IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JOSEPH G. TUNCAP,
Defendant-Appellant.

Supreme Court Case No.: CRA12-032
Superior Court Case No.: CF0643-10

OPINION

Cite as: 2014 Guam 1

Appeal from the Superior Court of Guam
Argued and submitted on July 16, 2013
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Joseph G. Tuncap appeals his conviction for three counts of Burglary (As a Second Degree Felony), one count of Attempted Theft of Property (As a Second Degree Felony), and one count of Attempted Theft of Property (As a Third Degree Felony). Tuncap argues that his arrest violated the Fourth Amendment, because the police had no probable cause to arrest him without a warrant. Furthermore, he argues that the police officers' warrantless search of his vehicle was unconstitutional. Finally, he argues that the trial court abused its discretion when it admitted into evidence a surveillance video without sufficient authentication. For the following reasons, we reverse in part and affirm in part Tuncap's convictions.

I. FACTUAL BACKGROUND

[2] After 3 a.m. on October 31, 2010, Officer Peter Paulino of the Guam Police Department (GPD) was driving up Adrian Sanchez Road (commonly known as "Hamburger Road") in Harmon when he spotted a single vehicle parked along the road near businesses. Officer Paulino noted the make and model of the car as well as its license plate, and recalled that the car was a getaway vehicle in a theft at Kmart on September 19, 2010. While investigating the Kmart incident, Officer Paulino ran the car's information through the police department computer system and found that Joseph Tuncap was the registered owner. Tuncap's known involvement in the Kmart theft was limited to being seen in the food court, meeting a woman who concealed a pair of slippers inside her bag, and driving her away after she was confronted by Kmart Loss Prevention Officers.

[3] Officer Paulino parked his car on the opposite side of the road so that he had a view of Tuncap's vehicle. Officer Paulino contacted GPD Officer James Muna, who then came to support Officer Paulino. The two officers watched the car for thirty or forty minutes, until a figure began walking toward the car. After opening and closing the hatchback, the figure entered the car and began driving toward Moon's Laundry. At this point Officer Muna blocked Tuncap's car with his police cruiser, and the officers exited their vehicles and drew their weapons. The officers ordered the driver out of the vehicle. As the driver exited, they asked if he was Joseph Tuncap. Tuncap confirmed his identity and laid on the ground as ordered. Officer Paulino kept his weapon pointed at Tuncap while Officer Muna handcuffed him.

[4] At this point, Officer Muna conducted a patdown of Tuncap. He felt a bulge in Tuncap's front pocket. Officer Muna asked Tuncap what it was, and Tuncap replied that it was his money. Officer Muna pulled the money out of Tuncap's pocket. He then patted down Tuncap's back side and found coins in his back pocket.

[5] Once Tuncap was handcuffed and placed in the back of the police car, the officers searched Tuncap's vehicle. After searching the vehicle, and approximately half an hour after Tuncap was handcuffed, the officers went to search nearby buildings and discovered evidence of a burglary at Triple L Construction and at Moon's Laundry.

[6] In addition to the charges against Tuncap stemming from the October 31, 2010 burglaries, Tuncap was also charged with an October 13, 2010 burglary of the Horse and Cow Bar and Grill ("Horse and Cow"). Record on Appeal ("RA"), tab 8 at 2 (Indictment, Nov. 9, 2010). The morning of the Horse and Cow burglary, an employee discovered the break-in and called the police. Once the police arrived and confirmed that the building was safe, the

employee-witness surveyed the premises. Gaming machines and pool tables were vandalized. In addition, two security cameras were tampered with.

[7] The only evidence that Tuncap committed the Horse and Cow burglary was the surveillance video taken by security cameras at the restaurant. To support the admission of the surveillance video, the People provided testimony of the investigating officer, GPD Officer John Camacho, who had investigated the scene. In addition to testifying about the evidence of the burglary, he testified that the security camera in the manager's office had been tampered with. He also testified that a security camera overlooking a hallway had been tampered with. Officer Camacho declared that he had viewed the surveillance video from Horse and Cow's monitors on the day of the burglary, that the video matched what he had observed of the scene, and that the video presented in court was the same as the one he had viewed from the monitors at Horse and Cow. He then identified Tuncap as the man he had seen in the surveillance video.

[8] Tuncap was subsequently charged with three counts of Burglary (As a Second Degree Felony), two counts of Attempted Theft of Property (As a Second Degree Felony), and one count of Theft of Property (As a Third Degree Felony). He moved to suppress the evidence obtained during his October 31 arrest, arguing that the arrest was unconstitutional for lack of probable cause, and to dismiss the indictment on the grounds of insufficient evidence. The trial court denied his motions to dismiss and suppress, and the case proceeded to trial.

[9] At trial, the People filed a motion to admit a compact disk containing video footage of the break-in at Horse and Cow that was recorded by surveillance cameras located at the establishment. Tuncap opposed the admission, arguing that the People failed to prove the surveillance footage was authentic or that a proper chain of custody was established. The trial court granted the People's motion, holding that questions concerning care and custody go to the

weight of the evidence and not its admissibility, and that the video footage would be admitted subject to foundational testimony concerning authenticity.

[10] Tuncap was convicted of three counts of Burglary (As a Second Degree Felony), one count of Attempted Theft of Property (As a Second Degree Felony), and one count of Attempted Theft of Property (As a Third Degree Felony). He timely filed a notice of appeal.

II. JURISDICTION

[11] This court has jurisdiction over appeals from final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-36 (2013), 7 GCA § 3107 (2005) and 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[12] This court reviews a trial court's decision on a defendant's motion to suppress evidence *de novo*. *People v. Cundiff*, 2006 Guam 12 ¶ 14 (citing *People v. Chargualaf*, 2001 Guam 1 ¶ 12). "Where a motion to suppress is grounded on a Fourth Amendment violation, the issue of the lawfulness of a search or seizure is reviewed *de novo*." *Chargualaf*, 2001 Guam 1 ¶ 12. We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. *People v. Fisher*, 2001 Guam 2 ¶ 7 (quoting *J.J. Moving Serv., Inc. v. Sanko Bussan (GUAM) Co., Ltd.*, 1998 Guam 19 ¶ 31)).

IV. ANALYSIS

[13] Tuncap challenges the constitutionality of his arrest and the search of his car. Appellant's Br. at 11-12 (March 13, 2013). He also challenges the admissibility of the Horse and Cow surveillance video, arguing that it was not sufficiently authenticated as required by Guam Rules of Evidence. *Id.*

A. Probable Cause for Tuncap's Arrest

[14] The Fourth Amendment's protections against unreasonable searches and seizures are made applicable to Guam under section 1421b(c) of the Organic Act of Guam. *People v. Chargualaf*, 2001 Guam 1 ¶ 14. The central inquiry in Fourth Amendment cases is "the reasonableness in all the circumstances of the particular government invasion of a citizen's personal security." *Id.* (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977)). An arrest made "without a warrant is per se unreasonable unless it falls within the specifically established and well delineated exceptions." *People v. Cundiff*, 2006 Guam 12 ¶ 26 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). Perhaps the most common exception to the warrant requirement is an arrest made with probable cause. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 113 (1975) (stating that the Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.")

[15] Tuncap argues that the police did not have probable cause to arrest him and his arrest was an unreasonable seizure in violation of the Fourth Amendment. Appellant's Br. at 13-17. When considering whether probable cause existed to make an arrest, we must first determine at what point Tuncap was arrested. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964) (stressing that the moment of arrest establishes what facts and circumstances are considered for determining whether probable cause existed).

[16] The parties do not dispute that Tuncap was arrested when the officers blocked his car and ordered him out at gunpoint. *See* Appellant's Br. at 13-15; Appellee's Br. at 20 (April 8, 2013) ("the Officers execute[d] a traffic stop of the vehicle, exit[ed] their own vehicle, and [drew] their weapons, completing Tuncap's arrest."). The parties cite to *United States v. Strickler*, 490 F.2d 378 (9th Cir. 1974) for the proposition that a traffic stop combined with an armed approach to

the vehicle constitutes an arrest. Appellant's Br. at 14; Appellee's Br. at 15 ("the People . . . do not contest the general proposition that a traffic stop *combined* with an officer pointing his weapon at a suspect would establish an immediate arrest.").

[17] We agree with the parties that Tuncap was arrested when he was ordered out of his car at gunpoint; however, we disagree with the parties' rationale. This court will not adopt the rule that an arrest occurs whenever police draw their weapons during a traffic stop. Instead, the analysis of whether an arrest occurred always requires "taking into account all of the circumstances surrounding the encounter," to determine whether "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (internal quotations omitted); *see also Cundiff*, 2006 Guam 12 ¶¶ 19-21 (describing how an arrest can occur either by means of physical restraint or in circumstances where a reasonable person would not have felt free to leave). Applying this test where weapons are drawn, courts hold that if such force is reasonably necessary under the circumstances for officer safety, the encounter is a stop requiring only reasonable suspicion rather than an arrest. *See, e.g., United States v. Serna-Barreto*, 842 F.2d 965, 968 (7th Cir. 1988); *United States v. Merritt*, 695 F.2d 1263, 1273 (10th Cir. 1982) ("the use of guns in connection with a stop is permissible where the police reasonably believe they are necessary for their protection."). When such force is not reasonably necessary for officer safety, drawing weapons converts a stop into an arrest that must be supported by probable cause. *See, e.g., United States v. Ceballos*, 654 F.2d 177, 183-84 (2d Cir. 1981).

[18] In *Serna-Barreto*, the pointing of a police weapon did not convert a stop into an arrest for a number of reasons. 842 F.2d at 967-68. The court noted that (1) the stop occurred at night, (2) the crime suspected was drug trafficking and that drug traffickers had a history of being armed

and firing on police, (3) the lone officer was initially outnumbered by multiple suspects, and (4) the officer did not have a full view of the suspects, because they were seated in a car. *Id.* Similarly, in *Merritt* a shotgun pointed at suspects did not convert a stop into an arrest. 695 F.2d at 1272-74. There, the Tenth Circuit stressed that the suspect the police were looking for was wanted for murder and was believed to be armed and dangerous. *Id.*

[19] On different facts, other courts have found the presence of drawn weapons render a police encounter an arrest. *See, e.g.*, *Ceballos*, 654 F.2d at 183-84. In *Ceballos*, police officers blocked a drug suspect's car and drew down on him. *Id.* at 180. The Second Circuit determined that this amount of force was unreasonable under the circumstances and that it converted a potential *Terry* stop into an arrest. *Id.* at 182-84. In reaching this conclusion, the panel noted that the officers had no reason to believe that the suspect was armed, nor did the suspect act in any way that would lead officers to believe that they needed to draw their weapons on him for their own safety. *Id.* at 184.

[20] Similarly, the amount of force used in this case was excessive enough under the circumstances to convert a stop into an arrest. Though it was late at night and Tuncap was seated in a car at the time of arrest, the balance of other factors establish this as an unreasonable amount of force. Officers Muna and Paulino outnumbered Tuncap and had no reason to believe that Tuncap was armed. Officer Paulino testified that guns were drawn, because of Tuncap's "history of theft and burglaries[,]" Transcripts ("Tr."), vol. 1, tab 1 at 22 (Mot. Hr'gs, Dec. 27, 2010), particularly a "rash of thefts" that included the Kmart incident and an earlier Payless burglary, *id.* at 37-38. Neither of these events involved violence or any evidence of Tuncap being armed, and nothing on the night in question indicated that Tuncap may be armed. In short, it was not

improper for the officers to draw down their guns on Tuncap, but once they did so, under these circumstances they arrested Tuncap and must have had probable cause to do so.

[21] We agree with the parties that Tuncap was arrested when he was ordered from the car at gunpoint and will determine whether probable cause to arrest him existed based on what the officers knew at that moment. To find probable cause we query whether at the moment of arrest "the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the arrestee had committed or was committing a crime. *People v. Cundiff*, 2006 Guam 12 ¶ 26 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

[22] At the time Tuncap was arrested the police knew a few things: that it was late at night and many of the nearby businesses were closed; that Joseph Tuncap was the registered owner of the vehicle; that Tuncap had a criminal history; and that, six weeks earlier, Tuncap had driven away from Kmart with a woman who had just stolen slippers. The officers may also have had a "gut feeling" or a "hunch" about what was transpiring that night, *see* Tr., vol 1, tab 1 at 40 (Mot. Hr'gs, Dec. 27, 2010), but such hunches fall short of establishing probable cause for an arrest. *See, e.g.*, *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) ("The Supreme Court . . . has made it clear that 'hunches' are insufficient to establish . . . probable cause.").

[23] On the other hand, the police did not have any evidence that Tuncap was aware that the woman he drove from Kmart had stolen the slippers, *see* Tr., vol. 1, tab 1 at 35-36 (Mot. Hr'gs, Dec. 27, 2010); Tr., vol. 1, tab 3 at 5 (Mot. Hr'gs, Dec. 29, 2010), nor did they know, before they drew down on him, that Tuncap was the silhouetted figure that they saw enter the vehicle, *see* Tr., vol. 1, tab 3 at 15-22, 36-37 (indicating that the officers confirmed Tuncap's identity only after blocking his car and drawing down on him). Most importantly, at the time of arrest, there

was no evidence that a crime was currently being committed; there were only vaguely suspicious circumstances that would not, alone, "warrant a prudent man in believing" that a crime was occurring. *Cundiff*, 2006 Guam 12 ¶ 26 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Accordingly, there was no probable cause to arrest Tuncap for the Kmart incident nor was there probable cause to arrest for anything that had occurred on the night of October 31, 2010. Without probable cause, this arrest was an unreasonable seizure in violation of the Fourth Amendment. Evidence obtained as a result of such an arrest must be suppressed as fruit of the poisonous tree where no intervening event purged the taint of the unlawful arrest. *See, e.g.*, *People v. Santos*, 2003 Guam 1 ¶ 65.

B. Warrantless Search of Tuncap's Car

[24] Tuncap also argues that the warrantless search of his car following his arrest was unconstitutional. Appellant's Br. at 18-19. Tuncap relies on *Arizona v. Gant*, 556 U.S. 332 (2009), to establish that police may only search an automobile incident to arrest when (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351. Tuncap argues that because he was in handcuffs and secured in the back of a patrol car at the time of the search, the first *Gant* rationale cannot provide a foundation for the search. Appellant's Br. at 18-19. Furthermore, Tuncap states that because the "crime of arrest was the theft of slippers from Kmart[,]" which had occurred approximately six weeks before the night of the search, the second rationale did not allow for the search. *Id.* at 19.

[25] The People claim that the second *Gant* rationale provided the legal basis for the search, because by the time of the car search the crime of arrest was for a burglary that night and not merely the Kmart theft. Appellee's Br. at 23-24. In so doing, the People rely on the additional

evidence of large sums of cash discovered on Tuncap's person during the patdown, Tuncap's failure to explain the money, and his wet, soiled, and lint-covered appearance. *Id.* at 24.

[26] As we have held, the police did not have probable cause to arrest Tuncap for any crime when they blocked his car and drew down on him. The only additional evidence-gathering conducted between Tuncap's arrest and the search of his car was Officer Muna's patdown. Patdowns of stopped suspects are permitted for officer safety, but only where the officer both has reason to believe that the suspect is armed and dangerous and limits the patdown to searching for weapons. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (requiring reasonable and particularized suspicion that the suspect is armed). Here, the officers had no reason to believe that Tuncap was armed or dangerous. Furthermore, Officer Muna exceeded the scope of a permissible *Terry* patdown by removing the money after his patdown convinced him that the bulge was neither a weapon nor plainly—by touch—contraband. *See Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (allowing seizure of contraband during a valid *Terry* patdown, but only where the item felt was clearly contraband without resort to additional manipulation). Officer Muna did not suspect that the bulge he felt in Tuncap's pocket was a weapon, nor did he testify that it was clearly contraband by touch. *See* Tr., vol. 1, tab 3 at 16-17 (Cont'd Mot. Hr'gs). Instead, Officer Muna testified that he felt a bulge that "felt like you stuff some kind of cloth into your pants[.]" *Id.* at 16. After Tuncap informed Officer Muna that the bulge was his money, Officer Muna reached into Tuncap's pocket and seized the money. *Id.* at 17. *Terry* and its progeny do not allow for such a seizure; as such, the removal of the money following the patdown exceeded the permissible scope of the law and could not be used as evidence of Tuncap's commission of a crime.

[27] The question remains whether the second *Gant* rationale—a search for evidence of the crime of arrest—provides a legal basis for the warrantless car search of Tuncap's car. This basis for a car search only authorizes a search where there is reason "to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (citing *Thornton v. United States*, 541 U.S. 615, 632 (2009) (Scalia, J., concurring)). At the time of arrest, there was no probable cause to arrest Tuncap for any crime. Furthermore, to the extent that the arrest was based on the Kmart incident, it is certainly not reasonable to believe that evidence of that event—the theft of a pair of slippers by someone other than Tuncap—would be found in Tuncap's car six weeks later. Evidence of the illegally-seized money should have been suppressed and cannot serve as foundation for the subsequent car search. Thus, the search of Tuncap's car was an unreasonable warrantless search in violation of the Fourth Amendment. All evidence obtained during the arrest and search should have been suppressed.

[28] Because all of the evidence obtained during Tuncap's arrest should have been suppressed, we reverse his convictions on Counts One and Two of Burglary and Counts One and Two of Attempted Theft of Property.

C. Admissibility of Surveillance Video

[29] Tuncap next argues that it was error for the trial judge to admit the CD containing the surveillance video from the Horse and Cow into evidence, because there was no testimony regarding "'the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.'" Appellant's Br. at 20 (quoting *Washington v. State*, 961 A.2d 1110, 1116 (Md. 2008)). Tuncap argues that this lack of testimony is fatal to the admissibility of the video under Rule 901

of the Guam Rules of Evidence ("GRE"), which requires authentication of evidence. Appellant's Br. at 20-21.

[30] The People counter that there was ample authenticating testimony and that Tuncap conflates authentication with chain of custody concerns. Appellee's Br. at 25. To support its authentication argument, the People offer that the testifying witness (Officer Camacho) viewed the footage directly from the restaurant's security monitors on the morning of the robbery, testified that what he viewed at trial was the same footage, and testified that what transpired on the video was consistent with his observations of the scene on the morning of the robbery. *Id.* at 29-30.

[31] GRE 901 requires "evidence sufficient to support a finding that the matter in question is what its proponent claims," in order for that evidence to be admissible. Guam R. Evid. 901(a). This court has not had the opportunity to expound on what GRE 901 requires for admissibility of a recording. *See, e.g., In re N.A.*, 2001 Guam 7 ¶ 52-53 (finding no abuse of discretion in refusing to admit a tape recording for which there had been no authenticating testimony whatsoever).[1]

[32] When presented with authentication challenges to the admissibility of video tapes or other recordings, courts have typically admitted such evidence on one of two grounds. First, courts admit such evidence when it is introduced to illustrate the testimony of a witness who observed the same scene viewed by the recording equipment. *Washington v. State*, 961 A.2d 1110, 1115-16 (Md. 2008). Second, where there is no first-hand witness, courts have adopted the "silent witness" theory to admit video recordings. *Id.* The "silent witness" theory allows for

[1] Because the Guam Rules of Evidence is based on the Federal Rules of Evidence, cases from state and federal courts are relevant and persuasive when we confront issues of first impression. *See, e.g., People v. Roten*, 2012 Guam 3 ¶ 16 & n.3.

the introduction of the recording as primary, substantive evidence of the events depicted. *See People v. Taylor*, 956 N.E.2d 431, 438 (Ill. 2011). Because there was no live witness to the burglary at the Horse and Cow, the People seek to admit this surveillance video under the "silent witness" theory.

[33] Virtually all jurisdictions allow the introduction of recordings pursuant to "silent witness" authentication, *see* 2 John W. Strong et al., *McCormick on Evidence* § 214, at 16 (5th ed.1999), but jurisdictions differ on what evidentiary showing is required to satisfy the "silent witness" standard. *See, e.g., State v. Haight-Gyuro*, 186 P.3d 33, 36-37 (Ariz. Ct. App. 2008). The approaches fall into two general categories: a multi-factor test, *see, e.g., State v. Cook*, 721 S.E.2d 741, 746 (N.C. Ct. App. 2012) (applying a four-factor analysis); *Ex Parte Fuller*, 620 So. 2d 675, 678 (Ala. 1993) (adopting a seven-factor analysis), and a flexible, less formulaic approach focusing on the facts of each case. *See, e.g., United States v. Reed*, 887 F.2d 1398, 1405 (11th Cir. 1989) (holding, in cassette tape context, that "the trial court has broad discretion to allow tapes into evidence without [a particularized, factor-based] showing so long as there is independent evidence of accuracy."); *Fisher v. State*, 643 S.W.2d 571, 575 (Ark. Ct. App. 1982) (stating that "it is neither possible nor wise to establish specific foundational requirements" for admissibility of evidence under the 'silent witness' theory, because the facts of each case will differ); *Dep't of Public Safety v. Cole*, 672 A.2d 1115, 1122 (Md. 1996) (stating that "[w]e decline to adopt any rigid, fixed foundational requirements necessary to authenticate photographic evidence under the 'silent witness' theory.").

[34] Though there is somewhat of a divide on how to analyze "silent witness" issues, even jurisdictions that adopt a multi-factor analysis tend to acknowledge that the facts of each case may differ. These jurisdictions neither require every factor be met nor rule out taking other

circumstances into account in particular cases. *See e.g.*, *Taylor*, 956 N.E.2d at 439; *United States v. Oslund*, 453 F.3d 1048, 1055 (8th Cir. 2006) (applying a factor-based test while stressing that "factors are guidelines to be viewed in light of specific circumstances, not a rigid set of tests to be satisfied.").

[35] Today, we hold that the specific factors detailed below may be useful in authenticating a video recording under the "silent witness" theory, but we caution that this list of factors is not exhaustive nor is each factor required in every case, and the trial courts retain the flexibility to consider such other factors as are relevant to the cases before them. The relevant factors include testimony about (1) how the recording system operates, (2) the system's working condition and pattern of maintenance, (3) who operates the system, has access to it, and maintains its archive of recordings, (4) the quality of the recording, and (5) the means by which the recording was copied to the format viewed at trial.

[36] Where testimony about the system is lacking, testimony about the particular recording and the events it recorded may still be "sufficient to support a finding that the matter in question is what its proponent claims." GRE 901(a). To authenticate in this manner, the trial court should look to when and where the video was first viewed by the testifying witness. *See, e.g.*, *Cook*, 721 S.E.2d at 747; *People v. Dennis*, 956 N.E.2d 998, 1005 (Ill. App. Ct. 2011). If the video is viewed at the scene soon after the event in question and is viewed not from a copy but directly from the system established on-site, there is little to no risk of tampering or editing the tape. To confirm this reasoning, there should also be an affirmance that the contents of the recording viewed contemporaneously with the recorded event are the same as the contents of the recording sought to be introduced into evidence. *See id.* Authentication can be bolstered where the testifying witness was present at the scene of the recorded event soon after it happened and

acknowledges that the recording depicts events that match with the scene observed. *See Dennis*, 956 N.E.2d at 1004-05. Such testimony would further corroborate that the surveillance video accurately depicts what occurred.

[37] The People did not present evidence or testimony about the particular security camera system at the Horse and Cow, but there was sufficient testimony to support a finding that the video accurately recorded the events that occurred on the night of the robbery. Officer Camacho testified that he arrived at the Horse and Cow soon after the burglary was discovered and viewed the surveillance video directly from the monitors on-site. *See* Tr. at 116 (Jury Trial, Aug. 30, 2012). He also testified that the contents of the recording shown in court were the same as those that he had viewed on the day of the burglary. *Id.* at 116, 135. Camacho affirmed that the events on the recording matched up with his own observations of the scene, including the hole Tuncap had broken in the door to gain entry and Tuncap's tampering with security cameras in a manner consistent with the state in which Officer Camacho found them. *See id.* at 119-22.

[38] Tuncap has not challenged the veracity, accuracy, or quality of the recording. Appellant's Br. at 20-22. Instead, he has argued that the means by which the People sought to authenticate the recording were inadequate as a matter of law. *Id.* In light of the general requirement of GRE 901—that the proponent provide "evidence sufficient to support a finding that the matter in question is what its proponent claims"—and the fact that the examples of authentication or identification conforming to the requirements of GRE 901(b) are merely illustrative, this argument fails. *See* GRE 901(a)-(b); *Haight-Gyuro*, 186 P.3d at 36-37 (admitting recording under substantially same evidentiary rule). Officer Camacho testified to facts sufficient to support a finding that the surveillance video was a true and accurate tape of

what had occurred on the night of the robbery. We affirm the trial court's admission of the surveillance video, and we affirm Tuncap's conviction for the burglary of the Horse and Cow.

V. CONCLUSION

[39] We hold that Tuncap was arrested when the police blocked his car and drew their weapons on him. We also hold that at the time of arrest, the police did not have probable cause to arrest Tuncap for any crime. Tuncap's arrest on October 31, 2010 therefore violated the Fourth Amendment of the U.S. Constitution made applicable to Guam by 48 U.S.C.A. § 1421b(c), the Organic Act of Guam.

[40] Next, we hold that police officers' search of Tuncap's car following his arrest was not reasonably necessary for officer safety, nor was it reasonable to suspect that evidence of any crime would be found therein. Thus, the search of Tuncap's car was also in violation of the Fourth Amendment. Because both his arrest and the search of his car violated the Fourth Amendment, nothing obtained pursuant to either event—including the money found during the patdown and items discovered in the car—could be admitted into evidence. Accordingly, we reverse Tuncap's convictions of two counts of burglary and two counts of attempted theft of property for the events of October 31, 2010.

[41] Finally, we hold that the People provided sufficient facts, through Officer Camacho's testimony, to authenticate the CD containing surveillance footage under GRE 901 and that such evidence was admissible. Accordingly, we affirm Tuncap's conviction for burglary of the Horse and Cow Bar and Grill.

[42] Therefore, we **AFFIRM IN PART, REVERSE IN PART**, and **REMAND** 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

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

JAN 16 2013

By: *IMELDA B. DUENAS*
Assistant Clerk of Court
Supreme Court of Guam