IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ELPIDIO T. FEGARIDO,
Defendant-Appellant.

Supreme Court Case No.: CRA13-015
Superior Court Case No.: CF0083-07

OPINION

Cite as: 2014 Guam 29

Appeal from the Superior Court of Guam
Argued and submitted on May 16, 2014
Hagåtña, Guam

Appearing for Plaintiff-Appellee:
Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
590 S. Marine Corps Dr., Ste 706
Tamuning, GU 96913

Appearing for Defendant-Appellant:
Stephen P. Hattori, *Esq.*
Assistant Alternate Public Defender
Alternate Public Defender
DNA Bldg., Ste 902
238 Archbishop F.C. Flores St.
Hagåtña, GU 96910

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

CARBULLIDO, J.:

[1] Defendant-Appellant Elipidio T. Fegarido appeals from a judgment of conviction filed on December 22, 2009, and reentered *nunc pro tunc* on May 31, 2013. Fegarido was charged with First Degree Criminal Sexual Conduct ("CSC") for sexually penetrating J.H.E. and Second Degree CSC for sexually touching J.H.E., J.E., and C.H.E. At the conclusion of trial, the jury convicted Fegarido of (1) First Degree CSC for sexually penetrating J.H.E.; (2) Second Degree CSC for sexually touching J.H.E.; and (3) Fourth Degree CSC for sexually touching C.H.E., as a lesser included offense of Second Degree CSC. Fegarido was acquitted of all Second Degree CSC allegations involving J.E. and C.H.E. except for the Fourth Degree CSC for sexually touching C.H.E, which was a lesser included offense of Count Nine of the Second Charge of Second Degree CSC.

[2] First, we affirm the trial court's reentry of the final judgment and find that this court has jurisdiction to hear the matter. Second, we affirm the trial court's denial of Fegarido's motion of acquittal on the First and Second Degree CSC charges. Finally, we affirm the Fourth Degree CSC conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Fegarido began dating Christina and moved in with her family at Ruelos Apartments in Dededo. At the time, Christina was living with three of her daughters: J.H.E. (DOB: 10-18-95), J.E. (DOB: 03-31-92), and C.H.E. (DOB: 03-03-91). They later moved to Santa Ana and then to Ypaopao.

[4] In response to a criminal sexual conduct report, the Guam Police Department interviewed Fegarido. At the interview, Fegarido waived his rights and wrote a statement in Tagalog. In the statement, he wrote:

> On January 12, I did it to [J.H.E.]. I inserted my finger while she was awake. She did not say anything nor did I during the incident. I did not do anything bad to [J.E.] As for [C.H.E.], all I did was grab the phone from her to break it to the wall but their mom got it from me. That is all I can remember and nothing else.

Transcripts ("Tr."), vol. 2 at 52 (Jury Trial, Dec. 16, 2008); People v. Fegarido, CF0083-07 (People's Exhibit 5, 5-A (Dec. 16, 2008)). A grand jury indicted Fegarido. In Count Two of the First Charge, the grand jury charged Fegarido with First Degree CSC for "intentionally engag[ing] in sexual penetration with another by causing his finger to enter the vagina of J.H.E., a minor under fourteen[] years of age in violation of 9 GCA §§ 25.15(a)(1) and (b)"[1] "[o]n or about the period between January 1, 2007 through January 31, 2007." RA, tab 37 at 1-2 (Superseding Indictment, Aug. 17, 2007). In Count Three of the Second Charge, the grand jury charged Fegarido with Second Degree Sexual Conduct for touching J.H.E.'s vagina "in violation of 9 GCA §§ 25.20(a)(1) and (b)"[2] "[o]n or about the period between January 1, 2007 through

---

[1] Pursuant to 9 GCA § 25.15:

> (a) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and if . . . (1) the victim is under fourteen (14) years of age . . . .
>
> (b) Criminal sexual conduct in the first degree is a felony in the first degree. Any person convicted of criminal sexual conduct under § 25.15(a) shall be sentenced to a minimum of fifteen (15) years imprisonment, and may be sentenced to a maximum of life imprisonment without the possibility of parole. Any person convicted of criminal sexual conduct in the first degree shall not be eligible for work release or educational programs outside the confines of prison nor shall the provisions under § 80.31 apply.

9 GCA § 25.15 (2005).

[2] Pursuant to 9 GCA § 25.20:

> (a) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if . . . (1) that other person is under fourteen (14) years of age . . . .

January 31, 2007." *Id.* at 2-3. In Count Nine of the Second Charge, the grand jury charged Fegarido with touching C.H.E.'s breast "in violation of 9 GCA §§ 25.20(a)(1) and (b)" "[o]n or about the period between January 1, 2004 through March 31, 2005." *Id.* at 3-4; *see also infra* Table 1: Summary of Charges; Appellee's Br. at 4 (Dec. 23, 2013).

[5] At trial, C.H.E. testified that she lived at Santa Ana in the seventh grade for one year before moving to Saipan. C.H.E. testified that while the family was living in Santa Ana, C.H.E. shared a room with her younger brother, but that she would sometimes sleep on the couch in the living room. C.H.E. testified that in Santa Ana, Fegarido had touched her breast "two or three times . . . I don't remember," and touched her vagina on the outside of her clothes "two or three times." Tr., vol. 1 at 52-54 (Jury Trial, Dec. 11, 2008). In addition, C.H.E. testified that while the family was living in the Ruelos Apartment, Fegarido touched her every time she slept outside in the living room, which was "about five times." *Id.* at 55. She testified that the first time "was in my breasts and [] butt and [] vagina but it was on the outside not the inside." *Id.* In regard to the second incident, she testified that "the second time was inside my breasts . . . over my bra. And then . . . he would unzip my pants but then I wouldn't move just to make him think I'm going to wake up. But I was awake. I just closed my eyes and I opened it a little bit. I guess he was scared so he just moved away and went back inside." *Id.* She testified that it was always at night time, always in the living room, and always when she was sleeping.

[6] J.H.E. testified that at Santa Ana, she slept in a room with C.H.E., and "[Fegarido] would always come inside the room and open the door with either, a knife or a key; I don't really know.

> (b) Criminal sexual conduct in the second degree is a felony in the first degree but a person convicted of criminal sexual conduct in the second degree who receives a sentence of imprisonment shall not be eligible for work release or educational programs outside the confines of prison.

9 GCA § 25.20 (2005).

But he will touch my sister first and then he'll touch me." Tr., vol. 3 at 31 (Jury Trial, Dec. 17, 2008). She testified that he would touch her by opening her pants and touching the outer part of her vagina inside her clothes. She testified that she would also see him touching C.H.E.'s vagina.

[7] In addition, J.H.E. testified that in Ypaopao she had turned a small storage room into her own room because she was tired of sharing a room with her sisters. She testified that Fegarido came into the storage room that she had been sleeping in, "touched the outer part of [her] vagina and then he sticked [sic] his finger in [her vagina]." *Id.* at 34-35. She stated that the incident occurred in 2007 "[b]efore Valentines or like around there." *Id.* at 35.

[8] After Fegarido rested his case, the parties discussed whether to include a lesser included offense for Second Degree CSC. Fegarido's counsel asserted and the court agreed that pursuant to *People v. Angoco*, 2001 Guam 17 ¶ 19, the court is required to "charge the jury with respect to the included offense." Tr., vol. 4 at 8 (Jury Trial, Dec. 18, 2008). The parties agreed that Fourth Degree CSC was a lesser included offense of Second Degree CSC:

> Defense Counsel: [T]here is a lesser included of second degree criminal sexual conduct . . . it's fourth degree criminal sexual conduct. Because here in our case, the facts came out that the victims, meaning the person alleged to have been subjected to criminal sexual conduct, whether 14, 16, 38 was asleep; all three of them. I looked at my notes, all three of them testified they were asleep, except for that one time where [J.E.] was doing the dishes, she was not asleep. So, maybe that could be argued as not fourth degree CSC, but when I looked at the evidence presented on my notes taken, the three . . . said that touching occurred when they were asleep. They're both vic- - One, they're both all victims and, two, they're - - they meet the criteria under physically helpless; asleep.
>
> I have spoken to [the prosecutor]; he has no problem with this conclusion, Your Honor.

> Prosecutor: That's correct, Your Honor, I agree with [defense counsel] and the Court . . . that fourth degree CSC would be the natural lesser included for second degree CSC, unfortunately.

Id. at 10-13.

[9] During the closing argument, the defense counsel attacked the reliability of the government's witnesses and argued that the government did not meet its burden of showing that Fegarido committed the offenses.

[10] After closing arguments, the trial court instructed the jury as follows:

> Jury Instruction 7EE, Essential Elements of Second Degree Criminal Sexual Conduct, as a First Degree Felony, Second Charge, Count Nine. The people must prove beyond a reasonable doubt that the defendant, Elpidio Fegarido, did intentionally engage in sexual contact with another, that is, by causing his hand to touch the breasts of [C.H.E.], a minor under 14 years of age, in Guam, on or about the period between January 1, 2004, through March 31, 2005, inclusive.
>
> Jury Instruction 7FF, Conviction of a Lesser Included Offense. The crime of Second Degree Criminal Sexual Conduct includes the lesser crime of Fourth Degree Criminal Sexual Conduct. If (1) you are not convinced beyond a reasonable doubt that the defendant is guilty of a lesser crime of Fourth Degree Criminal Sexual Conduct, you may find the defendant [not] guilty of Fourth Degree Criminal Sexual Conduct.
>
> The crime of Fourth Degree Criminal Sexual Conduct, as a Misdemeanor, is lesser to Second Degree Criminal Sexual Conduct, as a First Degree Felony.
>
> Jury Instruction 7GG, Essential Elements to Fourth – of Fourth Degree Criminal Sexual Conduct, as a Misdemeanor. The people must prove beyond a reasonable doubt that the defendant, Elpidio Fegarido, did intentionally engage in sexual contact with another, that is, by causing his hand to touch the breast of [C.H.E.], while Elpidio Fegarido knows or has reason to know that [C.H.E.] was physically helpless, in Guam, on or about the period between January 1, 2004, through March 31st, 2005 inclusive.

Tr., vol. 5 at 77-78 (Jury Trial, Dec. 19, 2008).

[11] After deliberating, the jury found Fegarido guilty on Count Two of the First Charge of First Degree CSC; Count Three of the Second Charge of Second Degree CSC; and Fourth

Degree CSC as a lesser included offense of Count Nine of the Second Charge of Second Degree CSC. RA, tabs 112-35 (Verdict Forms, Dec. 29, 2008).

[12] On December 22, 2009, the trial court issued its judgment. Prior to the judgment, Fegarido wrote to his trial counsel three times, inquiring about the status of his appeal.

[13] On March 19, 2010, Fegarido's trial counsel filed a notice of appeal. The People moved to dismiss the appeal, arguing that Fegarido failed to meet the timeliness requirements of Guam Rules of Appellate Procedure ("GRAP") Rule 4. This court dismissed the appeal, finding that the timeliness requirements of GRAP 4 barred this court from hearing the appeal.

[14] Fegarido filed a habeas petition in the trial court. Fegarido argued that his trial counsel failed to timely file a notice of appeal, and asked the court to vacate and reenter the judgment to allow him to file a timely appeal.

[15] The People filed a motion in the habeas proceeding, asking the trial court to vacate and reenter the judgment in the criminal proceeding to allow Fegarido to file a timely appeal. In addition, the People and Fegarido submitted a stipulation and order in the criminal proceeding, asking the trial court to vacate and reenter the judgment. The trial court vacated the December 22, 2009 Judgment, and reentered it on May 31, 2013.

[16] Fegarido filed a notice of appeal. This court issued an order requiring the parties to address whether the trial court's reentered judgment allowed Fegarido to bring this appeal.

II. JURISDICTION

[17] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-163 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[18] "Where a defendant has raised the issue of sufficiency of evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*." *People v. Anastacio*, 2010 Guam 18 ¶ 10. "Claims of error based on variance are treated as an attack on the sufficiency of the evidence." *People v. Campbell*, 2006 Guam 14 ¶ 9 (citing *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir. 1986)). "When reviewing the sufficiency of the evidence to support a conviction, this Court must determine 'whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt.'" *People v. Tenorio*, 2007 Guam 19 ¶ 9 (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 20).

[19] If no objections to jury instructions are made at the time of trial, the standard of review is plain error. *People v. Perry*, 2009 Guam 4 ¶ 9. "When the defendant fails to object to a jury instruction giving rise to a constructive amendment, we also review for plain error." *People v. Felder*, 2012 Guam 8 ¶ 8. "Plain error is a highly prejudicial error." *People v. Quitugua*, 2009 Guam 10 ¶ 11. Thus, "[w]e will not reverse unless (1) there was an error; (2) the error was clear or obvious under the current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.*.

IV. ANALYSIS

[20] We must initially address the issue of whether this court has jurisdiction over the appeal. Specifically, we look at whether the trial court properly vacated and reentered the final judgment to allow Fegarido to timely file an appeal without conducting an evidentiary hearing.

A. Whether the Trial Court can Vacate and Reenter a Judgment to Allow a Party to Timely File an Appeal without Conducting an Evidentiary Hearing.

[21] "The notice of appeal by a defendant shall be filed in the superior court within 10 days after the entry of the judgment or order appealed from." 8 GCA § 130.40 (2005). Generally, reentry of final judgment, with only formal changes not affecting any matter adjudicated, does not extend the time to appeal. *Dep't of Banking v. Pink*, 317 U.S. 264, 268 (1942); *see also Rodgers v. Watt*, 722 F.2d 456, 458 (9th Cir. 1983), *superseded on other grounds as recognized by In re Stein*, 197 F.3d 421, 426 (9th Cir. 1999) ("If the district court abused its discretion in extending the appeal period by vacating and reentering judgment, we are without jurisdiction."). "The purpose of limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

[22] However, a trial court may vacate and reenter a judgment to allow the defendant to timely file an appeal when the defendant was denied the right to a direct appeal as the result of constitutionally inadequate counsel. *United States v. Pearce*, 992 F.2d 1021, 1022-23 (9th Cir. 1993). "Ineffective assistance of counsel claims . . . may be heard on direct appeal but [are] more properly entertained in a collateral proceeding." *People v. Moses*, 2007 Guam 5 ¶ 9.

[23] The Ninth Circuit has held that "if the state does not object, the [trial] court can vacate and reenter the judgment without a hearing and allow the appeal to proceed, assuming without deciding that the [defendant's] claim is true." *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005).

[24] We find that the preferred course is for the trial court to make a finding of ineffective assistance of counsel in an evidentiary hearing. However, where there is uncontroverted

evidence supporting an ineffective assistance of counsel claim, the trial court may assume that the defendant's ineffective assistance of counsel claim is true, and vacate and reenter a judgment based on a stipulation between the parties.

[25] Here, there were multiple letters from Fegarido to his prior counsel asking about the status of his appeal. People v. Fegarido, CRA10-002 (Decl. of Vincent Leon Guerrero in Supp. of Def. Appellant's Opp'n to Mot. to Dismiss at Ex. A, B, C (Apr. 7, 2010)). Despite Fegarido's requests, his counsel failed to timely file the appeal. In addition, the People stipulated to the ineffective assistance of counsel claim and reentry of the judgment. RA, tab 166 (Stipulation & Order Re. Judgment, May 31, 2013). Therefore, the trial court appropriately vacated and reentered judgment to allow Fegarido to appeal even though it did not conduct the preferred evidentiary hearing. We now turn to the substantive issues raised by Fegarido on appeal.

[26] Fegarido argues that the trial court erred in denying the motion for acquittal on the First Degree CSC charge and the Second Degree CSC charge because J.H.E. did not testify as to the underlying facts and the only evidence supporting the charge is the defendant's statement. Appellant's Am. Br. at 9-13 (Nov. 21, 2013). In addition, Fegarido argues that the trial court erred in instructing the jury on Fourth Degree CSC as a lesser included offense of Second Degree CSC. *Id.* at 13-16.

B. Whether there was Sufficient Evidence for the Trial Court to Deny Fegarido's Motion for Acquittal on the First and Second Degree CSC Charge.

[27] Fegarido argues that the trial court erred in failing to grant the motion for acquittal of the First and Second Degree CSC charges involving J.H.E. Appellant's Am. Br. at 9-13.

[28] "When reviewing the sufficiency of the evidence to support a conviction, this Court must determine 'whether the evidence in the record could reasonably support a finding of guilty beyond a reasonable doubt.'" *Tenorio*, 2007 Guam 19 ¶ 9. As to the date the offense was

committed, a "variance measuring five or six months at the most [is] 'reasonably near' enough to uphold a conviction." *Campbell*, 2006 Guam 14 ¶ 25. In child abuse cases, we have held:

> [D]espite 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.

Id. ¶ 27.

[29] Here, Fegarido argues that there was not enough evidence to support a conviction that Fegarido committed First and Second Degree CSC "[o]n or about the period between January 1, 2007 through January 31, 2007." Appellant's Am. Br. at 9-13. However, J.H.E. testified that Fegarido touched the outer part of her vagina and stuck his finger in her vagina in 2007, "[b]efore Valentines or like around there." Tr., vol. 3 at 35 (Jury Trial). There is very little variance, if any, between J.H.E.'s testimony and the indictment. J.H.E. was able to testify about the general time period and the specific sexual acts that occurred. Furthermore, J.H.E.'s testimony is corroborated by Fegarido's written confession that he "inserted [his] finger" into J.H.E on January 12. People's Exhibit 5, 5-A (Dec. 16, 2008). Therefore, we find that there was sufficient evidence to support a conviction on both the First and Second Degree CSC charges.

C. Whether this Court Should Reverse a Conviction of Fourth Degree CSC because it was not a Lesser Included Offense of Second Degree CSC.

[30] Next, Fegarido argues that we should reverse the Fourth Degree CSC conviction because the trial court improperly instructed the jury on Fourth Degree CSC as a lesser included offense of Second Degree CSC. Appellant's Am. Br. at 13-16. Essentially, Fegarido argues that the Fourth Degree CSC conviction is a constructive amendment to the indictment. *See People v. Songeni*, 2010 Guam 20 ¶ 25 ("Convictions on crimes not charged in the indictment constitute 'constructive amendments' to indictments . . . .").

[31] "[W]e adhere to the settled rule that failure to object to a jury instruction before the jury retires to consider its verdict precludes reversal except where there is a plain error affecting substantial rights. Accordingly, we review the unobjected-to lesser included offense instruction for plain error." *Felder*, 2012 Guam 8 ¶ 18 (footnote omitted). Under the plain error standard of review, this court "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) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* ¶ 19.

1. Whether there was an error.

[32] We must determine whether the trial court erred in instructing the jury on Fourth Degree CSC as a lesser included offense of Second Degree CSC. An offense is "included" when:

> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

8 GCA § 105.58(b) (2005).

[33] We find that Fourth Degree CSC is not a lesser included offense of Second Degree CSC. First, Fourth Degree CSC is not "established by proof of the same or less than all the facts required to establish [Second Degree CSC]." *See* 8 GCA § 105.58(b)(1). In *People v. Cummins*, we determined that Second Degree CSC was not a lesser included offense of First Degree CSC under 8 GCA § 105.58(b)(1), the "same or less facts test." 2010 Guam 19 ¶¶ 17, 24. We found that Second Degree CSC contained a scienter element not included within the offense of First Degree CSC. *Id.* ¶ 20. We noted that First Degree CSC did not include a scienter element

because it merely required "sexual penetration," or "intrusion . . . of any part of a person's body into the genital or anal openings of another person's body." *Id.* ¶ 19. In contrast, we noted that Second Degree CSC did include a scienter element, because it required "sexual contact," or "*intentional* touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the *purpose of sexual arousal or gratification.*" *Id.* ¶ 20 (quoting 9 GCA § 25.10(a)(8) (first emphasis added)). We found that because Second Degree CSC contained a scienter element not included in First Degree CSC, Second Degree CSC did not have the same or less facts as those required to prove First Degree CSC. *Id.* ¶¶ 19-20.

[34] Here, the grand jury charged Fegarido with Second Degree CSC pursuant to 9 GCA § 25.20(a)(1). Under section 25.20(a)(1), "[a] person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if . . . that other person is under fourteen (14) years old of age." 9 GCA § 25.20(a)(1) (2005). However, the court included a lesser included offense instruction of Fourth Degree CSC pursuant to 9 GCA § 25.30(a)(2). Under section 25.30(a)(2), "[a] person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and . . . the actor knows or has reason to know that the victim is . . . physically helpless." *Id.* § 25.30(a)(2) (2005); Tr., vol. 5 at 77-78 (Jury Trial). Both crimes involve "sexual contact," or "*intentional* touching of the victim's or actor's intimate parts . . . for the purpose of sexual arousal or gratification." 9 GCA § 25.10(a)(8) (2005) (emphasis added). However, section 25.30(a)(2) includes an additional scienter element, that the defendant "knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless." 9 GCA § 25.30(a)(2). In order to prove Fourth Degree CSC, the prosecution would have to prove an additional

knowledge requirement. Therefore, Fourth Degree CSC does not require the same or less facts as Second Degree CSC, and it is not a lesser included offense under 8 GCA § 105.58(b)(1).

[35] Second, Fourth Degree CSC does not consist of an "attempt or solicitation to commit [Second Degree CSC]." *See* 8 GCA § 105.58(b)(2). In *People v. Songeni*, we explained that section 105.58(b)(2) "deals solely with inchoate offenses." 2010 Guam 20 ¶ 14. We found that Second Degree CSC was distinct from an inchoate offense of First Degree CSC, and was not a lesser included offense under section 105.58(b)(2). *Id.* ¶ 15. Similarly, we find that Fourth Degree CSC is distinct from an attempt or solicitation to commit Second Degree CSC, and therefore is not a lesser included offense under section 105.58(b)(2).

[36] Finally, Fourth Degree CSC does not "differ[] from [Second Degree CSC] only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission." *See* 8 GCA § 105.58(b)(3). In *Songeni*, we found that Second Degree CSC was not a lesser included offense of First Degree CSC under section 105.58(b)(3). 2010 Guam 20 ¶ 16. We found that the "degrees of [Criminal Sexual Conduct] are not clearly separated by divergent grades of 'injury' either to a person or to property." *Id.* ¶ 17. We compared CSC to assault, where different degrees of injury define "different grades of a single offense," noting that "aggravated assault contemplates 'serious bodily injury' while assault contemplates 'bodily injury'." *Id.* (comparing 9 GCA §§ 25.15-25.35 with 9 GCA §§ 19.20-19.30, 9 GCA §§ 22.30-22.35, and 9 GCA §§ 58.20(b)-58.30). In addition, we found that Second Degree CSC did not differ from First Degree CSC only in the respect that a lesser kind of culpability suffices to establish its commission. *Id.* ¶ 19. Instead, Second Degree CSC included an additional *mens rea* element not included in First Degree CSC because it required an "*intentional* touching of the victim's or actor's intimate parts . . . ." *Id.*

[37] Here, Fourth Degree CSC and Second Degree CSC involve the same exact injury – "sexual contact." *Compare* 9 GCA § 25.20(a)(1), *with* 9 GCA § 25.30(a)(2). In addition, although both offenses require an "intentional touching," Fourth Degree CSC includes an additional culpability requirement the defendant had knowledge that the victim "is mentally defective, mentally incapacitated or physically helpless." 9 GCA § 25.30(a)(2).

[38] Therefore, we find that the trial court erred in instructing the jury that Fourth Degree CSC was a lesser included offense of Second Degree CSC.

2. Whether the error was clear or obvious under current law.

[39] Next, we must look at whether the error was clear or obvious under current law. In *People v. Perry*, the defendant was convicted of assault, terrorizing, and multiple counts of criminal sexual conduct. 2009 Guam 4 ¶ 2. On appeal, we found that the trial court erred in failing to clearly instruct the jury that all essential elements of the crime must be proven beyond a reasonable doubt. *Id.* ¶ 30. To determine whether to reverse the convictions, we looked at whether the error was "clearly and obviously defective under current law." *Id.* ¶ 32. "[A] determination of whether an error is 'clear' for the purposes of plain error analysis does not require the existence of precedent exactly on point." *Id.* ¶ 32. We explained that "the 'plainness' of the error can depend on well-settled legal principles as much as well-settled legal precedents," and we could, "in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking." *Id.* (quoting *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003)). We found:

> This rule is particularly appropriate for our jurisdiction, whose case law consists of slightly more than ten years of Guam Supreme Court precedent. It would be unfair to require defendants to demonstrate plain error with a case directly on point given that many issues have not yet been resolved by this court.

Id. Despite finding no direct precedent addressing the same issue, we found that it was a fundamental principal that the "Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* ¶¶ 32-33 (quoting *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). We found that the trial court instructions failed to convey the idea that each and every element must be proved beyond a reasonable doubt, and therefore the error was "clearly and obviously defective." *Id.*

[40] Here, there is no direct precedent addressing whether Fourth Degree CSC is a lesser included offense of Second Degree CSC. However, it is well-settled that 8 GCA § 105.58(b) governs whether an offense is a lesser included offense. *See, e.g.*, *Songeni*, 2010 Guam 20 ¶ 23; *Cummins*, 2010 Guam 19 ¶¶ 17, 24. As discussed in the previous section, Fourth Degree CSC is not a lesser included offense of Second Degree CSC because it includes an additional scienter element, is not an inchoate offense, and does not differ only in that it has a lesser degree of injury or culpability. We find that under section 105.58(b), Fourth Degree CSC was clearly and obviously not a lesser included offense of Second Degree CSC. In addition, it is "settled that it is error for the trial court to constructively amend an indictment by giving an instruction that permits the jury to convict the defendant of an offense neither charged in the indictment nor included in the offense charged." *See Felder*, 2012 Guam 8 ¶ 21 (citing *Songeni*, 2010 Guam 20 ¶ 25). Therefore, we find that the Fourth Degree CSC instruction was a clear and obvious error under current law.

3. Whether the error affected substantial rights.

[41] Constructive amendments raise both Fifth Amendment and Sixth Amendment concerns. *Felder*, 2012 Guam 8 ¶ 23. In *Songeni*, this court recognized that constructive amendments to

indictments "have been found by federal courts to be reversible error as they violate both the Fifth and Sixth Amendments to the Constitution of the United States." 2010 Guam 20 ¶ 25. However, in *Felder*, this court found that the Fifth Amendment "right to a grand jury indictment is not a fundamental constitutional right in Guam," and that even "where it is constitutionally provided, many circuit courts do not find an unpreserved objection to constructive amendment to be *per se* reversible error." 2012 Guam 8 ¶ 31. Therefore, this court found that "where the defendant fails to object to a constructive amendment at trial, we review the constructive amendment claim for plain error," not reversible error. *Id.* Under the plain error analysis, "once a clear error has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case)." *People v. Mendiola*, 2010 Guam 5 ¶ 24; *see also Felder*, 2012 Guam 8 ¶ 31. "Therefore, in the absence of evidence in the record to show the defendant was prejudiced, the government will prevail." *People v. Quitugua*, 2009 Guam 10 ¶ 31. To be prejudicial, "the amendment must constitute 'a mistake so serious that but for it the [defendant] probably would have been acquitted.'" *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996) (quoting *United States v. Gunning*, 984 F.2d 1476, 1482 (7th Cir. 1993)).

[42] Despite finding clear error, we find that the trial court's error in instructing the jury that Fourth Degree CSC was a lesser included offense of Second Degree CSC did not affect Fegarido's substantial rights. Fegarido argues that he was not able to present a defense to the "physically helpless" element of Fourth Degree CSC. Essentially, Fegarido argues that he was denied his Sixth Amendment right to "be informed of the nature and cause of the accusation." *Felder*, 2012 Guam 8 ¶ 33 (quoting *Songeni*, 2010 Guam 20 ¶ 25). "In the context of constructive amendments, actual notice is important to a Sixth Amendment inquiry." *Felder*,

2012 Guam 8 ¶ 39 (citing *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1416 (11th Cir. 1989) (Clark, J., specially concurring)). "If a defendant has actual notice, due process may be satisfied despite an inadequate indictment." *Id.* (quoting *Alvarez-Moreno*, 874 F.2d at 1416). Here, Fegarido had notice that the Fourth Degree CSC instruction could be given because defense counsel brought the instruction to the court's attention, stating that "there is a lesser included of second degree criminal sexual conduct . . . it's fourth degree criminal sexual conduct." Tr., vol. 4 at 10-13 (Jury Trial).

[43] Furthermore, Fegarido fails to meet his burden of showing that the outcome would be different if the Fourth Degree CSC instruction was given in the indictment. Fegarido does not point to any evidence to rebut a showing of physical helplessness. In fact, while discussing whether Fourth Degree CSC was a lesser included offense of Second Degree CSC, defense counsel admitted that the victims "[met] the criteria under physically helpless." Tr., vol. 4 at 10-13 (Jury Trial). Moreover, Fegarido does not argue that he would have changed his trial tactics if he was aware of the Fourth Degree CSC instruction. Despite being aware of the Fourth Degree CSC instruction, Fegarido made no effort to argue the physically helpless element in his closing argument. Instead, Fegarido argued that the government did not meet its burden of showing any sexual misconduct. It seems unlikely that Fegarido's defense would have been different if the Fourth Degree CSC charge was included in the indictment. Therefore, we find that the error did not affect Fegarido's substantial rights. We need not address whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.

V. CONCLUSION

[44] The trial court properly vacated and reentered its judgment to allow Fegarido to timely file an appeal. In addition, the trial court did not err in denying Fegarido's motion for acquittal

on the First and Second Degree CSC charge involving J.H.E because there was sufficient evidence in the record to reasonably support a finding of guilty beyond a reasonable doubt. Finally, although the trial erred in including the Fourth Degree CSC instruction as a lesser included offense of Second Degree CSC, there was no plain error because the error did not affect Fegarido's substantial rights. Therefore, we **AFFIRM** the trial court's judgment convicting Fegarido of First, Second, and Fourth Degree CSC.

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

F. PHILIP CARBULLIDO
Associate Justice

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

KATHERINE A. MARAMAN
Associate Justice

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

ROBERT J. TORRES
Chief Justice

Table 1: Summary of Charges

Charge	Count	Victim	Date	Description	Disposition	Sentence
1st degree CSC: sexual penetration	1	JHE	04/01/05-04/30/05	finger in vagina	dismissed	n/a
	2	JHE	01/01/07-01/31/07	finger in vagina	guilty	19 years
	3	JHE	02/14/07	finger in vagina	not guilty	n/a
2nd degree CSC: sexual contact	1	JHE	08/01/01-05/30/02	hand on vagina	not guilty	n/a
	2	JHE	01/01/05-12/31/05	hand on breast	not guilty	n/a
	3	JHE	01/01/07-01/31/07	hand on vagina	guilty	15 years, concurrent
	4	JHE	02/14/07	hand on breast	not guilty	n/a
	5	JE	08/01/01-05/30/02	hand on breast	not guilty	n/a
	6	JE	08/01/01-05/30/02	hand on vagina	not guilty	n/a
	7	CHE	08/01/01-05/30/02	hand on breast	not guilty	n/a
	8	CHE	08/01/01-05/30/02	hand on buttocks	not guilty	n/a
	9	CHE	01/01/04-03/31/05	hand on breast	guilty: 4th° CSC/LIO	1 year, consecutive
	10	CHE	01/01/04-03/31/05	hand on buttocks	not guilty	n/a