. 1962).

[22] The trial court correctly found a problem in the original indictment and brought it to the attention of both parties. Tr. at 2 (Jury Trial, Feb. 2, 2012).[8] The difficulty, however, is that we cannot say with any certainty that the "offense charged" by the grand jury was something other than what was expressed in the language of the indictment itself. The grand jury effectively indicted San Nicolas with Third Degree CSC rather than First Degree CSC in the first charge; and for the second charge, with no crime at all.

[23] "A requested amendment of any indictment requires the trial judge to consider not only whether the proposed amendment compromises an individual's right to a probable cause determination by a grand jury, but also whether the amendment would create prejudice to the defendant incompatible with our conception of due process." *Coffield v. State*, 794 A.2d 588, 591 (Del. 2002). Here, not only was there not a request by the People to amend, but the People

[8] The trial court did not act inappropriately when it attempted to ascertain whether the grand jury was apprised of the facts to support the missing element prior to beginning an amendment procedure. Tr. at 24-25 (Mot. Hr'g, Feb. 3, 2012). Regardless of this, however, the trial court cannot substitute its own conclusions about the evidence for the actions of the grand jury.

actually opposed amending, believing the indictment to be sufficient in its original form.[9] The amendment in this case came by order of the trial court itself. Nonetheless (or perhaps especially so), the trial court's discretion must be limited by these considerations – the most relevant to this case being the consideration of whether the amendment affected San Nicolas's statutory right to a probable cause determination by a grand jury.

[24] Federal jurisprudence on this issue is based on the Fifth Amendment right to a grand jury, which is not a right extended to Guam, and is therefore not controlling on decisions of our court; in Guam, the right to a grand jury determination of probable cause is statutory. *See* 8 GCA §§ 1.15, 50.10, 50.54 (2005); *People v. Felder*, 2012 Guam 8 ¶¶ 24, 30. The distinction between a fundamental constitutional right and a right merely conferred by the legislature is by no means insignificant; nonetheless, such a distinction cannot relieve the trial courts or the People of the obligation to safeguarding this right, albeit statutory.

[25] The grand jury was convened and charged with the duty to make a determination as to whether probable cause existed to indict San Nicolas with a crime. However, based on the indictment that was returned, the crimes for which the grand jury charged San Nicolas did not amount to First Degree CSC or Second Degree CSC. By allowing (or ordering, as the case may be) the amendment, the trial court changed the offenses with which San Nicolas was charged. The amended indictment did not merely alter the original indictment in form, but it did so in substance. Such an amendment, therefore, was impermissible. Any effort to correct the

[9] Both parties objected to the amendment. RA, People's Resp. Suff. Indictment at 2-3 (Feb. 2, 2012) (arguing the original indictment was sufficient); RA, Mot. Partial Dismiss. Partially Defective Indictment at 1-7 (Feb. 3, 2012) (arguing the original indictment was not defective as to the first charge, in that it properly charged Third Degree CSC, but was defective as to the second charge, in that if failed to charge any crime at all – and that in neither case would an amendment be the proper remedy).

substantive errors needed to be made by the grand jury itself, and not by way of amendment ordered by the trial court.

[26] Guam's Criminal Procedure Code permits an indictment to be amended "upon the application of the prosecuting attorney . . . *if no additional [or] different offense is charged* and if substantial rights of the defendant are not prejudiced." 8 GCA § 55.20 (2005) (emphasis added); *see also* 42 C.J.S. *Indictments* § 259 ("[A]ny substantial or material amendment of an indictment, as affecting a change in the offense charged or as adding an offense, is impermissible and must be resubmitted to the grand jury."). Although the trial court acted within its authority in raising the defect in the indictment, it nonetheless erred by ordering the People to amend the indictment, essentially creating different and new charges against San Nicolas not found by the grand jury. A decision by the trial court will not be reversed for abuse of discretion unless we are left with "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *People v. Singeo*, 2012 Guam 27 ¶ 8 (citation and internal quotation marks omitted). Because the original indictment against San Nicolas was ordered to be amended by the trial court to add the missing element that resulted in a significant change in the offenses charged, allowing such an amendment was an abuse of discretion. As such, we cannot affirm the conviction.

V. CONCLUSION

[27] Pursuant to 8 GCA § 65.15(b), the trial court correctly exercised its authority to raise the issue of the defective indictment to both parties. However, we hold as a matter of law that the amendment in this case resulted in new and different charges against San Nicolas, to his prejudice. The trial court, therefore, abused its discretion by ordering the People to amend the

indictment in such a fashion, because the required amendment included an element not found by the grand jury which changed the charges from Third Degree CSC to First Degree CSC, and created the crime of Second Degree CSC where no crime was initially charged.

[28] Accordingly, we **REVERSE** and **VACATE** the judgment of conviction as to the charge of First Degree Criminal Sexual Conduct in the first charge (fifteen counts) and Second Degree Criminal Sexual Conduct in the second charge (one count). However, the judgment of conviction for Child Abuse in the third charge is unaffected by the issues discussed in this opinion, and thus, that conviction stands. We **REMAND** this matter to the trial court for further proceedings not inconsistent with this opinion.

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Chief Justice