IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JUAN JOSE TORRES,
Defendant-Appellant.

Supreme Court Case No. CRA13-012
Superior Court Case No. CF0253-12

OPINION

Cite as: 2014 Guam 8

Appeal from the Superior Court of Guam
Argued and submitted on October 24, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Juan Jose Torres appeals from a final judgment convicting him of one count of Third Degree Criminal Sexual Conduct and two counts of Assault with Intent to Commit Criminal Sexual Conduct. Torres raises seven issues on appeal, asserting that his indictment was defective; that the jury instructions constructively amended the indictment; that the government presented insufficient evidence of assault; that his statutory speedy trial right was violated; that the court admitted improper character evidence; that the court erroneously allowed the People to amend the indictment; and that the prosecution committed misconduct.

[2] We reverse the trial court's judgment in part, and affirm in part. We hold that the indictment was insufficient with respect to the Second Charge, Assault with Intent to Commit Criminal Sexual Conduct, and reverse the trial court's judgment on those counts. Because we vacate Torres's conviction for Assault with Intent to Commit Criminal Sexual Conduct, we need not address Torres's arguments regarding constructive amendment of the indictment or sufficiency of the evidence with respect to the Second Charge.

[3] We affirm the trial court's judgment on all other issues, and uphold Torres's conviction for Third Degree Criminal Sexual Conduct.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] On September 3, 2010, Torres's daughter CPT walked from the family's shared home to the local precinct of the Guam Police Department ("GPD") to report a crime involving criminal sexual conduct ("CSC"). After speaking to several police officers and giving consent to search

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

her residence for evidence, CPT was taken to the Healing Hearts rape crisis center for a medical examination. Torres was arrested and taken into custody later that day.

[5] CPT was 18 years old at the time of the report. She is the biological daughter of Torres. She has one sister, CT, and one brother, Jerik. On September 22, 2010, CPT signed a declaration stating that she no longer wished to speak to the government, or to prosecute the case. However, she maintained that she was the victim of Torres's alleged crime and did not want to have any contact with him. CPT left Guam sometime between December 1, 2010 and January 6, 2011 to live in Peru and then Colorado. Torres's wife was accused of arranging the disappearance of the witness.

[6] Torres was initially indicted by a grand jury on September 14, 2010. He was charged with Family Violence, Assault, First Degree CSC, Second Degree CSC, Third Degree CSC, Attempted CSC, and Assault with Intent to Commit CSC. The CSC charges involved digital-vaginal penetration. Torres first asserted his right to a speedy trial on December 16, 2010. On November 10, 2010, the People requested analysis from the Guam Crime Lab for samples collected on September 3 from CPT's clothing and medical examination. After the crime lab returned the testing as positive for semen, the People requested and received a blood sample from Torres. On January 19, 2011, the court denied the People's request for a continuance in order to conduct a DNA analysis at the FBI crime lab off island. On January 27, 2011, the court dismissed the case without prejudice upon the People's request. Several months later, the FBI returned a DNA match between Torres's blood and the semen found in CPT's vagina and on her clothes.

[7] Torres was indicted a second time on April 18, 2012, for four counts of Third Degree CSC, two counts of Assault with Intent to Commit CSC, and two counts of Felonious Restraint.

He was arraigned on April 25, 2012, and entered a plea of not guilty. The same day, he asserted his right to a speedy trial.

[8] On May 2, 2012, the People responded to Torres's request for notice, indicating intent to admit Torres's prior bad acts observed by his younger daughter, CT. These included "sexual advances observed by CT . . . against the victim." The People also proffered several admissible purposes of the testimony. According to the People, the defense received a copy of CT's written statement.

[9] Torres then moved to dismiss based on an alleged violation of his speedy trial rights. He argued that his speedy trial clock began with his first indictment, because the government dismissed and re-filed the charges in order to circumvent speedy trial limits. The court denied Torres's motion.

[10] During the jury trial, the government called CT as a witness. CT stated that she was currently in ninth grade. Over the defense's objection, CT testified that she had seen an incident several years ago that caused her concern. She saw her sister in her bra and underpants in the bedroom with her father, with the door closed. She stated that her father was "pretty close" to CPT, and that CPT was wearing a blindfold. In addition, CT stated that when she shared a room with CPT in their old house, her father sometimes would enter the bedroom at night and go to CPT's bed on the bottom bunk. CT did not hear anything and did not know what was going on.

[11] The People also called John Shaw, CPT's former boyfriend. Shaw testified that he never had sexual intercourse with CPT. He stated that while he was dating CPT, Torres interfered in their relationship, ultimately causing it to end. More specifically, Shaw stated that the relationship ended after he was "jumped." Transcript ("Tr."), vol. 4 at 96 (Jury Trial, July 26, 2012). When the People asked Shaw, "And who did you get jumped by?" the defense objected.

Id. at 97. At side bar, counsel for Torres argued that Shaw's testimony introduced an inadmissible bad act under Guam Rules of Evidence ("GRE") 404(b), of which he had received no notice. The following dialogue occurred:

> GOVERNMENT: We don't even know what he's going to say, yet.
>
> DEFENSE: So, they want to let the cat out of the bag and then say, I mean, obviously, it's – that's other bad acts of someone, and they didn't give us any information that they intend to use other bad acts of this nature.
>
> GOVERNMENT: Well, I think he's going to say he was jumped by Jarek.

Id. The court overruled Torres's objection. The government proceeded to ask Shaw whether "it was members of the [Torres] family that . . . jumped you?" *Id.* at 99. Shaw answered affirmatively.

[12] After the People finished the direct examination of Shaw, Torres again objected to Shaw's testimony. He claimed that Shaw's response left an improper implication that Torres attacked Shaw, and moved to strike. The prosecutor told the defense that it could ask Shaw who jumped him on cross-examination, and said, "I specifically wanted to stay away based on what [defense counsel] just said [about prior bad acts]." *Id.* at 100. The court then directed the People to ask the question of who exactly jumped Shaw, or the previous answer would be stricken. When the prosecutor did so, Shaw answered, "Of course, the dad and then the son." *Id.* at 101. The defense immediately objected, and the court sustained the objection and instructed the jury to strike the answer from memory.

[13] At the close of the government's case, Torres moved for an acquittal, based upon insufficiency of the evidence as to the First Charge; the fact that Assault with Intent to Commit CSC is not a crime and that the government did not properly plead it; and insufficiency of the evidence for the Third Charge of Felonious Restraint. The government also moved to dismiss

the Third Charge. The court then dismissed both counts of the Third Charge, as well as counts two through four of the First Charge. After the close of Torres's case, the defense renewed its motion for acquittal, which the court orally denied.

[14] Before the case was sent to the jury, the People moved to amend the Second Indictment. For the charge of Third Degree CSC, the People moved to change the word "and" to "or" in order to track the language of the statute. Torres opposed this change. After hearing arguments from both sides, the court granted the People's motion over Torres's objection.

[15] On July 31, 2012, the jury returned a verdict convicting Torres of one count of Third Degree CSC, and two counts of Assault with Intent to Commit CSC. Torres again filed a Motion for Acquittal based on the alleged defects in the Second Charge of the indictment. The government filed an opposition motion. In a written order, the court denied Torres' motion. On February 5, 2013, the court sentenced Torres to eight years of incarceration for the Third Degree CSC count, and three years for each count of Assault with Intent to Commit CSC. These sentences are all to run concurrently. Torres filed a timely notice of appeal.

II. JURISDICTION

[16] This court has jurisdiction over appeals from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-92 (2014)), 7 GCA §§ 3107(b) and 3108(a) (2005), and 8 GCA §§ 130.10 and 130.15 (2005).

III. STANDARD OF REVIEW

[17] We review timely raised objections to the sufficiency of an indictment for harmless error; if the objection is first made on appeal, we review for plain error. *People v. Jones*, 2006 Guam 13 ¶ 11. We review the amendment of an indictment *de novo*. *People v. Salas*, 2000 Guam 2 ¶ 10.

[18] A trial court's denial of a statutory speedy trial claim is reviewed for an abuse of discretion. *People v. Flores*, 2009 Guam 22 ¶ 9. We also review the trial court's admission of prior bad acts under GRE 404(b) for abuse of discretion. *People v. Quintanilla*, 2001 Guam 12 ¶ 9. However, we consider *de novo* whether evidence falls within the scope of GRE 404(b). *People v. Palisoc*, 2002 Guam 9 ¶ 7. Finally, we review a trial court's rulings on objections based on prosecutorial misconduct for harmless error. *People v. Moses*, 2007 Guam 5 ¶ 30.

IV. ANALYSIS

A. Sufficiency of the Indictment with Respect to the Second Charge, Assault with Intent to Commit CSC

[19] On appeal, Torres argues that Assault with Intent to Commit CSC is not a crime, but rather a sentencing enhancement. Appellant's Br. at 8 (Aug. 5, 2013). He also argues that the Second Indictment does not properly charge Assault with Intent to Commit CSC, because it did not allege the essential element of penetration, or any elements of Assault as defined by 9 GCA § 19.30. *Id.*

[20] 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." *Jones*, 2006 Guam 13 ¶ 12 (quoting *Portnoy v. United States*, 316 F.2d 486, 488 (1st Cir. 1963)). We read an indictment "in its entirety, construed according to common sense." *People v. Diaz*, 2007 Guam 3 ¶ 28 (quoting *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985)). 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. *Id.* (quoting *United States v. James*, 980 F.2d 1314, 1317 (9th Cir. 1992)). 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." *Jones*, 2006 Guam 13 ¶ 23.

[21] As a preliminary matter, we find Torres's argument that 9 GCA § 25.35 is not a crime to be without merit. As Torres concedes in his brief, the charge is listed in the Guam Code Annotated ("GCA") under the chapter "Sexual Offenses," along with the crimes of First, Second, Third, and Fourth Degree CSC. *See* Appellant's Br. at 8; Title 9 GCA, Chapter 25 (2005). This placement indicates that the legislature intended Assault with Intent to Commit CSC to be a crime. In addition, the sections in Chapter 25 repeatedly refer to "*prosecution[s]* under § 25.15 through 25.35." 9 GCA §§ 25.40-.45 (emphasis added). This clearly demonstrates that section 25.35 is a crime that can be charged.

[22] The Second Charge of the indictment states in relevant part, "JUAN JOSE TORRES did commit the offense of Assault with Intent to Commit Criminal Sexual Conduct, when he intentionally assaulted CPT . . . with the intent to commit criminal sexual conduct, in violation of 9 GCA §§ 25.35 and 80.30." Record on Appeal ("RA"), tab 1 at 2-3 (Indictment, Apr. 18, 2012) ("Second Indictment"); RA, tab 64 at 1-2 (Am. Indictment, July 27, 2012).[2] The corresponding statute provides that "[a]ssault with intent to commit criminal sexual conduct involving penetration is a felony in a [sic] third degree." 9 GCA § 25.35.

[23] Torres first contends that the Second Charge failed to allege the element of penetration. Appellant's Br. at 8. The People counter that penetration was sufficiently alleged because the First Charge accused Torres of "intentionally engag[ing] in sexual penetration with another, to wit: sexual intercourse" on September 3, 2010. RA, tab 64 at 1 (Am. Indictment); Appellee's Br. at 20-21 (Sept. 11, 2013). We agree that when reading the indictment broadly, one can infer that

[2] This charge is identical in both the Second Indictment and Amended Indictment.

the *second count* of the Second Charge sufficiently alleges penetration, because that charge also allegedly occurred on September 3, 2010. It is reasonable to conclude that the same facts underlie each crime during that time period.

[24] However, we take issue with the first count of the Second Charge. Although the language of the two counts is nearly identical, the acts described in the first count allegedly took place between August 31 and September 1, 2010. Neither the original nor the amended indictment in this case charges any intercourse or penetration during this time period. We cannot infer that the assault in the first count was committed with intent to commit penetration simply because the indictment alleges that other actions, which took place at different times, involved penetration. *See, e.g.*, *Valentine v. Konteh*, 395 F.3d 626, 632-35 (6th Cir. 2005) (indictment insufficient where it failed to differentiate between many acts of alleged criminal sexual conduct); *State v. Brown*, 992 S.W.2d 389, 391-94 (Tenn. 1999). Therefore, we find that the first count of the Second Charge fails to allege the essential element of penetration.

[25] Next, we address the People's failure to charge the elements of Assault as set forth in 9 GCA § 19.30. The question of whether the individual elements of Assault are considered essential elements of Assault with Intent to Commit CSC is a matter of first impression for this court. The People's brief cites to cases from Michigan, which has a similar statutory scheme, to argue that the essential elements of Assault with Intent to Commit CSC are only (1) assault, and (2) an intent to commit CSC. Appellee's Br. at 19 (citing *People v. Nickens*, 685 N.W.2d 657 (Mich. 2004); *United States v. France*, 394 Fed. Appx. 246 (6th Cir. 2010)).

[26] Courts have reached differing conclusions on whether the elements of the underlying crime of assault must be pled for crimes of assault with intent to commit a sexual act. *See United States v. Bryant*, 420 F.2d 1327, 1334 (D.C. Cir. 1969) (essential elements of assault with the

intent to commit rape include a showing of intended force in addition to assault); *United States v. Iron Shell*, 633 F.2d 77, 88 (8th Cir. 1980) (elements of assault with intent to commit rape do not include physical contact or offensive touching); *United States v. Joe*, 831 F.2d 218, 220 (10th Cir. 1987) ("Assault with intent to commit rape has the essential elements that the defendant assaulted the victim and that the defendant committed the assault with the specific intent to commit rape."). However, these cases have limited application to the Guam criminal statutes at issue, because they follow different statutory schemes that contain different language.[3]

[27] The GCA contains a separate statute that sets forth the elements of Assault, to which 9 GCA § 25.35 refers. *See Sumitomo Constr., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 ("[I]n determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections."). An indictment that does not specify these elements does not objectively inform a defendant of the full charges against him. Therefore, we hold that the essential elements of Assault with Intent to Commit CSC include the elements of Assault as set out in 9 GCA § 19.30. To properly charge Assault with Intent to Commit CSC, the People must either plead the elements of Assault by reference to the language of 9 GCA § 19.30, or plead facts that would satisfy the element(s) of Assault in 9 GCA § 19.30. Therefore, simply tracking the language of the Assault with Intent to Commit CSC statute will generally not suffice to set forth all of the elements of the offense, since the statute does not include elements of the underlying assault.[4]

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[3] Although Michigan has a similar statute for Assault with Intent to Commit CSC, *see* Mich. Comp. Laws Ann. § 750.520g (West 2014), it does not have an analogue to Guam's Assault statute, 9 GCA § 19.30.

[4] This case is distinguishable from our prior ruling in *People v. Jones*, 2006 Guam 13 ¶ 23, which upheld an indictment based on the premise that "[g]enerally, an indictment which tracks the words of the statute charging the offense is sufficient as long the words unambiguously set forth all the elements of the offense." Unlike in *Jones*, which found that specifying a predicate offense is not necessary in a charge for money laundering, *id.*, assault is the primary offense in a charge for Assault with Intent to Commit CSC. Because 9 GCA § 25.35 does not

[28] The assault statute, 9 GCA § 19.30(a), reads,

> A person is guilty of assault if he:
>
> (1) either recklessly causes or attempts to cause bodily injury to another;
>
> (2) recklessly uses a deadly weapon in such a manner as to place another in danger of bodily injury; or
>
> (3) by physical menace intentionally puts or attempts to put another in fear of imminent bodily injury.

9 GCA § 19.30(a) (2005). To properly plead the elements of Assault in this case, the People need only implicate one of the three subsections. In this case, the government did not reference 9 GCA § 19.30 or track its language. Therefore, to be sufficient, Torres's indictment must plead facts that would satisfy one of the elements of section 19.30.

[29] Here, we find that the People did not adequately allege facts that would satisfy 9 GCA § 19.30. The counts of Assault with Intent to Commit CSC in the indictment could potentially charge violations of subsection (1) of section 19.30(a), violations of subsection (3), or both.[5] The relevant facts in the Second Indictment claim that on the dates of the alleged Assault with Intent to Commit CSC, Torres engaged in sexual intercourse with CPT using "force and coercion," and that Torres knowingly restrained CPT "unlawfully in circumstances exposing [her] to risk of serious bodily injury." RA, tab 1 at 1-3 (Second Indictment); RA, tab 64 at 1-2 (Am. Indictment). None of these facts are included in the Second Charge. However, we look to the indictment as a whole to determine whether these facts can properly allege the elements of assault.

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unambiguously set forth all the elements of Assault, an indictment which tracks its language without more will be insufficient.

[5] Under the facts of the indictment and of this case, 9 GCA § 19.30(a)(2) is not relevant, as there is no indication that a deadly weapon was used.

[30] The indictment does not specify or give any guidance as to which specific facts constitute the assaults in the counts of Assault with Intent to Commit CSC. Under one interpretation, the indictment may allege that the assaults consisted solely of physically forced sexual penetration. Alternatively, the assaults might have involved forceful restraint. Under yet another reading, the assaults may have been actual harm (other than nonconsensual sex) inflicted upon CPT.

[31] In addition, because the indictment does not elaborate on its claim of "force or coercion" in the First Charge, we cannot say whether the force or coercion was physical, or achieved by a threat not involving violence.[6] The allegations of felonious restraint in the Third Charge likewise may or may not have resulted in physical bodily injury. Therefore, while some interpretations of the indictment might implicate a factual basis that properly constitutes assault, other interpretations fall short. *See United States v. Awan*, 459 F. Supp. 2d 167, 175 (E.D.N.Y. 2006) (indictment insufficient where "the indictment uses the generic expression [set forth in the statute] without specifying which of a variety of activities, any one of which would be criminal, that the defendant must defend against or which the grand jury considered.").

[32] The indictment is thus too vague to set forth the facts of the assaults in the Second Charge. Even the evidence introduced at trial sheds little light on the People's theory of what precisely constituted the assaults. We are unable to determine whether the "assault" was nonconsensual sexual intercourse, physical injury that resulted in bruises on the victim, or threats

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[6] Title 9 GCA § 25.10 defines "force or coercion" as:

> (A) when the actor overcomes the victim through the actual application of physical force or physical violence;
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> (B) when the actor coerces the victim to submit by threatening to use force or violence on the victim and the victim believes that the actor has the present ability to execute these threats;
>
> (C) *when the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person and the victim believes that the actor has the ability to execute this threat.*

9 GCA § 25.10(a)(2) (emphasis added).

made to the victim who, as Torres's child, would be in fear of imminent bodily injury. The jury instructions alone indicate that the People's theory rests on 9 GCA § 19.30(a)(1) – that Torres "either recklessly cause[d] or attempt[ed] to cause bodily injury to [CPT]." RA, tab 68 at 53, (Jury Instructions, July 31, 2012). In addition to not being included in either the original or the Amended Indictment, this specification still does not resolve what actions or factual allegations comprised the bodily injury to CPT.

[33] Given this court's difficulty in determining the facts that constitute the assault in the charge of Assault with Intent to Commit CSC, we conclude that the Second Indictment could not have served its purpose of informing Torres of the crime with which he was charged. Not fully apprised of the acts that he allegedly committed, Torres could not have adequately prepared a defense. For the same reasons, the indictment is insufficiently specific to ensure that Torres was tried based on the same facts that were given to the grand jury. *See United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000) (requiring "factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury" (citing *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999))). Therefore, the indictment was defective as to the Second Charge because it did not plead specific facts that reflect the essential element(s) of assault. The trial court erred in overruling Torres's objection on these grounds.

[34] Having found that there was error, we next consider whether the error was harmless. "The test for harmless error 'is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *People v. Perry*, 2009 Guam 4 ¶ 34 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)). The burden is on the government to establish that the error was harmless. *People v. Felder*, 2012 Guam 8 ¶ 32 n.15. We cannot say that government has met its burden here. Because the nature of the charge was unclear, Torres's

ability to prepare his defense was impaired. If the indictment had been adequate, he may have been able to successfully refute the People's argument as to the Second Charge. Accordingly, it does not appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Therefore, we vacate Torres's conviction of the Second Charge.[7]

B. Violation of Torres's Speedy Trial Rights

[35] Next, Torres contends that his speedy trial rights were violated. Appellant's Br. at 10. He argues that the government brought the same charges in both the first and second cases against him in order to circumvent the speedy trial limits set forth by statute. *Id.* at 13-14. The People claim that the charges in the indictments differ, and that the prosecution acted in good faith. Appellee's Br. at 25-26. Both parties rely on our decision in *Flores*, which established this court's approach to alleged speedy trial violations. *Flores*, 2009 Guam 22.

[36] In *Flores*, the defendant was indicted four times. *Id.* ¶ 5. He claimed that his speedy trial clock began with his second indictment. *Id.* ¶ 13. The court first acknowledged that where charges in the later three indictments differ from those in the first indictment, the speedy trial calculation does not begin with the first indictment. *Id.* ¶¶ 13-15. It then held that even where charges in an indictment are the same as in a previous one, the speedy trial clock will typically begin anew. *Id.* ¶ 28 ("[W]here an indictment is dismissed *nolle prosequi* under section 80.70, and a defendant is reindicted for the same charges, the time period for starting a trial . . . restarts when the subsequent indictment is filed."). However, the court recognized an exception where the government brings the same charges in a subsequent indictment "to circumvent the statute or rule prescribing a time limit for trial." *Id.* ¶ 27. This "good faith" requirement provides that if

[7] Because we vacate the Second Charge, we do not address Torres's arguments that the trial court's instruction on Assault constructively amended the indictment as to the Second Charge, or that the government presented insufficient evidence of Count One of the Second Charge.

the prosecution's actions clearly operate only to circumvent the speedy trial clock, the clock will not restart. *Id.* In the absence of any evidence showing such a bad motive, the court applied a "presumption of good faith on the part of the prosecution." *Id.* ¶ 29.

[37] Torres claims that the charges in the first and second indictments are the same. Reply Br. at 7 (Sept. 25, 2013). We disagree. The First Indictment charged Torres with Family Violence, Assault, First Degree CSC, Second Degree CSC, Third Degree CSC, Attempted CSC, and Assault with Intent to Commit CSC. People v. Torres, No. CF0529-10 (First Indictment at 1-3 (Sept. 14, 2010)). All these CSC charges were based upon acts of digital penetration. *Id.* The Second Indictment charged Torres with four counts of Third Degree CSC, two counts of Assault with Intent to Commit CSC, and two counts of Felonious Restraint. RA, tab 1 at 1-3 (Second Indictment). The CSC charges alleged sexual intercourse. *Id.* Thus, the Assault with Intent to Commit CSC charges in each indictment differ in their factual predicates. Moreover, Torres concedes that the Third Degree CSC charge for which he was convicted was not brought in the First Indictment. Appellant's Br. at 11. In addition, the Second Indictment originally included charges of felonious restraint that were absent in the First Indictment.

[38] Cases decided in this jurisdiction and others indicate that different factual allegations for the same statutory violation constitute different charges. *See Diaz*, 2007 Guam 3 ¶ 16 (not different offense for the purpose of amendment to indictment where no different facts or statutory provisions alleged); *Channer v. Dep't of Homeland Sec.*, 527 F.3d 275, 281 (2d Cir. 2008) (finding that claims are distinct where party makes the "same charge based on a different set of factual predicates"); *United States v. Sasser*, 974 F.2d 1544, 1549-50 (10th Cir. 1992) (where different events and entirely different facts are alleged, two conspiracy charges are distinct for purpose of double jeopardy). The government's loss of its key witness and receipt of

positive forensic results likely altered the factual bases of its charges against Torres. The second, factually distinct indictment reflects this change. Because the essential factual allegations in the Second Indictment differ from those in the First Indictment, the filing of the Second Indictment would require the starting of a new trial clock under *Flores*.

[39] Torres's speedy trial clock restarted when he was indicted for a second time on April 18, 2012. Torres's trial occurred within the statutorily prescribed 45-day period required by 8 GCA § 80.60(a)(2). Accordingly, his statutory speedy trial right was not violated.[8]

C. Whether the Trial Court's Admission of 404(b) Evidence was Reversible Error

[40] Torres argues that the trial court improperly admitted two instances of character evidence from the witnesses CT and John Shaw. Appellant's Br. at 17. First, he objects to CT's observations of her father in the bedroom with CPT, who was wearing only a bra, panties, and a blindfold, and to CT's testimony about Torres's late night visits to CPT's bunk bed. *Id.* Second, he objects to John Shaw's testimony about being "jumped" by Torres. *Id.* at 18. Torres cites to *Huddleston v. United States*, 485 U.S. 681 (1988), which identifies four ways of protection from unfair prejudice from 404(b) evidence in the Federal Rules of Evidence. *Id.* at 16-17. He argues that the trial court made none of these findings in admitting the evidence from CT and Shaw. *Id.*

[41] In considering whether evidence of a prior bad act is admissible, this court follows the four-part test set out in *Huddleston* and reiterated in *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994). *Palisoc*, 2002 Guam 9 ¶ 8. Under this test, to be admissible under GRE 404(b), the evidence of prior acts and crimes must (1) prove a material element of the crime currently charged; (2) show similarity between past and charged conduct; (3) be based on sufficient

[8] In light of this holding, we need not discuss whether the People's re-indictment was in bad faith or made in order to circumvent the speedy trial clock. *See Flores*, 2009 Guam 22 ¶ 28.

evidence; and (4) not be too remote in time. *Id.* The court then weighs the admissibility of the evidence under the balancing test set out in 6 GCA § 403. *Id.* ¶ 28.

1. CT's testimony

[42] We now review whether CT's evidence of past sexually suggestive conduct between Torres and CPT is admissible character evidence under GRE 404(b). Under the first prong of the *Hinton* test, the evidence must prove a material element of the crime charged. *Hinton*, 31 F.3d at 822. Although Torres claims that the People made no offer as to the admissible purpose of CT's testimony, the People made such a showing before trial and on appeal. Appellant's Br. at 17. *See also* Appellee's Br. at 30; RA, tab 20 at 1-2 (People's Notice Intent Admit Prior Bad Acts, May 2, 2012). CT's evidence of Torres's potentially sexual behavior tends to prove the mental element of intent to commit CSC. *See Palisoc*, 2002 Guam 9 ¶ 12 ("[E]vidence of a prior bad act can be admitted to prove intent in a case even if the defendant does not dispute the intent element of the offense."). CT's observations also tend to show Torres's opportunity, absence of mistake, or motive in his relations with his daughter. Finally, CT's testimony bolsters the People's theory that the sexual relations between Torres and his daughter were part of a continuous relationship. *See State v. DeLong*, 505 A.2d 803, 806 (Me. 1986) ("[E]vidence of prior incestuous acts was relevant and admissible to show the relationship between the parties that in turn sheds light on defendant's motive (i.e., attraction toward the victim), intent (i.e., absence of mistake), and opportunity (i.e., domination of the victim) to commit the crimes with which he was charged."). Therefore, there are several relevant and material purposes for which this evidence can be offered, aside from Torres's character for criminal sexual conduct.

[43] The second prong of the *Hinton* test examines whether there is similarity between the past and the charged conduct. The charged crimes all involve CSC. The evidence presented

places Torres in a closed bedroom with CPT, who was in only a bra, panties, and blindfold. Tr., vol. 4 at 37-38, 41 (Jury Trial). As Torres argues, this is not clearly a crime of CSC. Appellant's Br. at 17. However, acts need only be "sufficiently similar" so as to help establish elements such as intent. *Palisoc*, 2002 Guam 9 ¶ 22. Here, the conduct between Torres and his daughter had clear sexual undertones, and was at least somewhat similar to the crime charged. In addition, both the crimes charged and the evidence at issue concern the relationship between Torres and his daughter. Therefore, the evidence is sufficiently similar to pass the *Hinton* test.

[44] Evaluating the third factor, there is no indication that the bad act at issue lacks a sufficient evidentiary foundation. CT presented direct evidence of what she personally witnessed. The defense has not presented any argument that attacks CT's credibility or the veracity of the testimony. Therefore, the prior bad act is based on sufficient evidence. *See id.* ¶ 26 ("The focus is on whether the prosecution can show that a jury could reasonably conclude both that the [act] occurred and that [the defendant committed it].").

[45] Looking at the fourth prong, the time between the two acts is several years.[9] This court has followed other courts in declining to "adopt a rigid rule that would act to freeze dates on a time line for purposes of admissibility." *Id.* ¶ 27 (citing *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990)). In interpreting *Hinton*, the Ninth Circuit has noted that "previous decisions have upheld admission of evidence of acts up to twelve years old." *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002) (quoting *United States v. Rude*, 88 F.3d 1538, 1550 (9th Cir. 1996)); *see also United States v. Johnson*, 132 F.3d 1279, 1283 (9th Cir. 1997) (thirteen or more

[9] CT testified that the disputed events occurred while she was in fourth grade. Tr., vol. 4 at 40 (Jury Trial). She was in ninth grade at the time of trial. *Id.* at 22. As CT did not skip a grade and was not held back, *see id.* at 23, she would have been in seventh grade at the time the charged crimes occurred. Therefore, there is a three-year time difference between the acts.

years not too remote in time). Therefore, the time period here in and of itself does not bar admissibility under the *Hinton* test.

[46] We find that CT's testimony meets the *Hinton* test, and is admissible under Rule 404(b). However, we must still determine whether the trial court abused its discretion in admitting the evidence under the balancing test set out in GRE 403. *Palisoc*, 2002 Guam 9 ¶ 28. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." GRE 403. Here, the evidence is prejudicial to Torres because it is likely to emotionally impact the jury. However, the testimony was also highly probative on several issues, including the government's theory of the continuing relationship between Torres and CPT and the consensual nature of any relations between the two.

[47] In addition, CT's testimony was given subject to a limiting jury instruction. RA, tab 68 at 33 (Jury Instructions). This court has found that limiting instructions can help mitigate the unfair prejudicial effects of Rule 404(b) evidence. *See People v. Evaristo*, 1999 Guam 22 ¶ 17; *People v. Tedtaotao*, No. 93–00001A, 1994 WL 129737, at *4 (D. Guam App. Div. Mar. 15, 1994); *People v. Camacho*, No. 93–00073A, 1994 WL 728129, at *4 (D. Guam App. Div. Dec. 5, 1994). Finally, the trial court weighed both arguments when Torres objected during trial. It admitted the testimony after hearing arguments from both sides and considering the People's pretrial notice of intent to admit prior bad acts. Tr., vol. 4 at 35 (Jury Trial); *see also* RA, tab 20 at 1-3 (People's Notice Intent Admit Prior Bad Acts). The evidence did not violate Rule 403, and the trial court did not abuse its discretion in admitting CT's testimony.

2. John Shaw's testimony

[48] Torres also contests the admission of John Shaw's testimony of being assaulted by Torres and his son. Appellant's Br. at 18. He argues that the government did not give any notice of its

intent to admit the prior bad act of Torres "jumping" Shaw. *Id.* In addition, Torres claims that the court acted improperly in ordering the People to ask Shaw who exactly "jumped" him, and that the limiting instruction given by the court was insufficient to correct the prejudice that he suffered. *Id.* at 20-21.

[49] In determining whether the trial court abused its discretion, it should be noted that the court did not allow Shaw's testimony of being "jumped" to be admitted into evidence. The court immediately sustained Torres's objection after Shaw gave the offending answer, and admonished the jury not to consider the testimony. Tr., vol. 4 at 101 (Jury Trial). In addition, there is no indication that the court based its decision to allow the examination as it proceeded on erroneous legal standards or factual findings. The government told the court that it did not know what the witness planned to say. The court was justified in allowing the examination to continue, and was reasonable in ordering the government to ask the witness to clarify. This is not an instance where there is "no evidence on which the judge could have rationally based the decision." *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20 ¶ 8 (quoting *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14 ¶ 4). Therefore, the court did not abuse its discretion.

D. Whether the Trial Court Erred in Permitting the Government to Amend the Third Degree Criminal Sexual Conduct Charge in the Indictment

[50] Torres argues that the trial court erred in allowing the People's amendment to the First Charge of the Second Indictment in this case. Appellant's Br. at 25. The indictment uses the conjunctive in alleging that Torres used "force *and* coercion," while the Amended Indictment uses the disjunctive of "force *or* coercion." *Id.*; RA, tab 1 at 1 (Second Indictment); tab 64 at 1 (Am. Indictment). Torres argues that this language makes it impossible to determine whether there was a unanimous jury verdict, because the jury could disagree on the means of committing

the crime. Appellant's Br. at 26. He cites to *Diaz* for the rule that where a statute is written in the disjunctive, the pleading should be in the conjunctive. *Id.* at 25.

[51] The government argues that the Amended Indictment tracks the statute, and as such is proper. Appellee's Br. at 38. It claims that use of "force or coercion" is a single theory of the crime and thus would not endanger the jury's unanimity. *Id.* at 36-37. Moreover, the jury instructions included language of "force *or* coercion." RA, tab 68 at 50, 55-56 (Jury Instructions). After the government moved to amend the indictment during the jury trial, the trial court allowed the amendment over Torres's objection. Tr., vol. 5 at 7 (Jury Trial); RA, tab 64 at 1-2 (Am. Indictment).

[52] 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." *United States v. Booth*, 309 F.3d 566, 572 (9th Cir. 2002). Yet courts also recognize that although charges are most properly pled in the conjunctive, the jury need only convict on one means of commission. *See, e.g.*, *Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) ("[I]t is common for prosecutors to charge in the *conjunctive*, yet it is well established that, to prove such a charge, a prosecutor need only prove in the *disjunctive*—one version of the crime." (citing *Malta–Espinoza v. Gonzales*, 478 F.3d 1080, 1082 (9th Cir. 2007))); *United States v. Bertolo*, 55 Fed. Appx. 406, 409 (9th Cir. 2002).

[53] 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. *People v. Maysho*, 2005 Guam 4 ¶ 11 ("[W]hen the statute speaks disjunctively, [proof in] the conjunctive is not required even if the offense is charged conjunctively in the

indictment." (quoting *United States v. Arias*, 253 F.3d 453, 457-58 (9th Cir. 2001)) (internal quotation marks omitted)). In addition, our law provides that the trial court may permit amendment of an indictment "if no additional [or] different offense is charged and if substantial rights of the defendant are not prejudiced." 8 GCA § 55.20 (2005). "Cases from Guam's courts suggest that this [two-part test in 8 GCA § 55.20] is not a high hurdle to overcome." *People v. Salas*, 2000 Guam 2 ¶ 13.

[54] The facts of this case are nearly identical to those in *People v. Diaz*, 2007 Guam 3. As in the present case, *Diaz* involved an indictment that was initially worded in the conjunctive, and subsequently amended by the People to reflect a disjunctively worded statute. 2007 Guam 3 ¶ 14. In that case, we found that because the amended indictment did not contain any new or different factual allegations, it did not charge a new or different offense. *Id.* ¶ 16. This court then held that the question of the defendant's prejudice centers on whether a defense under the original indictment would be equally available after the change is made, and "whether any evidence the defendant might have would be equally applicable to the indictment" in either form. *Id.* ¶ 17 (quoting *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940)).

[55] The court found that a change to the disjunctive made Diaz "neither less nor more certain of the charge against him." *Id.* ¶ 17. It rejected Diaz's argument that the indictment allowed the jury to reach a non-unanimous opinion, because the indictment, following the statute, did not allege multiple means of committing the criminal act. *Id.* ¶ 19. Finally, the court found that "Diaz's reliance on the general rule against disjunctive pleading is misplaced." *Id.* ¶ 20. We stressed that the charge alleged one specific act, and the rule in favor of conjunctive pleadings focuses on cases where a statute creates multiple different offenses. *Id.* ¶¶ 20-21.

[56] Torres's argument is foreclosed by our decision in *Diaz*. As in *Diaz*, the Amended Indictment in this case did not present any different or additional facts; it altered only the wording of the charge. Second, the crime of Third Degree CSC provides only one way in which a person may be guilty: "if the person engages in sexual penetration with another person and if . . . force or coercion is used to accomplish the sexual penetration." 9 GCA § 25.25(a)(2). Use of force or coercion does not designate two different ways in which Third Degree CSC can be committed, nor does it distinguish between two separate offenses. Consequently, the same defenses are available to Torres under both the original and amended indictments, and the same evidence is applicable. Finally, lack of unanimity does not present a valid issue because the jurors need not agree on whether Torres used only force, or only coercion, or both. It is sufficient that the jurors unanimously agreed that Torres used force or coercion. Therefore, Torres was not prejudiced by the change in the wording of the indictment, and there was no error in allowing the amendment.

E. Whether the Prosecution Committed Misconduct

[57] Torres claims that the People committed prosecutorial misconduct in eliciting evidence from John Shaw that Torres "jumped" Shaw. Appellant's Br. at 26-27. Torres analogizes this to *United States v. Millen*, in which the court found misconduct when a prosecutor "evoked a highly prejudicial answer by asking a question which was unlikely to trigger objection." Appellant's Br. at 28; *United States v. Millen*, 594 F.2d 1085, 1088 (6th Cir. 1979). He argues that this misconduct seriously prejudiced him because the remaining evidence to convict him was "severely limited." Appellant's Br. at 27.

[58] This court has not readily overturned cases based on prosecutorial misconduct. For such claims to succeed, the defense must show that "the prosecutor's comments so infected the trial

with unfairness as to make the resulting conviction a denial of due process . . . . The fact that the prosecutor's remarks to a jury may have been undesirable or even universally condemned is not tantamount to a constitutional violation." *Moses*, 2007 Guam 5 ¶ 28 (citations and internal quotation marks omitted) (no reversal where the prosecutor made improper statements, vouched for two witnesses, and made inflammatory statements to the jury during closing argument); *see also Evaristo*, 1999 Guam 22 ¶¶ 18-34 (no reversal where prosecutor made improper remarks in closing and at trial, used 404(b) evidence beyond the court's limiting instruction, and improperly vouched for government witnesses); *People v. Ueki*, 1999 Guam 4 ¶¶ 17-31 (no reversal where the prosecutor improperly vouched for witness).

[59] At most, the prosecutor in this case could be responsible for creating the improper suggestion that Torres "jumped" Shaw when she initially asked the witness if "members of the [Torres] family" attacked him. Tr., vol. 4 at 99 (Jury Trial). Nonetheless, we conclude that the prosecution's actions do not amount to misconduct. The 404(b) evidence that Torres jumped Shaw was elicited on the court's order. Therefore, the People did not act in such an egregious manner as to amount to misconduct.

[60] Moreover, the court immediately struck the answer and instructed the jury to disregard it. The Jury Instructions also included an order against using character evidence as proof of Torres's character or propensity to act in a certain way. Such instructions are regularly found to cure errors involving prosecutorial misconduct. *See, e.g.*, *United States v. Eldridge*, 107 Fed. Appx. 36, 40 (9th Cir. 2004) (no reversible error where court instructed the jury that objectionable statements did not constitute evidence); *Delgado v. Morgan*, 150 Fed. Appx. 647, 649 (9th Cir. 2005) (prosecutorial misconduct mitigated by limiting instructions). For these reasons, the

prosecution's conduct did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Moses*, 2007 Guam 5 ¶ 28.

V. CONCLUSION

[61] The Second Charge of the Second Indictment alleging Assault with Intent to Commit CSC is defective. Both counts failed to adequately plead the facts of Assault as set forth in 9 GCA § 19.30, and Count One additionally failed to allege the element of penetration. Therefore, we vacate Torres's convictions for the Second Charge.

[62] The People did not violate Torres's speedy trial rights because Torres's Second Indictment is based upon factually different charges from his First Indictment. Consequently, his speedy trial clock begins with the Second Indictment and was not violated in this case.

[63] The trial court did not abuse its discretion in admitting evidence of Torres's prior bad acts from CT and John Shaw. CT's evidence satisfies the admissibility requirements of Rule 404(b), and the trial court did not erroneously apply GRE 403 in admitting her testimony. In addition, the trial court did not abuse its discretion in allowing the People to question John Shaw, because it did not know what Shaw was going to say, and because it immediately struck the testimony and admonished the jury.

[64] The trial court did not err in allowing the People to amend the wording of the indictment from the conjunctive to the disjunctive. Our courts have held that such an alteration does not constitute an amendment because it does not charge a new or different offense, and does not prejudice the defendant in any substantial way.

[65] Finally, the People did not commit prosecutorial misconduct at trial, because the trial court directed the prosecutor to ask the offending question, and because we find no indication that the prosecutor's actions were egregious enough to meet our high standard for misconduct.

[66] For the foregoing reasons, we **REVERSE** in part and **AFFIRM** in part the Judgment of the trial court, and order that Torres's sentence for the counts in the Second Charge be vacated.

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Chief Justice