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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

TOMMY JOHN QUICHOCHO AFAISEN,
Defendant-Appellant.

Supreme Court Case No.: CRA15-021
Superior Court Case No.: CF0626-14

OPINION

Cite as: 2016 Guam 31

Appeal from the Superior Court of Guam
Argued and submitted on February 19, 2016
Dededo, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Tommy John Quichocho Afaisen appeals a final judgment convicting him of two counts of Attempted Murder (as a First Degree Felony); two counts of Aggravated Assault (as a Second Degree Felony); Robbery (as a Second Degree Felony); Theft of a Motor Vehicle (as a Second Degree Felony); Terrorizing (as a Third Degree Felony); and Special Allegations of Possession and Use of a Deadly Weapon in the Commission of a Felony affiliated with each charge and count except Theft of a Motor Vehicle. Afaisen seeks reversal of one of the Attempted Murder convictions and its corresponding Special Allegation, and reversal of the Theft of a Motor Vehicle conviction based on double jeopardy violations.

[2] For the reasons stated herein, we hereby affirm the Attempted Murder convictions and sentences; we reverse the Theft of a Motor Vehicle conviction and vacate the corresponding sentence; and remand to the trial court to dismiss the Theft of a Motor Vehicle conviction, and enter an amended final judgment not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On or about the early morning hours of December 4, 2014, Afaisen and Irvin White schemed to rob a third party. At trial, Irvin testified that he did not want to use his own truck to rob the third party; as a result, they both searched for a vehicle. In White's truck, Afaisen and White drove to the parking lot of the Days Inn in Tamuning. They attempted to steal one vehicle that was parked in the Days Inn parking lot, but to no avail. Thereafter, they entered the Days Inn, where there was one employee on the night shift. With a gun in hand, Afaisen and White approached the employee,

pointed the gun at him and asked, "Where is it?" The employee testified that Afaisen and partner took several items, including the Days Inn cash box, hotel keys, his wallet, iPad, backpack, and keys to his Nissan Sentra.

[4] Afaisen and White exited the building and used the just-stolen keys to drive off in the employee's vehicle, which was located in the parking lot of the Days Inn. At trial, surveillance video was shown corroborating the occurrence of the described events. After Afaisen and White left, the Days Inn employee called the police.

[5] Driving on Ypao Road, two Guam Police Department officers, Anthony Borja and J.D. San Nicolas, spotted the Nissan Sentra. A high-speed chase through the Tamuning area ensued. Officer Borja testified that the chase led the parties near the Guam Premier Outlets, and that as they passed Applebee's restaurant, he heard a pop sound. His partner, Officer San Nicolas, yelled, "Oh, man, gunshots . . . gunshots!" Transcript ("Tr."), at 9 (Jury Trial Day 2, Feb. 3, 2015). Officer Borja further testified that while still in pursuit of the Nissan Sentra and as the parties passed Micropac, he heard two more gunshots that were directed toward both officers. Several events occurred thereafter, and both Afaisen and White were ultimately apprehended.

[6] A Grand Jury indicted Afaisen on December 12, 2014, charging him with the following: (1) two counts of Attempted Murder (as a First Degree Felony), for intentionally and knowingly attempting to cause the death of another human being, that is Officer Anthony A. Borja and Officer Jon Derek San Nicolas, in violation of 9 GCA §§ 16.40(a)(1), 13.60(a) and (b), with two Special Allegations (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 GCA § 80.37; (2) two counts of Aggravated Assault (as a Second Degree Felony), in violation of 9 GCA § 19.20(a)(1), with two Special Allegations (Possession and Use of a Deadly Weapon in the

Commission of a Felony), in violation of 9 GCA § 80.37; (3) Robbery (as a Second Degree Felony), in violation of 9 GCA § 40.20(a)(3), with a Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 GCA § 80.37; (4) Theft of a Motor Vehicle (as a Second Degree Felony), in violation of 9 GCA §§ 43.20(a) and 43.30(a); and (5) Terrorizing (as a Third Degree Felony), in violation of 9 GCA § 19.60(a) and (b), with a Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 GCA § 80.37. Record on Appeal ("RA"), tab 12 at 2-5 (Indictment, Dec. 12, 2014). After a jury trial, Afaisen was found guilty of all charges. Thereafter, the trial court sentenced Afaisen on April 8, 2015. He was sentenced to the following:

> A. That as to CHARGE ONE:
>
> 1. Count One of ATTEMPTED MURDER (As a lst Degree Felony), in violation of 9 G.C.A. §§ 16.40(a)(1), 13.60(a) and (b), the Defendant shall serve **TEN (10) YEARS** imprisonment, **CONCURRENT** to all charges except SPECIAL ALLEGATION charges;
>
> 2. Count One of Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 G.C.A. § 80.37, the Defendant shall serve **FIVE (5) YEARS** imprisonment, **CONSECUTIVE** to all charges.
>
> 3. Count Two of ATTEMPTED MURDER (As a 1st Degree Felony), in violation of 9 G.C.A. §§ 16.40(a)(1), 13.60(a) and (b), the Defendant shall serve **TEN (10) YEARS** imprisonment **CONCURRENT** to all charges except SPECIAL ALLEGATION charges;
>
> 4. Count Two of Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 G.C.A. § 80.37, the Defendant shall serve **FIVE (5) YEARS** imprisonment, **CONSECUTIVE** to all charges[.]
>
> B. That as to CHARGE TWO:
>
> 1. Count One of AGGRAVATED ASSAULT (as A 2nd Degree Felony), in violation of 9 G.C.A. §§ 19.20(a)(1), the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Two, Count One;

2. Count One of Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Two, Count One;

3. Count Two of AGGRAVATED ASSAULT (as A 2nd Degree Felony), in violation of 9 G.C.A. §§ 19.20(a)(1), the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Two, Count Two;

4. Count Two of Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 G.C.A. § 80.37, the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Two, Count Two;

C. That as to CHARGE THREE:

1. ROBBERY (As a 2nd Degree Felony), in violation of 9 G.C.A. § 40.20(a)(3), the Defendant shall serve **TEN (10) YEARS** imprisonment **CONCURRENT** to all charges except SPECIAL ALLEGATION charges; and

2. Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 G.C.A. § 80.37, the Defendant is sentenced to serve **FIVE (5) YEARS** imprisonment, **CONSECUTIVE** to all charges.

D. That as to CHARGE FOUR:

1. THEFT OF A MOTOR VEHICLE (As a 2nd Degree Felony), in violation of 9 G.C.A. §§ 43.20(a) and 43.30(a), the Defendant shall serve **FIVE (5) YEARS** imprisonment **CONCURRENT** to all charges except SPECIAL ALLEGATION charges;

E. That as to CHARGE FIVE:

1. TERRORIZING (As a 3rd Degree Felony), in violation of 9 G.C.A. §§ 19.60(a) and (b), the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Three;

2. Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 G.C.A. § 80.37, the Defendant's sentenced [sic] is merged with the sentence imposed in Charge Three.

RA, tab 103 at 3-5 (Judgment, May 18, 2015). Afaisen timely appealed. RA, tab 99 (Notice of Appeal, May 7, 2015).

II. JURISDICTION

[7] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 114-229 (2016)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

[8] Afaisen filed his notice of appeal on May 7, 2015; the notice of entry of judgment was filed on May 18, 2015. Such an appeal is timely filed under Rule 4(b)(2) of the Guam Rules of Appellate Procedure, which provides that "[a] notice of appeal filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry." Guam R. App. P. 4(b)(2).

III. STANDARD OF REVIEW

[9] Claims of double jeopardy are questions of law and are reviewed *de novo*. *See People v. Camacho*, 2015 Guam 37 ¶ 10 (citing *People v. San Nicolas*, 2001 Guam 4 ¶ 8); *People v. Quenga*, 2015 Guam 39 ¶ 8. When a double jeopardy claim is raised for appellate review, we are also required to discern legislative intent under the applicable charging statutes. *See San Nicolas*, 2001 Guam 4 ¶ 9 (citations omitted). Discerning legislative intent requires statutory interpretation which is also analyzed under a *de novo* standard of review. *See id.* "Whether or not an offense is defined as a continuing course of conduct involves issues of statutory interpretation" and is reviewed *de novo*. *People v. Diaz*, 2007 Guam 3 ¶ 10 (citing *San Nicolas*, 2001 Guam 4 ¶¶ 23-26).

IV. ANALYSIS

[10] Afaisen raises two double jeopardy arguments on appeal. First, he challenges his two Attempted Murder and related Special Allegation convictions. He maintains that his protection against double jeopardy was violated when he was twice convicted, claiming that his conduct on the

night of the criminal episode does not support both convictions for Attempted Murder and related Special Allegations. Second, Afaisen claims that his protection against double jeopardy was again violated when he was convicted for both Robbery and Theft of a Motor Vehicle. He contends that the theft of the motor vehicle was part of a single transaction incorporating the robbery, and therefore, both convictions cannot stand. We discuss each argument in turn.

A. Whether Afaisen's Protection Against Double Jeopardy was Violated When He was Convicted for Two Attempted Murders and Related Special Allegations as a Result of Firing Multiple Shots in the General Direction of Two Police Officers

[11] As his initial argument, Afaisen maintains that he should not have been convicted and sentenced for both Attempted Murder and related Special Allegation charges when the convictions came as a result of the same course of conduct and neither police officer was in fact harmed. Appellant's Br. at 7, 9-10 (Sept. 2, 2015).

1. Double Jeopardy Clause under the Fifth Amendment – "Unit of Prosecution"

[12] The Double Jeopardy Clause of the Fifth Amendment, made applicable to Guam by the Organic Act of Guam, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *United States v. Tateo*, 377 U.S. 463, 465 (1964) (quoting U.S. Const. amend. V); 48 U.S.C.A. § 1421b(u) (Westlaw current through Pub. L. 114-229 (2016)). "It is well established that the Double Jeopardy Clause protects against successive prosecutions as well as successive criminal punishments for the same crime." *San Nicolas*, 2001 Guam 4 ¶ 8 (citations omitted). "The Double Jeopardy Clause embodies the principle that the power to define criminal offenses and impose punishment resides whole with the Legislature . . . ." *Id.* ¶ 9 (citing *Whalen v. United States*, 445 U.S. 684, 688 (1980)). "Therefore, when determining whether the [L]egislature has authorized that the defendant be punished twice for two violations of the same statute, we must

discern the legislative intent." *Id.* (citing *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999)). "Absent clear legislative intent to the contrary, the plain meaning [of the statute] prevails." *Agana Beach Condo. Homeowners' Ass'n v. Untalan*, 2015 Guam 35 ¶ 13 (citing *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17). "[I]n determining legislative intent, a statute should be read as a whole, and . . . courts should construe each section in conjunction with other sections." *Id.*

[13] Afaisen was sentenced for two violations of the same statute; therefore, the most relevant test to determine whether the Legislature intended to allow for cumulative punishments under the same statute is the "unit of prosecution" test. *See San Nicolas*, 2001 Guam 4 ¶ 10. Under the "unit of prosecution" test, "[t]he relevant inquiry is 'whether the conduct at issue was intended to give rise to more than one offense under the same [statutory] provision.'" *Id.* ¶ 13 (quoting *United States v. McLaughlin*, 164 F.3d 1, 14 (D.C. Cir. 1998)). The language and legislative history of the statute provide this court with guidance on determining legislative intent. *See id.* After resorting to the canons of statutory construction, when legislative intent is found to be ambiguous, we apply the rule of lenity where "doubt will be resolved against turning a single transaction into multiple offenses." *Id.* (quoting *McLaughlin*, 164 F.3d at 14-15); *see also People v. Lau*, 2007 Guam 4 ¶ 11 n.5 (citing *United States v. Pearson*, 321 F.3d 790, 791 (9th Cir. 2003)). Therefore, under the rule of lenity, the disposition would reverse multiple convictions under a single statute when the defendant's conduct manifests from a single transaction. *See id.*

2. "Unit of Prosecution" – Attempted Murder in Violation of 9 GCA §§ 16.40(a)(1), 13.60(a) and (b)

[14] Plaintiff-Appellee People of Guam ("the People") contend that the plain language of the charging statute is unambiguous because the murder statute refers to "another human being" and the

Legislature intended that each separate human being who was victimized by an attempted murder would be an appropriate unit of prosecution. Appellee's Br. at 18 (Oct. 16, 2015).

[15] Title 9 GCA § 16.20 provides that "[a] person is guilty of criminal homicide if he causes the death of *another human being*" under five enumerated circumstances or states of mind. 9 GCA § 16.20(a) (2005) (emphasis added). "Murder" is defined in 9 GCA § 16.40, which provides that "[c]riminal homicide constitutes murder when: (1) it is committed intentionally or knowingly . . . ." 9 GCA § 16.40(a)(1) (2005).

[16] "In cases where the defendant's single act injures more than one person, legislative intent as to the appropriate unit of prosecution can be gleaned by the descriptive words of the statute." *San Nicolas*, 2001 Guam 4 ¶ 20 (citation omitted). In *San Nicolas*, we addressed phrasing of statutes with regard to whether a separate unit of prosecution is allowed for each victim based on a defendant's single criminal act. *See id.* We held that the phrasing, "a child," as used within Guam's child abuse statute, evidenced the Legislature's intent that each separate child be the appropriate unit of prosecution. *Id.* ¶ 21 (analyzing 9 GCA § 31.30 – Child Abuse; Defined & Punished). We also discussed United States Supreme Court cases, *Bell v. United States*, 349 U.S. 81 (1955), and *Ladner v. United States*, 358 U.S. 169 (1958), where the criminal statutes in those cases used the phrasing "'*any*' woman" and "'*any*' federal officer." *San Nicolas*, 2001 Guam 4 ¶ 22. We noted that because those statutes used the word "*any*," the proper unit of prosecution was not clear and the Court applied the rule of lenity. *See id.* ¶¶ 16-17 (citing *Bell*, 349 U.S. at 83-84; *Ladner*, 358 U.S. at 176-79). In holding as such, there was a single unit of prosecution, albeit multiple victims. *Id.*

[17] We confronted a similar issue in *People v. Manley*, 2010 Guam 15. In that case, we addressed phrasing within Guam's aggravated assault statute in order to determine the appropriate unit of

prosecution. *See Manley*, 2010 Guam 15 ¶¶ 33-34. We held that the term "another," as used in Guam's aggravated assault statute, provides the basis for a separate unit of prosecution, regardless of that person being identified either as "another" or as "another person." *Id.* ¶¶ 34-35. Citing to our *San Nicolas* opinion, we reasoned that a "statute[] using the singular words 'a' or 'another' reveal the intent that each victim be the appropriate unit of prosecution." *Id.* ¶ 34 (quoting *San Nicolas*, 2001 Guam 4 ¶ 20).

[18] Here, the language from the homicide statutes, 9 GCA §§ 16.20 and 16.40, is unambiguous, and it is apparent that the Legislature intended for a separate unit of prosecution for each victim. By using the phrasing "another human being," it was the Legislature's intent to create distinct charges per victim. As such, we find that it was the Legislature's clear purpose that each victim constitutes a separate unit of prosecution when convicted of violating 9 GCA §§ 16.20 and 16.40. This conclusion proves consistent with our holding in *Manley* in that when the term "another" is used within a statute, each victim may be the appropriate unit of prosecution. Other courts have similar holdings. *See Ex Parte Garza*, 115 S.W.3d 123, 126 n.1 (Tex. Ct. App. 2003) ("[E]ach victim in [an] attempted murder case is an 'allowable unit of prosecution.'" (citing *Manrique v. State*, 994 S.W.2d 640, 646 n.5 (Tex. Crim. App. 1999) (McCormick, P.J., concurring))); *see also Manrique*, 994 S.W.2d at 646 (McCormick, P.J., concurring) (expressing that "a separate offense was committed with each round fired from the AK-47 assault rifle and that the 'intention of the lawmakers' also was to protect each victim 'from felonious injury and mutilation'"); *Vineyard v. State*, 958 S.W.2d 834, 838 n.7 (Tex. Crim. App. 1998) (holding that in a prosecution for possessing an image depicting a child engaging in sexual conduct, each item of pornography is an allowable unit of prosecution).

[19] Because sections 16.20 and 16.40 are unambiguous with respect to the appropriate unit of prosecution, we will not apply the rule of lenity. Therefore, we find that the homicide statutes allow for a separate unit of prosecution for each victim.

3. "Unit of Prosecution" – Attempt Statute under 9 GCA § 13.10

[20] Afaisen argues that because he was charged with *attempted* murder and because the police officers were not in fact injured, we should conduct our double jeopardy analysis under the "Attempt" statute found in 9 GCA § 13.10, rather than the "Murder" statutes found in 9 GCA §§ 16.20 and 16.40(a)(1). *See* Appellant's Reply Br. at 1-2 (Nov. 3, 2015); Appellant's Br. at 8, 10. The attempt statute reads as follows:

> **§ 13.10. Attempt: Defined.**
>
> A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

9 GCA § 13.10 (2005).

[21] Afaisen believes that the Guam Legislature did not "allow a defendant to be punished for an inchoate crime for the same conduct where none of the victims are injured and there is no showing of specific intent to harm multiple individuals." Reply Br. at 2-3. He cites to *State v. Boswell*, 340 P.3d 971 (Wash. Ct. App. 2014), in an attempt to persuade this court to adopt the "continuing course of conduct" analysis, and relevant factors that are used in *Boswell*, to determine the unit of prosecution for inchoate offenses. *Id.* at 1-2 (citing *Boswell*, 340 P.3d 971).

[22] In *Boswell*, the Court of Appeals of Washington stated that the unit of prosecution for inchoate crimes, such as attempt, solicitation, or conspiracy, "is the act necessary to support the inchoate offense, not the underlying crime." 340 P.3d at 975-76. The *Boswell* court's concern

involved the balance between the prosecution arbitrarily charging multiple counts based on each conceivable step leading up to the commission of a crime, and permitting the prosecution to hold a defendant accountable for repeated attempts on one victim's life. *See id.* at 977. As a remedy to this concern, the *Boswell* court adopted the "continuing course of conduct" test to determine the appropriate unit of prosecution for an inchoate crime. *See id.* The *Boswell* court held that the defendant's two convictions for attempted murder did not violate the defendant's protection against double jeopardy because the defendant committed two distinct attempts to murder one victim – poisoning the victim, and then later shooting her. *Id.* An important distinguishing factor between Afaisen's case and *Boswell* is that there was only one victim in *Boswell*. *See id.* Therefore, the *Boswell* court based its multiple convictions on multiple acts by the defendant, rather than multiple victims. Here, we address a distinguishable matter of whether a defendant's single act against multiple victims supports multiple convictions. For that reason, we find the *Boswell* case unpersuasive in our analysis.

[23] The case of *State v. Bernal*, opined by the Supreme Court of New Mexico, held that the number of victims has been a "particularly significant indicator in determining whether acts are distinct." 146 P.3d 289, 294 (N.M. 2006) (citing *State v. Morro*, 987 P.2d 420, 424 (N.M. 1999)). *Bernal* utilized six factors from *Herron v. State*, 805 P.2d 624 (N.M. 1991), to determine the distinctness of crimes. The six factors, referred to as the "continuing course of conduct" factors, are: (1) temporal proximity of the acts; (2) the victim's location during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) the number of victims. *See Bernal*, 146 P.3d at 294. The *Bernal* court went on to clarify that "while the existence of multiple victims does not, itself, settle whether conduct is unitary

or distinct, it is a strong indicator of legislative intent to punish conduct that can only be overcome by other factors." *Id.* (citing *State v. Barr*, 984 P.2d 185, 191 (N.M. 1999); *Herron*, 805 P.2d at 628). Thus, "multiple victims will likely give rise to multiple offenses." *Herron*, 805 P.2d at 628.

[24] In the instant case, Afaisen shot at two victims, Officer Borja and Officer San Nicolas. Although he argues that there was no evidence presented at trial establishing specific intent or individualized steps that he took to harm each officer, and uses the *Boswell* case in an attempt to persuade this court to adopt the "continuous course of conduct" factors, the proper statute to examine when determining the unit of prosecution for attempted murder is the homicide statute, not the "attempted" portion of the charges. Because we find Guam's homicide statutes unambiguous, the "continuous course of conduct" factors are not applicable because such factors are only applied where the charging statute is ambiguous.

[25] As such, we are not persuaded by Afaisen's arguments on this issue and will not adopt the law from *Boswell*. Moreover, when determining the proper unit of prosecution, the substantive criminal statute should be examined, not the attempt statute.

4. "Unit of Prosecution" – Special Allegation in Violation of 9 GCA § 80.37

[26] We will also address the proper unit of prosecution under the Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony in violation of 9 GCA § 80.37. Although we affirm both of Afaisen's Attempted Murder convictions, we must examine whether the accompanying Special Allegation for each Attempted Murder conviction may also be affirmed. The Special Allegation statute with which Afaisen was charged provides the following:

> **§ 80.37. Deadly Weapons Used in Felonies; Sentence.**
>
> Whoever unlawfully possesses or uses a deadly weapon in the commission of *a felony* punishable under the laws of Guam shall, in addition to the punishment

> imposed for the commission of *such felony*, be imprisoned for . . . . The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commission of any other felony.

9 GCA § 80.37 (2005) (emphasis added). As we have discussed previously, a statute "using the singular words 'a' or 'another' reveals the intent that each victim be the appropriate unit of prosecution." *Manley*, 2010 Guam 15 ¶ 34 (quoting *San Nicolas*, 2001 Guam 4 ¶ 20).

[27] The Special Allegation charged pursuant to section 80.37 uses the singular words "*a* felony" and "punishment imposed for the commission of *such felony*." 9 GCA § 80.37 (emphases added). Using the logic from *San Nicolas* and *Manley*, we find that the statutory language under section 80.37 proves that the Guam Legislature intended that a special allegation is permissible for each underlying felony conviction. Sentencing pursuant to section 80.37 is a sentencing enhancement and not an offense in and of itself. The Legislature did not intend to aggregate the deadly weapon sentencing, but intended to allow for a separate unit of prosecution for each felony conviction. "Guam's purpose of enacting [9 GCA] § 80.37 was specifically to impose a penalty that would be in addition to the punishment for the underlying felony." *Guam v. Snaer*, 758 F.2d 1341, 1344 (9th Cir. 1985), *cert. denied*, 474 U.S. 828 (1985) (citation omitted). Because we affirm both Attempted Murder convictions, each Attempted Murder conviction supports a separate sentence enhancement pursuant to section 80.37, even though Afaisen used one deadly weapon. Our holding on this issue is consistent with our past statutory interpretation analysis as expressed in *San Nicolas* and *Manley*. We do not find a compelling reason to deviate from those past interpretations.

[28] We conclude that Guam's homicide and attempt statutes are unambiguous – the Legislature intended for a separate unit of prosecution for each victim. Moreover, a special allegation pursuant to 9 GCA § 80.37 is a sentencing enhancement. We find that a defendant's double jeopardy protections

are not violated when a defendant is convicted of multiple special allegations when each special allegation coincides with a felony conviction. Afaisen's two Attempted Murder and Special Allegation convictions and corresponding sentences are therefore affirmed.

B. Whether the Protection Against Double Jeopardy was Offended When Afaisen was Convicted and Sentenced for both Robbery and Theft of a Motor Vehicle

[29] Afaisen maintains that because the taking of the motor vehicle occurred during the course of committing the robbery, the two acts constitute a "continuing course of conduct." Appellant's Br. at 10-12; Reply Br. at 3. As a "continuing course of conduct," Afaisen claims that the double jeopardy protection prohibits the conviction for theft of a motor vehicle. Appellant's Br. at 10-12; Reply Br. at 3. He contends that upon application of the test as set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the robbery charge and theft of a motor vehicle charge each relied on the same act of theft and may constitute only one offense. Appellant's Br. at 11.

[30] The People oppose by claiming that the acts were sufficiently separated in time and space to support the separate offenses of robbery and theft of a motor vehicle. Appellee's Br. at 22. In contending that the robbery and motor vehicle theft were separated in time and space, it is the People's position that the double jeopardy clause is not offended. *Id.*

[31] Our analysis on this issue begins with determining whether Afaisen's theft of the motor vehicle was a "continuing course of conduct" of the robbery. If deemed a continuing course of conduct, then the convictions under both charging statutes violated Afaisen's protections against double jeopardy.

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1. Charging statutes and 9 GCA § 1.22(e)

[32] Title 9 GCA § 1.22 applies when determining whether a defendant may be convicted of conduct that constitutes more than one offense. *See* 9 GCA § 1.22 (2005). This section states in relevant part:

> **§ 1.22. Prosecution for Conduct Which Constitutes More Than One Offense.**
>
> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> . . . .
>
> (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

9 GCA § 1.22(e). Section 1.22 is based on Model Penal Code section 1.07(1). 9 GCA § 1.22, SOURCE. A defendant may face prosecution for multiple offenses, but a conviction for each offense cannot stand in the event a provision under section 1.22 is invoked. *See id.*

[33] Afaisen was charged with and convicted of Robbery in violation of 9 GCA § 40.20(a)(3). RA, tab 103 at 3-4 (Judgment). "A person is guilty of *robbery in the second degree* if, in the course of committing a theft, he: . . . (3) is armed with or displays what appears to be explosives or a deadly weapon." 9 GCA § 40.20(a)(3) (2005). Afaisen was also charged and convicted for Theft of a Motor Vehicle, in violation of 9 GCA §§ 43.20(a) and 43.30(a). RA, tab 103 at 3-4 (Judgment). "A person is guilty of *theft* if he unlawfully takes or obtains or exercises unlawful control over, movable property of another with intent to deprive him thereof." 9 GCA § 43.30(a) (2005). "*Theft* constitutes a felony of the second degree, . . . if the property stolen is a[n] . . . automobile . . . ." *Id.* § 43.20(a) (2005).

[34] If a defendant's actions are considered the same conduct, 9 GCA § 1.22(e) prohibits multiple convictions of more than one offense when "the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses." 9 GCA § 1.22(e). We have previously stated that in determining whether section 1.22(e) applies, the "test is whether the [charging] statute prohibits individual acts, or instead, prohibits the course of action which they constitute." *People v. Diaz*, 2007 Guam 3 ¶ 53 (citing *San Nicolas*, 2001 Guam 4 ¶ 24). "If the statute prohibits continuous conduct, only one offense is committed even though the course of conduct persists over a long period of time." *Id.* (quoting *United States v. Johnson*, 612 F.2d 843, 845 (4th Cir. 1979)). In the alternative, "[i]f the statute proscribes distinct and separate acts, multiple prosecutions may be maintained even though the acts were committed in furtherance of the same criminal enterprise." *Johnson*, 612 F.2d at 846 (citations omitted). The analysis from *Diaz* is of assistance in determining the scope of 9 GCA § 1.22(e); however, that case involved multiple counts of one charging statute. *See generally Diaz*, 2007 Guam 3. Here, we have a matter where the defendant was charged under two statutes for acts that may or may not constitute a continuing course of conduct. Therefore, in the instant case, we are guided by *Diaz* in a limited aspect.

[35] In Guam, prosecutors do not charge separate counts of Theft of Property for each item taken during the same course of conduct. *See, e.g.*, *People v. McKinney*, 2016 Guam 3 ¶¶ 2, 5, 24 (where defendant broke into victims' home and stole two laptops, a television, and other items; defendant was charged with Theft of Property and the indictment alleged that the defendant "[d]id unlawfully take, obtain and exercise unlawful control over the movable property of [victims]; that is a *laptop, a television, and other items*"). As such, we must initially address whether the theft of the motor

vehicle and theft that constitutes the robbery arise from the same conduct, because "[i]f the convictions do not arise from the same conduct, then the analysis ends." *State v. Hood*, 300 P.3d 1083, 1086-87 (Kan. 2013) (alteration in original) (quoting *State v. Hood*, 234 P.3d 853, 857 (Kan. Ct. App. 2010)); *see also State v. Bernal*, 146 P.3d 289, 292 (N.M. 2006) ("First, we examine whether the conduct was unitary, meaning whether the same criminal conduct is the basis for both charges. If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation." (citations omitted)); *Steels v. State*, 170 S.W.3d 765, 769 (Tex. Ct. App. 2005) ("The protection against double jeopardy is inapplicable where separate and distinct offenses occur during the same transaction." (citation omitted)).

2. Whether Afaisen's action in committing theft of the motor vehicle and robbery constituted a continuing course of conduct

[36] The issue becomes whether the theft of the motor vehicle occurred in the same transaction as the robbery – stated differently, whether the theft of the motor vehicle and the robbery stemmed from a continuing course of conduct. It is a matter of first impression for this court to determine whether acts occur during a "continuing course of conduct" under these particular facts.[1] It is clear that under 9 GCA § 1.22(e), a continuing course of conduct must be "uninterrupted." However, it is unclear what may constitute "uninterrupted" conduct.[2] To properly address Afaisen's second issue raised on

[1] This court has not previously addressed principles to apply when determining when a criminal episode involving the taking of property after committing a robbery gives rise to distinct and independent acts resulting in separate crimes for double jeopardy purposes.

[2] Title 8 GCA § 10.60 alludes to "continuing course of conduct," but for the purpose of statute of limitations and commencing a criminal action:

> An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

8 GCA § 10.60 (2005).

appeal, we must determine whether the subsequent theft of the motor vehicle involved the same theft that constituted the robbery.[3]

[37] Jurisdictions such as Virginia, Kansas, and Florida have employed a factor test to determine whether a case presents a matter of the same or unitary conduct. *See Hood*, 300 P.3d at 1087; *Hayes v. State*, 803 So. 2d 695, 704 (Fla. 2001); *Millard v. Commonwealth*, 539 S.E.2d 84, 86 (Va. Ct. App. 2000). California takes a broader approach and looks to the intent and objective of the defendant. *See People v. Bauer*, 461 P.2d 637, 642-44 (Cal. 1969). Further discussion of these approaches is warranted.

a. California – intent and objective of defendant

[38] To determine the divisibility of a course of conduct, courts in California depend upon the intent and objective of the defendant. *See id.* at 642; *Neal v. California*, 357 P.2d 839, 844 (1960), *overruled on other grounds by People v. Correa*, 278 P.3d 809 (Cal. 2012) ("Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [California's double jeopardy statute] depends on the intent and objective of the actor."). "[I]f all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one . . . [and] the taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences." *Bauer*, 461 P.2d at 642.

[3] Generally, "each taking constitutes a separate larceny when each taking is the result of a separate, independent impulse or intent on the part of the thief." Peter G. Guthrie, J.D., *Series of Takings Over a Period of Time as Involving Single or Separate Larcenies*, 53 A.L.R. 398 (1973). Conversely, "a series of takings from the same individual over a period of time is a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme." *Id.* "Whether or not a series of successive takings from the same owner constitutes a series of larcenies or a single larceny depends upon the facts and circumstances of each case with respect to whether or not there was a continuing impulse, intent, plan, or scheme activating the successive takings." *Id.*

[39] In *Bauer*, the defendant broke into a residence, restrained the victims, stole items, including keys, and subsequently stole the victims' vehicle. *Id.* at 640. The *Bauer* court stated that the evidence presented did "not show that the theft of the car was an afterthought but indicate[d] to the contrary that the robbers, who while ransacking the house were carrying the stolen property to the garage, formed the intent to steal the car during the robbery if not before it." *Id.* at 642. The court reasoned further that the "fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction." *Id.* The court stated this principle also applies if "one of the crimes may have been an afterthought." *Id.*

b. Kansas – *Schoonover* factors

[40] Courts in Kansas consider numerous factors in determining whether a defendant's conduct is part of the same transaction. *See Hood*, 300 P.3d at 1087; *State v. Schoonover*, 133 P.3d 48, 79 (Kan. 2006). Some factors include:

> (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.

Schoonover, 133 P.3d at 79. In application of the *Schoonover* factors, the *Hood* court concluded that a defendant's conduct of snatching a bank bag and purse and then fleeing was unitary conduct because the acts of taking the bank bag and taking the purse occurred at the same time, in the same location, without any intervening event, and without a fresh impulse. *See Hood*, 300 P.3d at 1087.

c. Virginia – *Millard /Acey* Factors

[41] Virginia also employs a factor-based test to determine when a defendant's conduct may be considered the same transaction. Virginia utilizes the common law "single larceny doctrine," where

theft of property at or about the same time from the same general location constitutes a single crime of larceny. *See Millard*, 539 S.E.2d at 86; *see also* Daniel H. White, J.D., Annotation, *Single or Separate Larceny Predicated upon Stealing Property from Different Owners at the Same Time*, 37 A.L.R.3d 1407, § 2 (1971 & Supp.) ("The overwhelming majority of jurisdictions follow generally the so-called 'single larceny doctrine'; that is, that the taking of property belonging to different owners at the same time and place constitutes but one larceny."). "A series of larcenous acts will be considered a single count of larceny if they 'are done pursuant to a single impulse and in execution of a general fraudulent scheme.'" *Millard*, 539 S.E.2d at 86 (quoting *Acey v. Commonwealth*, 511 S.E.2d 429, 432 (Va. Ct. App. 1999)).

[42] The Virginia courts consider the following factors when deciding whether the single larceny doctrine applies: "(1) the location of the items taken, (2) the lapse of time between the takings, (3) the general and specific intent of the taker, (4) the number of owners of the items taken and (5) whether intervening events occurred between the takings." *Id.* The court noted that the primary factor for consideration is the intent of the thief. *Id.* ("Nevertheless, multiple unlawful takings constitute separate larcenies if the thief acted upon a separate intent or impulse for each theft." (citing *Richardson v. Commonwealth*, 489 S.E.2d 697, 700-01 (Va. Ct. App. 1997)).

[43] In *Millard*, the court found that presenting three checks with forged endorsements and receiving a single payment constituted the same conduct, and therefore, the defendant could not be convicted for three separate offenses. *Id.*

d. Florida – *Hayes* factors

[44] In *Hayes*, the Florida Supreme Court held that in determining a double jeopardy issue in a case that involves armed robbery and subsequent grand theft, courts should look to (1) the location of

the items taken; (2) the lapse of time between the takings; (3) number of owners of items taken; and (4) whether intervening events occurred between takings. 803 So. 2d at 704.

[45] The defendant in *Hayes* asserted that his conviction for armed robbery and grand theft of a motor vehicle was barred on double jeopardy grounds, because both convictions resulted from the same criminal episode. *Id.* at 697-98. The *Hayes* court analyzed other jurisdictions' variations of the time, place, or circumstances test, and adopted the same factors employed in the *Millard* /*Acey* test from Virginia, less the intent factor.[4] *Id.* at 704. The court also held that the armed robbery inside a victim's residence and subsequent grand theft of the victim's automobile involved distinct and independent criminal acts, and therefore, convictions on both charges did not violate double jeopardy principles. *Id.*

3. Adoption and application of the *Millard /Acey* factors

[46] To synthesize, jurisdictions utilize different tests for determining when multiple thefts may constitute distinct and independent criminal acts or are part of a continuous course of conduct. Our precedent and governing statutes are silent on the matter.

[47] The People submit that we should follow the law as stated in the Florida case, *Hayes v. State*. Appellee's Br. at 25-27. The People support its contention by claiming that the facts from *Hayes* are similar. *Id.* Therefore, the People argue, this court should hold that the subsequent taking of the

[4] The Florida court supported its ruling by citing to its previous holding in *Hearn v. State*, 55 So. 2d 559 (Fla. 1951). The *Hearn* case involved the taking of items from multiple owners and, therefore, the *Hayes* court essentially applied the same principles when the takings were from a single victim. *Hayes*, 803 So. 2d at 704 ("We conclude, based on this Court's precedent, that in reaching a determination of the double jeopardy issue in a case involving a single victim's property, courts should look to whether there was a separation of time, place, or circumstances between the initial armed robbery and the subsequent grand theft, as those factors are objective criteria utilized to determine whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent. In making this determination of whether there is a separation of time, place, or circumstances giving rise to distinct and independent acts, the courts should consider the location of the items taken, the lapse of time between takings, the number of owners of the items taken, and whether intervening events occurred between the takings.").

victim's motor vehicle after an armed robbery involves distinct and independent criminal acts and the convictions for both crimes do not offend the double jeopardy principles. *Id.*; *see also Hayes*, 803 So. 2d at 704.

[48] We are persuaded by the test as articulated by the Virginia courts in *Millard* and *Acey*. We therefore hold that the following factors must be considered when determining whether the takings of several items constitute distinct and independent criminal acts, or are part of the same transaction: (1) the location of the items taken; (2) the lapse of time between the takings; (3) the general and specific intent of the taker; (4) the number of owners of the items taken; and (5) whether intervening events occurred between the takings. *See Millard*, 539 S.E.2d at 86 (quoting *Acey*, 511 S.E.2d at 432).

[49] Adoption of the factors utilized by the Virginia courts would not disturb our previous holding in *Diaz*. In *Diaz*, we did not find that multiple counts of Official Misconduct for unlawful use of a government credit card on multiple occasions constituted the same course of conduct when the transactions extended over a period of time. *Diaz*, 2007 Guam 3 ¶¶ 51-53. We did not agree with the defendant that the Official Misconduct was the actual use of the credit card, and not each individual act of using the credit card. *Id.* ¶ 53. "The unauthorized acts *occurred over a period of months* and the acts were committed before, during, and after [the defendant's business trip]." *Id.* (emphasis added).

[50] Applying the *Millard* /*Acey* factors to the facts of this case, our analysis proceeds as follows:

(1) **The location of the items taken**. The keys and other items were taken from inside of the Days Inn front office, and the Nissan Sentra was located in the Days Inn parking lot at the time it was taken. Tr. at 45-46 (Jury Trial Day 1, Jan. 30, 2015); Tr. at 107-109 (Jury Trial Day 2, Feb. 3, 2015).

(2) **The lapse of time between the takings**. After Afaisen and White took several items from the employee, they exited the building and used the just-stolen keys to unlawfully take the vehicle. Tr. at 46-53 (Jury Trial Day 1); Tr. at 107-109 (Jury Trial Day 2). From the amount of time the employee witnessed Afaisen leave, to the moment the employee called the police, Afaisen was already driving off in the stolen vehicle. Tr. at 52-54 (Jury Trial Day 1).

(3) **The general and specific intent of the taker**. Before the robbery, Afaisen and his partner had the purpose of unlawfully taking a vehicle, as evidenced by the fact that they already attempted to steal a vehicle parked in the Days Inn parking lot before entering the Days Inn lobby. Tr. at 91 (Jury Trial Day 2). At the time they stole the items inside the Days Inn, their intent to obtain a vehicle did not alter, as proven by the fact that they stole the employee's vehicle. *Id.* at 90-91. Afaisen did not act upon a separate intent or impulse for each theft but rather committed the criminal acts in a single impulse and in execution of a general fraudulent scheme.

(4) **The number of owners of the items taken.** The items stolen in the Days Inn included the employee's wallet, iPad, cell phone, backpack, and keys. Tr. at 50-53 (Jury Trial Day 1). The keys and the vehicle were stolen from one owner, the employee. *Id.*

(5) **Whether intervening events occurred between the takings.** Based on the record, we do not find that any significant event transpired between the taking of the keys and the taking of the motor vehicle.

[51] After our analysis of the factors, we find that (1) the theft of the motor vehicle was committed as a continuing course of conduct with the items taken inside of the Days Inn because the takings occurred at or near the same location, (2) there was no significant amount of time between the two takings, (3) Afaisen had the intent to steal a vehicle prior to taking the keys, (4) the keys and the vehicle belonged to the same owner, and (5) no other intervening events occurred between the takings. The theft of the motor vehicle constituted a continuing course of conduct from the robbery, and Afaisen cannot be convicted of both offenses without violating the provisions of 9 GCA § 1.22(e) or the protections against double jeopardy.

[52] Although a defendant may be prosecuted for two crimes stemming from the same conduct, that defendant may not be convicted for both crimes. As we conclude that the conviction for the Theft of a Motor Vehicle violates 9 GCA § 1.22(e), we must not only reverse the conviction of Theft of a Motor Vehicle but also dismiss the charge. Merger of the sentences is not a proper disposition under 9 GCA § 1.22(e). The statute specifically states that if a defendant is prosecuted for more than one offense for the same conduct, he or she may not be "*convicted* of more than one offense" when part of a continuing course of conduct that is uninterrupted. 9 GCA § 1.22(e) (emphasis added). Therefore, the proper disposition, under the circumstances of this case, is not merger of sentences but dismissal of the Theft of a Motor Vehicle conviction.

[53] We hold that Afaisen's protection against double jeopardy was violated when he was convicted and sentenced for both Theft of a Motor Vehicle and Robbery. Therefore, we reverse and dismiss the conviction for Theft of a Motor Vehicle.

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V. CONCLUSION

[54] Based on the foregoing, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the trial court. We affirm both Attempted Murder and related Special Allegation convictions and sentences. We reverse the Theft of a Motor Vehicle conviction. We remand to the trial court to dismiss the Theft of a Motor Vehicle conviction, vacate the corresponding sentence, and enter a new final judgment not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice