IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ANTHONY T. QUENGA,
Defendant-Appellant.

Supreme Court Case No.: CRA14-006
Superior Court Case No.: CF0020-08

OPINION

Cite as: 2015 Guam 39

Appeal from the Superior Court of Guam
Argued and submitted on May 20, 2015
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Anthony T. Quenga appeals from a judgment of conviction following a jury trial. Quenga seeks reversal of his convictions based on claimed defects in the indictment and also asserts claims of insufficiency of the evidence, instructional error, and improper vouching. For the reasons herein, we reverse in part and affirm in part the judgment of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On the night of January 12, 2008, the Guam Police Department discovered that Blue House, a karaoke bar in Upper Tumon, was a front for prostitution. Investigations revealed that the owner, Song Ja Cha, had arranged with a man in Chuuk to send several young Chuukese women to Guam to work at Blue House. The women were told they would be working at a restaurant, but instead were held against their will and forced to serve as prostitutes. Cha was arrested, along with Saknin Weria and Freda Eseun, two Blue House employees who had acted as supervisors, and charged with compelling prostitution, promoting prostitution, felonious restraint, and assault.

[3] The investigation grew to include three members of the Guam Police Department, Anthony T. Quenga, David Q. Manila, and Mario L. Laxamana, who were suspected of having used their influence as law enforcement officers to keep Blue House employees from running away or seeking help and coercing them to continue to engage in prostitution. Quenga and Manila were also each accused of rape by Blue House employees. On November 16, 2012, the

People filed a superseding indictment, charging them with several offenses and conspiracies. Quenga moved to dismiss the indictment on statute of limitations grounds, arguing that more than three years had passed since the time of the alleged offenses. The trial court denied the motion, concluding that each charged offense fell within the public officer exception to the general statute of limitations, rendering the indictment timely.

[4] Following a plea deal by Laxamana and additional superseding indictments, the operative indictment (i.e., the Fourth Superseding Indictment) charged Quenga with several counts of kidnapping, felonious restraint, and compelling and promoting prostitution, as well as conspiracy to commit each of these crimes. *See* Record on Appeal ("RA"), tab 560 (Fourth Superseding Indictment, July 31, 2013). He was also charged with first degree criminal sexual conduct ("CSC"), second degree CSC, and attempt to commit first and second degree CSC. Finally, he was charged with two misdemeanors, criminal intimidation and official misconduct.

[5] Cha's trial was severed and Weria and Eseun received plea deals, leaving Manila and Quenga to be tried together. The trial lasted over a month and featured testimony from over 20 prosecution witnesses. Following the People's case, Quenga made a motion for a judgment of acquittal, which was denied. Ultimately, the jury found him guilty of eight counts of conspiracy to commit kidnapping, eight counts of kidnapping, eight counts of conspiracy to commit felonious restraint, eight counts of felonious restraint, eight counts of conspiracy to compel prostitution, eight counts of compelling prostitution, ten counts of conspiracy to promote prostitution, nine counts of promoting prostitution, one count of first degree CSC, two counts of second degree CSC, one count of attempted first degree CSC, one count of attempted second degree CSC, one count of criminal intimidation, and one count of official misconduct. He was

sentenced to two concurrent sentences of 30 years imprisonment for the first degree CSC and attempted first degree CSC convictions, to run concurrently with the sentences for the other convictions.

[6] This appeal followed.

II. JURISDICTION

[7] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-61 (2015)), and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[8] The following standards of review apply to our analysis of Quenga's claims regarding the indictment. We review timely raised objections to the sufficiency of an indictment with regard to the elements of an offense for harmless error. *People v. Torres*, 2014 Guam 8 ¶ 17. The application of a particular statute of limitations is a question of law reviewed *de novo*. *People v. Jung*, 2001 Guam 15 ¶ 10. "A double jeopardy claim is a question of law reviewed *de novo*." *People v. San Nicolas*, 2001 Guam 4 ¶ 8. "Whether an indictment is duplicitous is a question of law reviewed *de novo*." *People v. Muna*, No. CR94-00075A, 1996 WL 104532, at *1 (D. Guam App. Div. Mar. 6, 1996), *aff'd in part, rev'd in part*, 110 F.3d 69 (9th Cir. 1997).

[9] The following standard of review applies to Quenga's sufficiency of the evidence claims:

> When a defendant appeals a motion for judgment of acquittal based on an insufficiency of the evidence, we review the trial court's denial of the motion *de novo*. When ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence. On appeal, the standard is not whether the prosecution proved each element of the offense beyond a reasonable doubt because at this stage the trier of fact has previously determined the defendant to be guilty beyond a reasonable doubt. Thus, the reviewing court is not charged with making a determination as to the defendant's guilt. Instead, the reviewing court must

> determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Upon review, the evidence shall be viewed in a light most favorable to the prosecution. This standard is highly deferential.

People v. Mendiola, 2014 Guam 17 ¶¶ 14-15 (citations and internal quotation marks omitted).

[10] As Quenga did not object to the instructions or line of questioning complained of, we review his claims of instructional error and impermissible vouching for plain error. *See People v. Felder*, 2012 Guam 8 ¶ 18; *Mendiola*, 2010 Guam 5 ¶¶ 11, 16.

IV. ANALYSIS

A. Statute of Limitations

[11] We first consider Quenga's claims regarding the statute of limitations. Quenga raises three distinct but intertwined arguments related to the statute of limitations. First, he argues that the indictment was insufficient with regard to the statute of limitations as it did not plead facts invoking the public officer exception. Second, he argues that the People should have been required to prove the applicability of the public officer exception to the jury at trial. Third, he argues that the public officer exception is inapplicable because the offenses with which he was charged were not based on misconduct in office.

[12] The following facts and procedural history are relevant to our analysis of these issues. All of the offenses charged against Quenga were alleged to have been committed between February 12, 2004, and January 13, 2008. *See* RA, tab 560 at 24 (Fourth Superseding Indictment). He was first charged on November 16, 2012. RA, tab 158 (Superseding Indictment, Nov. 16, 2012). The initial superseding indictment charging Quenga was silent with regards to the statute of limitations.

[13] After being indicted, Quenga filed a motion to dismiss arguing that the statute of limitations barred prosecution of all charges except official misconduct because the general statute of limitations period of three years had expired and "none [of the other charges] allege misconduct based upon misconduct in office." RA, tab 176 at 1-2 (Mot. Dismiss, Nov. 19, 2012). The People filed an opposition arguing that 8 GCA § 10.40, the public officer exception to the statute of limitations, was applicable to the case. RA, tab 327 at 3 (Opp. Mot. Dismiss, Dec. 17, 2012). In their statement of facts, the People set forth that Quenga was a police officer at the time of the alleged offenses and remained so at the time he was charged. *Id.* at 2. Furthermore, they stated:

> In this case, it is undisputed that Defendant Quenga . . . [was] actively employed by the Guam Police Department at the time of the alleged offenses and at the time of [his] indictment. If that is disputed, the [People] respectfully submits that the Court could . . . hold a brief evidentiary hearing on the issue.

Id. at 4. Quenga did not file a response disputing the fact that he was a police officer at these times or request a fact finding proceeding on the matter. Considering the issue on the papers, the trial court denied the motion. RA, tab 274 at 4 (Dec. & Order, Dec. 3, 2012). Interpreting 8 GCA § 10.40 to apply to any offense committed by a public officer and accepting the undisputed fact that Quenga was a police officer at both the time of the offenses and the indictment, the court concluded that all of the alleged offenses fell within the public officer exception. *Id.* at 3-4.

[14] Following a plea agreement by Laxamana, the People filed a third superseding indictment. For the first time, the People included the following three opening paragraphs:

> 1. Defendants, Anthony T. Quenga and David Q. Manila, at all times mentioned herein, were employed by the Government of Guam as Police Officers as defined in 10 GCA § 77101(f), and assigned as patrol officers to the Tumon/Tamuning Precinct.

2. At all times mentioned herein Defendants Anthony T. Quenga and David Q. Manila did commit the offenses alleged herein in violation of their sworn duties as set forth in 10 GCA § 771010 et. seq., 10 GCA § 77103(a)(1)(2)(3)(4)(5)(6)(7)(8); 10 GCA § 77115 and 10 GCA § 77117(a)(1).
3. The allegations contained in paragraphs 1 through 2 of this 3rd superseding indictment are re-alleged and incorporated by reference in each of the charges and counts below as if fully set forth therein.

RA, tab 412 (Third Superseding Indictment, Mar. 15, 2013). The indictment did not include a citation to the public officer exception or allege that Quenga was a police officer within three years of the indictment. The ultimately operative fourth superseding indictment contained identical language. RA, tab 560 at 2 (Fourth Superseding Indictment). At trial, the issue of the statute of limitations was not raised by either party or the court. The court did not instruct the jury to make any findings regarding the allegations in the opening paragraphs quoted above.

1. Sufficiency of the Indictment

[15] We first consider whether the indictment charging Quenga was sufficient with regards to the statute of limitations. Quenga argues that because the prosecution relied upon the public officer exception to the statute of limitations, it was required to plead in the indictment all the facts necessary to invoke its use. Appellant's Br. at 8 (Jan. 5, 2015).

[16] Under Guam law, the statute of limitations for any felony other than murder and CSC with a minor is generally three years. 8 GCA § 10.20 (2005). The statute of limitations for a misdemeanor is generally one year. 8 GCA § 10.30 (2005). While statutes of limitations constitute important safeguards for criminal defendants, they are purely legislative in nature and are not set by reference to any constitutional principle. *See United States v. Marion*, 404 U.S. 307, 323 (1971) ("[S]tatutes [of limitations] represent legislative assessments of relative interests

of the State and the defendant in administering and receiving justice . . . . There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function."). Thus, the legislature is empowered to set the limitations period as it sees fit, including creating exceptions extending or tolling the statute of limitations under whatever circumstances that it deems appropriate. The public officer exception found at 8 GCA § 10.40 is one such example, providing:

> Notwithstanding §§ 10.20 and 10.30, a prosecution may be commenced against a public officer or employee . . . for any offense based upon misconduct in office by such public officer or employee at any time while such public officer or employee continues in public office or employment or within three (3) years thereafter.

8 GCA § 10.40 (2005).

[17] We have not had the occasion to consider what pleading responsibilities, if any, are incumbent upon the People to provide notice when relying on an exception to the statute of limitations. However, we addressed a similar question regarding the statutes of limitations in civil cases. In *Amsden v. Yamon*, we held that dismissal of a complaint was proper where the plaintiff relied on a tolling statute to avoid his claims being barred by the statute of limitations, but failed to affirmatively plead specific facts invoking the statute. 1999 Guam 14 ¶¶ 15-16. We take this opportunity to expressly adopt an analogous rule for criminal cases. Where the People file a charging document that appears on its face to be outside the statute of limitations period, they must allege specific facts that toll or invoke an exception to the general statute of limitations in order to avoid dismissal.

[18] Although federal precedent suggests that such an affirmative pleading requirement is not compelled by the United States Constitution, *see United States v. Titterington*, 374 F.3d 453, 457

(6th Cir. 2004) ("[T]he statute of limitations for [certain federal] prosecutions does not impose a pleading requirement on the Government, but merely creates an affirmative defense for the accused."), we nonetheless find it appropriate given the special protection afforded to criminal defendants and the importance of notice to allow them to mount a defense. It would be illogical to extend a civil defendant the benefit of a specific pleading requirement for an exception to the statute of limitations, while denying it to a criminal defendant whose liberty is at stake. Specific facts invoking an exception may be critical to an accused's defense, as successfully disproving them will result in dismissal of the charges. A defendant should receive formal notice of such allegations as soon as they are made.

[19] Several other jurisdictions have embraced similar rules to the one we now adopt. *See, e.g.*, *Jannuzzo v. State*, 746 S.E.2d 238, 242 (Ga. Ct. App. 2013) ("Where an exception is relied upon to toll the statute of limitation, it must be alleged in the indictment and proved."); *Tita v. State*, 267 S.W.3d 33, 38 (Tex. Crim. App. 2008) (indictment that fails to plead facts indicating that statute of limitations has been tolled subject to dismissal). Many courts have recognized this rule specifically in relation to their jurisdiction's own public officer exception. *See Commonwealth v. Creamer*, 345 A.2d 212, 216 (Pa. 1975) (requiring prosecution to allege in indictment that defendant was public officer in order to invoke public officer exception); *People v. Munoz*, 319 N.E.2d 98, 100 (Ill. 1974) ("When a statute extends the statute of limitations in certain cases, and the offense is alleged to have been committed on a date not within the general limitation period, the indictment must aver facts avoiding the bar of the limitation statute.").

[20] The initial indictment charging Quenga contained no mention of the public officer exception. Except perhaps with regard to the misdemeanor official misconduct charge, it did not

allege any facts necessary to invoke its application, namely that Quenga was a public officer or employee, that he was charged while still employed as a public officer or three years thereafter, and that the alleged offenses were based on misconduct in office. In a subsequent indictment, the prosecution added allegations that Quenga was a police officer at the time of the offenses and that he committed the offenses in violation of his sworn duties, but did not include any allegation that Quenga was a police officer within three years of the time of the indictment. Accordingly, the indictment was insufficient, as all necessary facts to invoke the public officer exception were not properly pleaded.

[21] In light of this determination, we must consider whether the harmless error standard applies to this claim. We have previously applied the harmless error standard after holding an indictment to be insufficient for failing to allege all of the essential elements of a charged offense. *See Torres*, 2014 Guam 8 ¶¶ 33-34. Although the statute of limitations is not an element of a charged offense, we consider the two situations to be sufficiently analogous to necessitate a consistent approach. In both scenarios, the accused has been deprived of effective notice of information that may be critical to preparing a defense. Furthermore, we cannot see any good reason to mandate automatic reversal for insufficient pleading with respect to the statute of limitations, but not with respect to the elements of the offense, where the defendant's constitutional right to be apprised of the nature and cause of an accusation has been violated. *See* U.S. Const. amend. VI. The Texas Court of Criminal Appeals has also considered this issue and concluded that the harmless error standard is applicable where the trial court fails to dismiss an indictment for insufficiently pleading facts tolling the statute of limitations. *See Mercier v. State*,

322 S.W.3d 258, 263-64 (Tex. Crim. App. 2010). Accordingly, we conclude that harmless error is the appropriate standard.

[22] An error is harmless if we are able to conclude beyond a reasonable doubt that the defendant was not prejudiced so as to affect the outcome of the case. *See People v. Perry*, 2009 Guam 4 ¶ 34. The burden is on the government to establish that the error was harmless. *Id.* Here, the indictment failed to provide sufficient notice to Quenga of the exception that was being relied upon and the facts that he needed to disprove in order to attain dismissal of the case against him. This created a danger that Quenga would not know what facts to challenge in defending on statute of limitations grounds or to raise a statute of limitations defense at all and should have prompted the trial court to dismiss the indictment.

[23] One noteworthy consideration in our analysis of this issue is the fact that, had the trial court properly dismissed the motion on statute of limitations grounds, the People would have been able to file a superseding indictment including the necessary allegations, as jeopardy had not yet attached. *See People v. Rios*, 2008 Guam 22 ¶ 6 (citing *People v. Manila*, 2005 Guam 6 ¶ 6 n.4) (in jury trial, jeopardy does not attach until jury is empaneled); *see also United States v. Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005) (citing *United States v. Ball*, 163 U.S. 662, 672 (1896)) (double jeopardy clause does not preclude retrial after indictment is determined to be insufficient). That the People did in fact successfully file a superseding indictment including additional, albeit still insufficient, allegations related to the public officer exception suggests that such an outcome would likely have occurred had the court acted properly by granting Quenga's motion to dismiss.

[24] More importantly, the particular danger caused by the lack of notice was not realized in this case. Quenga filed a motion to dismiss arguing that the charged offenses were not based on misconduct in office, demonstrating that he was aware that the People were relying upon the public officer exception. In response, the People set forth the factual basis for that reliance and invited Quenga to challenge those facts in a pretrial proceeding, thus providing Quenga with an opportunity to mount a statute of limitations defense with all the necessary information that a sufficient indictment would have provided.

[25] In a previous case applying the plain error standard of review, we held that the trial court's failure to provide sufficient notice to a defendant of the terms of his plea agreement was not prejudicial where the record showed that a reasonable possibility existed that the defendant was nonetheless aware of the consequences of her plea. *People v. Quitugua*, 2009 Guam 10 ¶¶ 28, 43. The record shows that Quenga was aware of the People's reliance on the public officer exception and the factual allegations triggering its application. Although we are applying the harmless error standard, rather than plain error, we find that heightened standard to be met; it was not merely possible that Quenga was aware of all relevant information to defend against the indictment on statute of limitations grounds, but practically certain.

[26] We have no reason to doubt that, had the indictment been properly dismissed, the People would have taken the opportunity to replead the charges with all necessary allegations and any subsequent attempt to dismiss the case on statute of limitations grounds would have played out identically, with no dispute that Quenga was a police officer at the necessary times to invoke the public officer exception. Accordingly, we are convinced that under the specific circumstances of this case, the People's failure to sufficiently plead the public officer exception, and the court's

failure to dismiss without prejudice on those grounds, was not prejudicial so as to affect the outcome of the case. Therefore, the trial court's improper denial of Quenga's motion to dismiss was harmless.

2. The Jury's Role

[27] Next, we consider Quenga's claim that the People were required to prove the factual basis for the public officer exception to the jury at trial. Since he makes this contention in spite of the fact that he did not raise a statute of limitations defense at trial or contest any of the facts necessary to invoke the public officer exception, Quenga is essentially arguing that the exception should have been considered an element of the offense.

[28] Some jurisdictions, by case law or by statute, have adopted this view. *See* Del. Code Ann. tit. 11, § 205(j) ("In any prosecution in which [an exception] is sought to be invoked to avoid the limitation period . . . the [prosecution] must allege and prove the applicability of [the exception] as an element of the offense."); *People v. Morris*, 554 N.E.2d 150, 153 (Ill. 1990) ("Where an indictment on its face shows that an offense was not committed within the applicable limitation period, it becomes an element of the State's case to allege and prove the existence of facts which invoke an exception to the limitation period.").

[29] Other jurisdictions, however, have rejected this approach. A California appellate court has stated that "the statute of limitations is not an 'element' of the offense insofar as the 'definition' of criminal conduct is concerned. Although the right to maintain the action is an essential part of the final power to pronounce judgment, that right constitutes no part of the crime itself." *People v. Linder*, 42 Cal. Rptr. 3d 496, 503 (Ct. App. 2006) (citations and internal quotation marks omitted). In light of this determination, the court held that an exception to the

statute of limitations must not be put before the jury in every case, despite the fact that the statute of limitations constitutes a substantive right. *Id.* Rather, the court explained that the issue becomes one for the jury only if the defendant raises a statute of limitations defense at trial. *Id.*

[30] We find California's approach to be more persuasive. There is nothing in our statutes that designates exceptions to the statute of limitations as an element of an offense.[1] Rather, the plain language of the public officer exception, like other statutes of limitations in our code, speaks only to whether or not a given prosecution may be "commenced," not what must be proven at trial if such a prosecution occurs. Furthermore, requiring proof with respect to the statute of limitations only when the issue is contested at trial accords with our precedent that a defense generally need not be disproven to the jury unless the defendant first raises it. *See People v. Gargarita*, 2015 Guam 28 ¶ 14 ("[O]nce the issue of self-defense has been raised, the prosecution bears the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense in committing any offense."); *see also* 8 GCA § 90.21 (defense need to be negated "by proof at trial, unless the issue is in the case as a result of evidence at the trial sufficient to raise a reasonable doubt on the issue").

[31] Quenga raised the issue of the statute of limitations prior to trial by moving to dismiss. Quenga raised no factual dispute, but challenged the People's reliance on the public officer exception only on the ground that the charges set forth in the indictment were not "offenses based upon misconduct in office." Based on the undisputed facts before it, the court found as a matter of law that the exception applied. At trial, he never argued that he was not a police officer

[1] While the Model Penal Code definition of "element of an offense" includes "(1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as . . . (d) negatives a defense under the statute of limitations," Model Penal Code § 1.13(9) (2015), this portion of the Code has not been adopted by Guam.

at the time of the alleged offenses or prosecution or that the alleged offenses were not based upon misconduct in office. Rather, the defense admitted that Quenga was a police officer at the time of the alleged offenses and that the Blue House was within his patrol area. Tr., vol. 3 at 30 (Jury Trial, Aug. 14, 2014). Quenga's status as a police officer at the time of the prosecution was not mentioned at all, let alone disputed. Quenga did not raise the statute of limitations as a defense or challenge the applicability of the public officer exception at trial. Accordingly, the court was under no obligation to put the issue to the jury.

3. Applicability of the Public Officer Exception

[32] Having concluded that the court's failure to dismiss the indictment as insufficient was harmless and that the issue of the public officer exception's applicability was not required to be put before the jury, what remains to be determined is whether the court was correct in finding the public officer exception to be applicable to the present case. Quenga argues, as he did in his pretrial motion to dismiss, that the exception does not apply to any of the charged offenses except official misconduct.

[33] The application of a particular statute of limitations is a question of law which we review *de novo*. *Jung*, 2001 Guam 15 ¶ 10. In doing so, we accept the facts as found by the trial court unless they are clearly erroneous. *See People v. Camacho*, 2004 Guam 6 ¶ 13 (findings of fact relied upon by trial judge in drawing legal conclusion reviewed for clear error).

[34] In order for the public officer exception found at 8 GCA § 10.40 to be applicable, three separate elements must be satisfied. First, the defendant must be or have been a public officer or employee or a person acting in complicity with a public officer or employee. 8 GCA § 10.40. In this case, the trial court found, and it was not disputed, that Quenga was a police officer. RA, tab

274 at 4 (Dec. & Order). A police officer undoubtedly qualifies as a public officer or employee, and therefore this element is satisfied.

[35] Second, the prosecution must have been commenced while the defendant continues in public office or employment or within three years thereafter. 8 GCA § 10.40. The trial court found that "[a]t the time of [Quenga's] Indictment and arrest, [he was] still employed by the Government of Guam as [a] police officer[]." RA, tab 274 at 3 (Dec. & Order). This fact was not disputed during the court's disposition of the motion and has not been disputed on appeal. As such, the prosecution was commenced while Quenga continued in public office or employment and this element is also satisfied.

[36] Finally, the charged offenses must be "offense[s] based upon misconduct in office." 8 GCA § 10.40. In order to determine whether the offenses with which Quenga was charged qualify, we must first determine to what category of offenses this language refers, which presents a matter of statutory interpretation. In interpreting this statutory language, "[o]ur duty is to interpret statutes in light of their terms and legislative intent. . . . Absent clear legislative intent to the contrary, the plain meaning prevails." *People v. Flores*, 2004 Guam 18 ¶ 8 (citations and internal quotation marks omitted).

[37] One potential interpretation of the statute, which was apparently accepted by the trial court, is that the exception is applicable to any offense committed by a public officer or employee while serving in office. Quenga argues that the exception cannot be construed so broadly. We agree. The plain language of the statute indicates that the exception applies only to

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offenses based upon misconduct in office, and not those committed by a public officer solely in his or her private capacity.[2]

[38] In clarifying this line between private offenses and those based upon misconduct in office, we look to other jurisdictions applying their own public officer exceptions. An Illinois appellate court has stated that "to decide whether [the exception] applies, a court must first determine whether the defendant was acting in a private or an official capacity" and that "a defendant acts in his official capacity if he has in some fashion exploited his official position to the detriment of the public good." *People v. Collins*, 703 N.E.2d 968, 970 (Ill. App. Ct. 1998) (citations and internal quotation marks omitted). An Ohio appellate court has stated that the public officer exception applies where the defendant has "misused his or her office either to effectively conceal the misconduct or otherwise to obstruct timely prosecution." *State v. Sakr*, 655 N.E.2d 760, 762 (Ohio Ct. App. 1995).[3]

[39] We agree with these authorities that a court applying the public officer exception must look to the specific circumstances of an alleged offense in order to determine whether it qualifies as an offense based upon misconduct in office. Circumstances in which the public officer

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[2] In finding the exception to apply to all offenses committed by a public officer or employee, the trial court cited to the Compiler's comment for 8 GCA § 10.40, which states:

> Under [the previous statute] there was no time limitation imposed on a prosecution for the theft of public monies or falsification of public records, but there was no exception for misdeeds generally by a public officer. Section 10.40 now covers all offenses but its coverage is limited to the public official, employee or his accomplice and merely extends the applicable period; it does not completely eliminate it.

8 GCA § 10.40, cmt. While this comment would seem to support the trial court's conclusion, we note that "[a]nnotations and comments [to the Guam Code] are not part of the law." 1 GCA § 101(a) (2005).

[3] The Ohio court also identified a group of offenses codified in a particular chapter of the state's criminal codes as offenses considered to be *per se* "based upon misconduct in office." *Sakr*, 655 N.E.2d at 761. An equivalent group of offenses in our criminal code would seem to at least include Title 9, Chapter 49, "Governmental Bribery, Other Unlawful Influence and Related Offenses." The misdemeanor "Official Misconduct," which Quenga does not dispute constituted an offense based upon misconduct in office, falls under this chapter.

exception would be applicable include when the defendant is alleged to have exploited his or her position in some way to perpetrate the offense or to prevent it from being discovered and prosecuted.[4]

[40] We now look to the allegations set forth in the operative indictment[5] to determine whether the public officer exception is applicable to the offenses with which Quenga was charged. Quenga was accused of conspiring with a fellow police officer to kidnap several women and force them to work as prostitutes. He was also accused of criminal sexual conduct and attempted criminal sexual conduct with one of the women. The indictment alleged that Quenga perpetrated these offenses in violation of his sworn duties and several statutes which, read together, effectively convey the responsibilities of a police officer. *See* 10 GCA § 77101(f) (2005) ("[A] [p]olice officer . . . is charged with preserving the public peace and enforcing laws and court orders . . . ."); 10 GCA § 77103 (2005) (listing the powers of a police officer); 10 GCA § 77115 (2005) (reciting the police officer's oath); 10 GCA § 77117(a)(1) (2005) ("[N]o police officer shall in any way interfere with the rights or property of any person, except where such interference is permitted by law."). Further, the indictment alleged that Quenga was assigned as a patrol officer in the Tumon portion of Tamuning, the area where the Blue House undisputedly was situated.

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[4] Given our adoption of a pleading requirement for exceptions to the statute of limitations, these circumstances should ordinarily be set forth in the indictment in order to allow the trial court to rule on a challenge. As the facts and circumstances alleged will often go beyond the essential elements of the charged offense, these additional allegations need not be proven at trial unless the defendant raises a statute of limitations defense disputing the factual basis for the applicability of the exception.

[5] In ruling that the public officer exception was applicable, the trial court considered the first superseding indictment, which did not contain allegations regarding Quenga's public office. We deem it appropriate to consider the operative indictment in our review of the issue on appeal, as it provides a more comprehensive description of the allegations levied against Quenga.

[41] Given these allegations, we conclude that although the trial court's interpretation of 8 GCA § 10.40 was overly broad, the court nonetheless correctly determined that all of the charges levied in the indictment constituted offenses based upon misconduct in office. Quenga was under a duty to report any crimes that occurred at the Blue House and instead conspired with another officer to not only conceal rampant illegality, but to perpetuate it. Accordingly, the third element of the public officer exception was applicable to the prosecution.

[42] As Quenga was a police officer at the time of the offenses and at the time of the indictment, and the offenses charged were based upon misconduct in office, all three elements of the public officer exception were satisfied and, therefore, the exception was applicable and the prosecution timely.

B. Double Jeopardy

[43] We next address Quenga's claim that, as charged, promoting prostitution and compelling prostitution are the same crime. The question before us is whether Quenga's convictions for both of these offenses amount to a violation of the double jeopardy clause. For this claim, Quenga cites to 9 GCA § 1.22, arguing that promoting prostitution and compelling prostitution "differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct . . . ." 9 GCA § 1.22(d) (2005).

[44] The following principles are relevant to this claim:

> The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. The Bill of Rights of the Organic Act of Guam similarly provides that [n]o persons shall be subject for the same offense to be twice put in jeopardy of punishment. . . . It is well established that the Double Jeopardy Clause protects against successive prosecutions as well as successive criminal punishments for the same crime. A double jeopardy claim is a question of law reviewed *de novo*.

San Nicolas, 2001 Guam 4 ¶ 8 (citation and internal quotation marks omitted).

[45] Where, as here, a defendant claims that he has been punished multiple times for the same crime under two separate statutory provisions, we apply the test articulated by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether a double jeopardy violation has occurred. *San Nicolas*, 2001 Guam 4 ¶ 11; *see also* 9 GCA § 1.22 (disallowing conviction for both an offense and its lesser included offenses).

[46] First, we must determine whether the legislature has expressly authorized multiple punishments under the relevant statutes.

> When multiple punishments are involved, the Double Jeopardy Clause is a restraint on the prosecution and the courts, not on the Legislature, which may choose to authorize multiple punishments if it wishes. Absent express authorization by the legislature, however, a presumption arises that the same offense cannot be punished under two separate statutory provisions. Once this presumption is invoked, the court must then take the second step in its analysis, employing *Blockburger* to determine whether the two statutes in effect punish the same offense.

People v. Torres, 2008 Guam 26 ¶ 40 (citations and internal quotation marks omitted).

[47] No legislative intent to effectuate multiple punishments is readily discernable from the relevant statutory language, and the People have not produced any materials demonstrating such an intent. Therefore, the presumption has not been rebutted, and we proceed to the next step of our analysis. *See id.* ¶ 41.

[48] Proceeding with the *Blockburger* analysis, we next consider whether the two statutes punish the "same offense" for the purposes of Double Jeopardy. "The *Blockburger* Court provided that '[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.'" *San*

Nicolas, 2001 Guam 4 ¶ 11 (emphasis omitted) (quoting *Blockburger*, 284 U.S. at 304). In applying the *Blockburger* test, we consider the statutory elements of the offenses charged. *Torres*, 2008 Guam 26 ¶ 52. Furthermore, "[t]he *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Christian v. Wellington*, 739 F.3d 294, 298 (6th Cir. 2014) (quoting *Illinois v. Vitale*, 447 U.S. 410, 416 (1980)).

[49] The statutory elements of promoting prostitution, as applicable to Quenga's case, are (1) knowingly (2) soliciting, inducing or causing a person to commit or engage in prostitution or to reside in or occupy a place of prostitution. 9 GCA § 28.20(a)(2) (2005). The statutory elements of compelling prostitution, as applicable to Quenga's case, are (1) intentionally, knowingly or recklessly, (2) by force, threat or duress, (3) compelling another to engage in, promote or abet prostitution. 9 GCA §§ 4.40, 28.30(a)(1) (2005).[6]

[50] Despite Quenga's assertion to the contrary, the crime of compelling prostitution clearly contains an element which is not found in the crime of promoting prostitution: the use of force, threat or duress. That, however, does not end our inquiry. The remaining question is whether promoting prostitution contains any element which is not found in the crime of compelling prostitution. The People argue that an element of promoting prostitution not found in compelling prostitution is that of causing a person to reside in or occupy a place of prostitution. This, however, is not an essential element, as it is but one of two means of committing the offense provided by the statute. The prosecution need not establish that the defendant caused a person to

[6] As 9 GCA § 28.30 does not expressly prescribe a culpable mental state for the crime of compelling prostitution, the generally required mental states of "intentionally, knowingly or recklessly," as set forth in 9 GCA § 4.40, apply to the offense. *See* 9 GCA § 4.40.

reside in or occupy a place of prostitution in order to secure a conviction, so long as it establishes that the defendant solicited, induced or caused a person to commit or engage in prostitution.

[51] Since the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial, we are concerned only with whether it would be possible for a defendant, charged in the manner as which Quenga was charged, to be convicted of both offenses based on the same proof. If a defendant is shown to have knowingly caused a person to engage in prostitution by threat, the statutory elements of both compelling prostitution and promoting prostitution are necessarily satisfied. There is no additional fact that is necessary to establish the offense of promoting prostitution. Therefore, under the *Blockburger* test, promoting prostitution and compelling prostitution represent the "same offense" for the purposes of Double Jeopardy analysis, and it was improper for Quenga to be convicted of both.

C. Duplicity

[52] Next, we consider Quenga's claim that the charges of criminal sexual conduct and criminal intimidation are duplicitous.[7] Guam law requires a jury's verdict to be unanimous. 8 GCA § 105.30(a) (2005). "An indictment is considered duplicitous if a single count combines two or more different offenses. A danger of duplicity is that a jury could find a defendant guilty on a count without reaching a unanimous verdict on the commission of an offense." *United States v. Renteria*, 557 F.3d 1003, 1007-08 (9th Cir. 2009) (citations omitted). We will discuss each charge in turn.

[7] We do not address Quenga's claim that the promoting prostitution charges were duplicitous because we have already concluded that the convictions for those charges amounted to a double jeopardy violation.

1. Criminal Sexual Conduct

[53] First, we consider whether the CSC charges are duplicitous. In the operative indictment, the First Degree CSC charge stated:

> [Quenga] . . . did commit the offense of First Degree [CSC], in that, [he] engaged in sexual penetration with another, that is: digital penetration of the genital opening of [the victim], and the sexual penetration occurred under circumstances involving a commission of a felony, that is, promoting/compelling prostitution, and [he] was aided or abetted by [Cha] or other persons, and [he] used force or coercion to accomplish the sexual penetration . . . .

RA, tab 560 at 30 (Fourth Superseding Indictment). The two counts of Second Degree CSC and the related attempt charges were similarly charged in the conjunctive. *Id.* at 30-31. Quenga argues that the prosecution should have elected a single means of committing CSC rather than pleading both.

[54] We have recently stated that "[w]hen a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those conjunctively charged acts may establish guilt." *Torres*, 2014 Guam 8 ¶ 52; *see also Renteria*, 557 F.3d at 1008 ("When a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any of those acts conjunctively charged may establish guilt."). The CSC charges against Quenga are not duplicitous because each count alleges a single offense. The allegations of circumstances involving a commission of a felony do not denote a separate offense from those alleging that Quenga was aided and abetted by Cha. Rather, they represent separate means of committing the same offense, properly charged in the conjunctive. Accordingly, the indictment was not duplicitous with regard to the CSC charges.

2. Criminal Intimidation

[55] Quenga next claims that the charge of criminal intimidation was duplicitous. The indictment stated:

> [Quenga] . . . did commit the offense of Criminal Intimidation, in that [he] did knowingly compel or induce another to do an act which the latter had a legal privilege not to do so, or to refrain from doing an act which the latter had a legal privilege to do, by threatening to commit a criminal offense, or take or withhold action as an official, or to cause an official to take or withhold action . . . .

RA, tab 560 at 32 (Fourth Superseding Indictment). Unlike the CSC charges, criminal intimidation was charged in the disjunctive.

[56] In *People v. Diaz*, we explained the rationale behind the general rule against disjunctive pleading recognized in many jurisdictions, stating: "The most substantial reason against disjunctive pleading relates to statutes where the use of either or any of two or more accusatory words creates uncertainty as to which of two or more offenses created by the one statute, is charged, and conviction had in event of conviction." 2007 Guam 3 ¶ 21 (quoting *State v. Strauser*, 63 N.W.2d 345, 347 (S.D. 1954)). More recently, in *People v. Torres*, we discussed the rule against disjunctive pleading in greater depth, stating:

> The rule against disjunctive pleading has been recognized in many federal circuits. It is established in the Ninth Circuit that "[w]hen a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those conjunctively charged acts may establish guilt." Yet courts also recognize that although charges are most properly pled in the conjunctive, the jury need only convict on one means of commission.
>
> We have adopted these principles, which suggest that conjunctive pleading is not strictly necessary where a statute is written disjunctively, because the government may prove its case disjunctively.

2014 Guam 8 ¶ 52-53 (citations omitted).

[57] Under *Torres*, disjunctive pleading does not render an indictment defective on its own. Nonetheless, such practice should be viewed with caution as it opens the door to error at trial, as occurred in this case. In charging the jury, the trial court stated:

> The People must prove that:
>
> 1) On or about the period between January 1, 2006 and January 13, 2008;
> 2) In Guam;
> 3) [Quenga] . . . did commit the offense of Criminal Intimidation;
> 4) In that [he] did knowingly compel or induce another to do an act which the latter had a legal privilege not to do so, or to refrain from doing an act which the latter had a legal privilege to do;
> 5) By threatening to commit a criminal offense, or take or withhold action as an official, or to cause an official to take or withhold action.

RA, tab 640 at 207 (Jury Instructions, Sept. 19, 2013). In doing so, the court created the possibility of a non-unanimous verdict. While some jurors may have found that Quenga compelled the victims to do acts which they had legal privileges not to do, other jurors may have found that he compelled victims to refrain from doing acts which they had a legal privilege to do. Similarly, some jurors may have found, for example, that Quenga threatened to commit a criminal offense, while others found that he took action as an official. Had the prosecution asked the jury to find that all possible theories were satisfied or, after the presentation of evidence, chosen a single theory for each element, the error would have been avoided. But under these circumstances, we cannot be certain that a unanimous verdict was found, as required by 8 GCA § 105.30(a). Accordingly, under the circumstances of this case, we agree with Quenga that the charge of criminal intimidation was duplicitous.

D. Kidnapping Charge

[58] Next, Quenga claims that the indictment was defective because the kidnapping charges failed to specify what felony was being facilitated by the alleged unlawful confinement. The following principles are relevant to this issue:

> It is well established that an indictment is sufficient which apprises a defendant of the crime with which he is charged so as to enable him to prepare his defense and to plead judgment of acquittal or conviction as a plea to subsequent prosecution for the same offense. We read an indictment in its entirety, construed according to common sense. When an indictment's sufficiency is challenged following a verdict, it is only required that the necessary facts appear in any form or by fair construction within the document. An indictment which tracks the words of the statute charging the offense is sufficient as long as the words unambiguously set forth all the elements of the offense.

Torres, 2014 Guam 8 ¶ 20 (citations and internal quotation marks omitted); *see also People v. Parker*, No. DCA CR-89-00048A, 1990 WL 320359, at *2 (D. Guam App. Div. Oct. 24, 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992) ("[W]e must liberally construe the indictment in favor of validity. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.").

[59] An essential element of kidnapping is that the victim be unlawfully confined for the purpose of facilitating the commission of a felony. *See* 9 GCA § 22.20(a)(2) (2005). Each count of kidnapping charged in the indictment states that Quenga unlawfully confined another for the purpose of facilitating the commission of a felony, but does not specify which felony was being facilitated. RA, tab 560 (Fourth Superseding Indictment).

[60] Reading the indictment in its entirety and construing it with common sense, we conclude that the indictment was not defective, as it provided Quenga with sufficient notice of the charges against him. We need not decide whether an indictment that charges kidnapping alone requires specificity as to the alleged felony being facilitated, because, in this case, Quenga was charged with committing multiple felonies that were facilitated by the kidnapping: felonious restraint,

compelling prostitution, and promoting prostitution. These were the only three other completed felonies that Quenga was alleged to have committed with regard to each of the same victims as those alleged in the kidnapping charge. To conclude that Quenga was not provided with adequate notice of the charges against him would require an overly narrow reading of the indictment that departs from common sense.

E. Sufficiency of the Evidence

[61] We next consider Quenga's claims of insufficient evidence. This requires us to view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Mendiola*, 2014 Guam 17 ¶ 15 (citations omitted). This is a highly deferential standard of review. *Id.* (citation omitted).:

1. Kidnapping

[62] Quenga claims that the prosecution presented insufficient evidence to support the charge of kidnapping. He argues that there was no evidence that he knew that the waitresses were being confined at Blue House.[8]

[63] Quenga was convicted of kidnapping as a first degree felony in violation of 9 GCA §§ 22.20(a)(2) and 4.60. Read together, these statutes provide that a person is guilty of kidnapping if, with the intention of promoting or assisting in the commission of kidnapping, he or she

[8] Quenga also argues that the conviction must be reversed because the People identified two separate felonies during closing arguments as those facilitated by Cha's confinement of her employees. He maintains that because of these statements, the court cannot be certain that the jury agreed that a felony had been committed. Based on the statutory elements, however, the People needed only to present evidence that the victims were confined "to facilitate commission of *any* felony." 9 GCA § 22.20(a)(2) (emphasis added). Therefore, if the jury members agreed the confinement was accomplished for the purposes of facilitating either of the two felonies listed by the People, then that would be sufficient to satisfy the elements of kidnapping and support the conviction.

induces or aids another person to unlawfully confine another for a substantial period to facilitate commission of any felony. 9 GCA §§ 4.60, 22.20(a)(2) (2005). Confinement is unlawful if it is accomplished by force, threat or deception. 9 GCA § 22.20(c).

[64] Quenga was convicted of kidnapping seven Blue House employees. In order to sustain the convictions, the record must contain evidence that Quenga, with the intention of promoting or assisting in the commission of kidnapping, aided Cha in confining each of these victims for a substantial period to facilitate the commission of any felony.

[65] The record is replete with evidence that Cha confined each victim for the purpose of compelling and promoting prostitution. Each worked as a prostitute at Blue House, with Cha profiting off their efforts. Each testified that they did not want to do so and wanted to leave Blue House. Tr., vol. 13 at 154-55 (Jury Trial, Aug. 29, 2013) (testimony of E.N.); Tr., vol. 8 at 67 (Jury Trial, Aug. 22, 2013) (testimony of K.C.); Tr., vol. 9 at 40 (Jury Trial, Aug. 23, 2013) (testimony of A.T.); Tr., vol. 15 at 9, 72-75 (Jury Trial, Sept. 3, 2013) (testimony of S.S. and D.R.); Tr., vol. 16 at 58, 87 (Jury Trial, Sept. 4, 2013) (testimony of M.C. and L.P.). The testimony showed that the victims were locked in at night and were threatened that they would be physically abused or arrested if they tried to run away.

[66] There was also ample evidence that Quenga intentionally aided Cha in her actions to confine the waitresses, thus acting as her accomplice under 9 GCA § 4.60. At various junctures, he stood by in uniform as Cha warned the waitresses that they would be arrested if they tried to run away or refused to prostitute themselves. Tr., vol. 13 at 79, 91-92 (Jury Trial); Tr., vol. 11 at 51 (Jury Trial, Aug. 27, 2013). He also made the same warning directly on multiple occasions.

Tr., vol. 13 at 81 (Jury Trial); Tr., vol. 10 at 90 (Jury Trial, Aug. 26, 2013); Tr., vol. 12 at 71-72 (Jury Trial, Aug. 28, 2013).

[67] Quenga argues that the People failed to present evidence showing that he knew the waitresses were being unlawfully confined. Essentially, he argues that the evidence did not show that he acted with the intention of promoting or assisting in the commission of kidnapping. The evidence established, however, that Quenga repeatedly threatened the waitresses that attempting to leave the premises would result in arrest. From these actions, the jury reasonably could infer that Quenga knew the waitresses were being held against their will and that it was his intention to assist Cha in keeping them confined at Blue House. *See People v. Jesus*, 2009 Guam 2 ¶ 62 ("In a sufficiency of the evidence analysis, courts determine whether there is sufficient direct and/or circumstantial evidence from which reasonable inferences can be drawn to support each element of the crime or crimes charged.").

[68] Accordingly, viewing the evidence in a light most favorable to the People, we conclude that the People presented sufficient evidence at trial to support the kidnapping convictions.

2. Felonious Restraint

[69] Next, Quenga claims that there was insufficient evidence to support the convictions of felonious restraint. He argues that no evidence presented to the court showed that Quenga had knowledge that the women working at Blue House were being forced to do so.

[70] The People presented evidence that Quenga was present and in uniform as Cha warned the waitresses that they would be arrested if they failed to "make the customers happy." Tr., vol. 13 at 91-92 (Jury Trial). They also presented evidence that Quenga warned the waitresses that they must obey Cha and "make the customers happy" or face arrest. *Id.* at 81; Tr., vol. 10 at 90

(Jury Trial); Tr., vol. 12 at 71-72 (Jury Trial). As with the kidnapping convictions, it was reasonable for the jury to infer from this behavior that Quenga knew the waitresses were being forced to work as prostitutes against their will.

[71] Accordingly, viewing the evidence in a light most favorable to the People, we conclude that the People presented sufficient evidence at trial to support the felonious restraint convictions.

3. Conspiracy Charges

[72] Finally, Quenga claims that there was insufficient evidence of the 34 conspiracies of which he was convicted. He argues that each of the charged conspiracies was allegedly the object of the same agreement or continuous conspiratorial relationship between Manila and Quenga and that there was no allegation of a separate conspiracy for each victim.

[73] While properly viewed as a challenge to the sufficiency of the evidence, we are mindful that this claim also raises concerns regarding the Double Jeopardy Clause's prohibition on multiple punishments for the same offense. *See Pennsylvania. v. Andrews*, 768 A.2d 309, 313 (Pa. 2001) (double jeopardy issue "inextricably intertwined" with sufficiency of the evidence issue when considering multiple conspiracy convictions). In order to prevent multiple punishments, our criminal code provides that "[i]f a person conspires to commit a number of crimes, he may be convicted of only one conspiracy so long as those multiple crimes are the object of the same agreement or continuous conspiratorial relationship." 9 GCA §13.35 (2005). Our statute is an adoption of Model Penal Code section 5.03(3), which itself is a codification of the rule enunciated by the United States Supreme Court in *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("Whether the object of a single agreement is to commit one or many crimes, it is

in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."). Several other jurisdictions have adopted similar statutes or provisions embodying the *Braverman* rule. *See, e.g.*, Ohio Rev. Code § 2923.01(F) (2011); 18 Pa. Cons. Stat. § 903(c) (1972).

[74] The People's case against Quenga with respect to conspiracy was established with circumstantial evidence. *See People v. Vu*, 49 Cal. Rptr. 3d 765, 777 (Ct. App. 2006) ("The elements of conspiracy may be proven with circumstantial evidence, particularly when those circumstances are the defendant's carrying out the agreed-upon crime.") There was no direct evidence of one or more agreements between Quenga and Manila or what those agreements entailed.

[75] The Pennsylvania Supreme Court has provided guidance for determining whether the evidence supports multiple conspiracy convictions in cases such as this: "Absent evidence respecting the scope of an agreement . . . the issue [of whether multiple conspiracies occurred] may be decided by the alternate test . . . whether the [crimes] resulted from a 'continuous conspiratorial relationship.'" *Andrews*, 768 A.2d at 316. The court has adopted a multi-factor test for determining whether multiple offenses were part of a continuous conspiratorial relationship:

> The number of overt acts in common; the overlap of personnel; the time period during which the alleged acts took place; the similarity in methods of operation; the locations in which the alleged acts took place; the extent to which the purported conspiracies share a common objective; and the degree to which interdependence is needed for the overall operation to succeed.

Id. (quoting *Commonwealth v. Koehler*, 737 A.2d 225, 245 (Pa. 1999)). We find these factors appropriate for our analysis of this claim and adopt the multi-factor test in *Andrews* for determining whether multiple offenses are part of a continuous conspiratorial relationship.

[76] We now consider whether the evidence at trial supported the jury's conclusion that Quenga and his co-conspirator formed a separate conspiratorial relationship with respect to each crime charged and with respect to each victim, as opposed to a single conspiratorial relationship encompassing all of the crimes and victims. Viewing the evidence in the light most favorable to the People, we conclude that the evidence plainly demonstrated that there was a single conspiratorial relationship encompassing all of the crimes. The evidence showed that Quenga and Manila agreed to aid Cha in holding Blue House employees against their will and forcing them to work as prostitutes, thus creating a conspiratorial relationship. Each of the underlying crimes—kidnapping, felonious restraint, compelling prostitution, and promoting prostitution—took place at the same location and were enforced by the same overt acts. They each shared a common objective of fostering an illicit prostitution enterprise. The crimes were interdependent, where "one offense is a 'necessary intermediate step' to committing a later offense," *Andrews*, 768 A.2d at 316, as the waitresses could not be forced into prostitution without first being held against their will and forced to work at Blue House. Therefore, we conclude that there was insufficient evidence to convict Quenga of a separate conspiracy for each underlying crime.

[77] We are similarly persuaded that a single conspiratorial relationship encompassed all of the victims. Even under the deferential standard for evaluating the evidence, it cannot reasonably be construed to support a conclusion that Quenga ended his conspiratorial relationship and created a new one each time a new Blue House employee was brought in from

Chuuk. Rather, each victim's being lured to Blue House and forced to work there as a prostitute was part of a single scheme to operate an illegal prostitution enterprise, enforced with the help of Quenga and Manila as police officers. Therefore, we conclude there was insufficient evidence to convict Quenga of a separate conspiracy for each victim. *See State v. Begin*, 652 A.2d 102, 107 (Me. 1995) (vacating conspiracy conviction "because the evidence in this case supports the existence of only one relationship between [the conspirators], regardless of the number of victims").

[78] Having concluded that the evidence supported only a single conspiracy, we now must consider the remedy. Quenga argues that all conspiracy convictions should be vacated because he was never charged with a single all-encompassing conspiracy. Other jurisdictions resolving similar claims, however, have found it appropriate to vacate all but the most serious conspiracy conviction. *See State v. Gallegos*, 254 P.3d 655, 669 (N.M. 2011) ("[T]he appropriate remedy is to vacate [d]efendant's redundant convictions with punishment imposed on the single remaining conspiracy at the level of the 'highest crime conspired to be committed.'"); *United States v. George*, 752 F.2d 749, 755 (1st Cir. 1985) ("Where there is only one conspiracy, *Braverman* requires sentencing on one count only and dismissal of the remainder to protect double jeopardy rights."). Therefore, we vacate all but the most serious conspiracy count, which is the First Charge, Conspiracy to Commit Kidnapping (As a First Degree Felony).[9]

[9] Quenga also claims that his sentence violated 9 GCA § 1.22, in that he was sentenced for both conspiracy to commit an offense and the underlying offense itself. As Quenga will be resentenced on remand, we need not address this claim. We trust that the trial court will be mindful of 9 GCA § 1.22 in imposing its sentence.

[79] We must also address Quenga's claim that the charging of 37 separate conspiracies when only a single conspiracy existed acted to prejudice him and render the trial unfair to the point that a new trial is required. We are not persuaded. Rather, we agree with federal courts that have concluded that a new trial is not warranted after vacating redundant conspiracy convictions. *See George*, 752 F.2d at 755 ("*Braverman* does not require the granting of a new trial."); *United States v. Mori*, 444 F.2d 240, 246 (5th Cir. 1971) ("[W]hile punishment on [multiple counts for the same conspiracy] is impermissible, a new trial is not required.").

F. Instructional Error

[80] Next, Quenga claims that the trial court erred in failing to instruct the jury not to consider co-actors' pleas in determining his guilt. Quenga did not request a jury instruction in this regard at trial or object to the instructions as given.

[81] Where there is no objection to the jury instructions at the time of trial, the court will review only for plain error. *Felder*, 2012 Guam 8 ¶ 18.

> Plain error is highly prejudicial error. Thus, [w]e 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. [The defendant] bears the burden to demonstrate that reversal is warranted.

Id. ¶ 19 (citations and internal quotation marks omitted).

1. Whether an Error Occurred

[82] We first consider whether the court erred in failing to instruct the jury not to consider co-actors' pleas in determining Quenga's guilt.

> A codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt. If the codefendant testifies, however, either the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness. Because of the potential for

> prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are critical.

United States v. Baez, 703 F.2d 453, 455 (10th Cir. 1983) (citations omitted). "The concern raised by the mention of a co-defendant's guilty plea is that after a jury learns that one co-defendant has admitted guilt, it may possibly infer that the defendant on trial is more likely to be guilty, as well." *United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994) (citing *Baez*, 703 F.2d at 455). As such, courts have found error where a co-defendant testifies to having pleaded guilty and no limiting instruction is given. *People v. Rios*, 338 P.3d 495, 501 (Colo. App. 2014) ("[A] defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a codefendant . . . has been convicted of the same charge."); *United States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999) ("When a [co-defendant's guilty] plea is introduced for any proper reason . . . the district court . . . should instruct the jury that the co-defendant's plea may not be considered as evidence of the defendant's guilt. Such [a]n instruction is necessary because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant, given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty."); *United States v. Austin*, 786 F.2d 986, 992 (10th Cir. 1986) ("[P]utting evidence of codefendants' convictions before the jury . . . without a cautionary instruction limiting the jury's consideration to a permissible purpose, constituted plain error affecting substantial rights . . . .").

[83] On the other hand, courts have held that there was no error in admitting evidence of a co-defendant's guilty plea where the court instructed the jury that the co-defendants' conviction could not be considered as evidence of the defendant's guilt. *See United States v. Blandford*, 33 F.3d 685, 709 (6th Cir. 1994); *United States v. Dworken*, 855 F.2d 12, 30 (1st Cir. 1988).

[84] Co-defendants Laxamana, Weria and Eseun pleaded guilty and testified at trial. During their testimony, the prosecution elicited the fact that each of them had received a plea deal and pleaded guilty. Prior to deliberations, the court gave the following instruction regarding the co-defendant testimony: "To the extent that a codefendant gives testimony that tends to incriminate another defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all evidence in this case." RA, tab 640 at 51 (Jury Instructions). The court did not instruct the jury that the co-defendants' guilty pleas could not be used as evidence of Quenga's guilt.

[85] Accordingly, we conclude that the court erred in failing to issue an instruction limiting the jury's consideration of the evidence of the co-defendants' guilty pleas. Such an instruction was necessary to prevent the jury from assuming that because Laxamana and the other co-defendants pleaded guilty, that Quenga must also have been guilty as well.

2. Whether the Error is Clear or Obvious under Current Law

[86] Next, we must determine whether the error was clear or obvious under current law.

> [A] determination of whether an error is 'clear' for purposes of the plain error analysis does not require the existence of precedent exactly on point. . . . [T]he 'plainness' of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, 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. This rule is particularly appropriate for our jurisdiction, whose case law consists of [less than twenty] 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.

People v. Gargarita, 2015 Guam 28 ¶ 20.

[87] Although there is no direct Guam precedent holding that a limiting instruction is necessary in the case of evidence of a co-defendant's guilty plea, we have previously held that a limiting instruction is necessary where evidence may be used by the jury for an improper purpose. *See People v. Palisoc*, 2002 Guam 9 ¶ 29 (instruction necessary to limit jury's consideration of prior bad acts to proving motive, intent, and plan). Further, the idea that a jury should not consider a co-defendant's guilty plea as evidence against the defendant is the type of well-settled legal principle that does not require direct precedent to be considered clear or obvious. *See Perry*, 2009 Guam 4 ¶ 33 (violation of "fundamental principle of American jurisprudence" constituted clear error).

[88] Accordingly, we conclude that the court's error in failing to give a limiting instruction regarding the evidence of the co-defendants' guilty pleas was clear or obvious under current law.

3. Whether the Error Affected Substantial Rights

[89] Next, we must consider whether the court's failure to give a limiting instruction affected Quenga's substantial rights.

> 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). Therefore, in the absence of evidence in the record to show the defendant was prejudiced, the government will prevail. To be prejudicial, the [error] must constitute a mistake so serious that but for it the [defendant] probably would have been acquitted.

People v. Fegarido, 2014 Guam 29 ¶ 41 (citations and internal quotation marks omitted). "The plain error rule is not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked only in exceptional circumstances . . . ." *People v. Quitugua*, 2009 Guam 10 ¶ 52 (citations omitted) (quoting *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980)) (internal quotation marks omitted).

[90] In *United States v. Vigliatura*, the Eleventh Circuit Court of Appeals considered whether the failure to instruct the jury that a co-defendant's guilty plea could not be used as evidence of the defendant's guilt amounted to plain error. 878 F.2d 1346, 1348 (11th Cir. 1989). The court stated:

> The fact that the [trial] court did not give a cautionary instruction . . . does not automatically constitute plain error. Instead, this [c]ourt must: carefully examine all the facts and circumstances of the case in their proper context. The presence or absence of an instruction is an important factor, but it is also essential to consider other factors, such as whether there was a proper purpose in introducing the fact of the guilty plea, whether the plea was improperly emphasized or used as substantive evidence of guilt, whether the introduction of the plea was invited by defense counsel, whether an objection was entered or an instruction requested, whether the defendant's failure to object to the testimony could have been the result of tactical considerations, and whether, in light of all the evidence, the failure to give an instruction was harmless beyond a reasonable doubt.

Id. (citation and internal quotation marks omitted). After evaluating these factors, the court concluded that plain error did not occur. *Id.* Although the court was not applying the exact same plain error standard as we apply here, these factors are useful for determining whether Quenga was prejudiced in this case.

[91] Here, the guilty plea was properly introduced to counter the defense's preemptive attacks during opening arguments on the credibility of the testifying co-defendants. Further, the prosecution did not improperly emphasize the pleas or state that they should be considered evidence of Quenga's guilt. Quenga did not object to the instructions as given, which properly warned the jury to carefully consider the credibility of the testifying co-defendants. Finally, the evidence against Quenga was very strong, with a procession of witnesses each testifying in detail about his crimes. Each of these factors weighs in favor of a conclusion that plain error did not occur. The only factors in favor of Quenga's position are that he did not invite the introduction

of the plea agreement and that there is no plausible tactical reason for his counsel not to have requested a limiting instruction.

[92] Weighing these factors, with particular emphasis on the strength of the evidence against him, we conclude that the court's error in failing to give a limiting instruction did not affect Quenga's substantial rights. The circumstances of this case do not show that the extraordinary remedy of plain error is appropriate. Accordingly, we conclude that his instructional error claim fails on the third prong of the plain error standard of review.

G. Impermissible Vouching

[93] Finally, Quenga argues that the prosecutor impermissibly vouched for the credibility of government witnesses. He argues that this was done by eliciting from the testifying co-defendants the fact that they had agreed to tell the truth as part of their plea agreements.

> [Impermissible vouching] occurs when the government places the prestige of the government behind the witnesses through personal assurances of their veracity .... Vouching of that sort is dangerous precisely because a jury may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.

People v. Mendiola, 2010 Guam 5 ¶ 16. As Quenga did not object when the relevant testimony was elicited from the witnesses, we review only for plain error. *Id.* ¶ 13.

[94] The Tenth Circuit Court of Appeals has stated:

> [W]hile guaranteeing the truthfulness of a witness's testimony is impermissible, presenting evidence of his or her obligation or motivation to testify truthfully is unobjectionable. Plea agreements fall into the latter category. It is well established that prosecutors may admit plea agreements, even those which include truthfulness provisions, without violating the dictates against vouching. Use of the 'truthfulness' portions of these agreements becomes impermissible vouching only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness'[s] testimony.

United States v. Jones, 468 F.3d 704, 707 (10th Cir. 2006) (citations and internal quotation marks omitted).

[95] The Eleventh Circuit Court of Appeals, on the other hand, has adopted a rule wherein "statements contained in a plea agreement that require a witness to testify truthfully should not be used during direct examination and may be used on re-direct only if the credibility of the witness is attacked on cross examination." *United States v. Cohen*, 888 F.2d 770, 774 (11th Cir. 1989). An exception exists, however, where the co-defendant's credibility was preemptively attacked by the defense during opening argument. *Id.* at 774-75. In those cases, the prosecution may properly elicit the terms of the plea agreement on direct examination. *Id.* at 775.

[96] In this case, the prosecution merely asked the witnesses to state the terms of their plea agreements and neither explicitly nor implicitly guaranteed the veracity of the witnesses' statements. Further, the prosecution did not mention the terms of the plea deals during closing argument, when impermissible vouching is most likely to occur. Additionally, defense counsel for Manila attacked the credibility of the government's co-defendant witnesses in his opening argument, stating that they had made agreements to avoid jail time and that their motivations needed to be questioned. Therefore, the introduction of the co-defendants' plea agreements was properly done on direct examination to bolster their credibility. Under either the Tenth Circuit or the Eleventh Circuit's rule, the prosecution's eliciting of the fact of the plea agreements was proper.

[97] Accordingly, we conclude that there was no error in allowing the witnesses to testify regarding the terms of their plea agreement and, therefore, Quenga's claim of impermissible vouching fails under the first prong of the plain error standard of review.

V. CONCLUSION

[98] Promoting prostitution and compelling prostitution are the same offense for the purposes of double jeopardy. As the legislature did not allow for multiple punishments with respect to these crimes, the convictions of promoting prostitution must be vacated. The duplicitous conviction of criminal intimidation also must be vacated. There was insufficient evidence to establish the formation of multiple conspiracies and all but the most serious conspiracy conviction must be vacated. Due to these improper convictions, it is appropriate that Quenga be resentenced for the most serious conspiracy count, which is the First Charge, Conspiracy to Commit Kidnapping (As a First Degree Felony).

[99] Accordingly, we **REVERSE** the judgment of the trial court with respect to these convictions and **REMAND** to vacate the improper convictions and resentence. In all other respects, the judgment is **AFFIRMED**.

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