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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

CARL FLORENCE EUCOGCO GARGARITA,
Defendant-Appellant.

Supreme Court Case No.: CRA14-021
Superior Court Case No.: CF0345-13

OPINION

Cite as: 2015 Guam 28

Appeal from the Superior Court of Guam
Argued and submitted on April 28, 2015
Santa Rita, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Carl Florence Eucogco Gargarita appeals from a judgment of conviction following a jury trial. Gargarita argues for reversal of his conviction based on a claim of instructional error. For the reasons stated herein, we reverse the conviction and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In 2013, Carl Florence Eucogco Gargarita was involved in a relationship with Irene Giralao. At the time, Irene was living with her ex-husband, Anthony Giralao, who was not aware of Irene's relationship with Gargarita. One evening, Irene and Gargarita went out with friends to a night club in Tumon. After consuming alcohol and smoking marijuana, Irene and Gargarita went together to Irene's car and had sex. While having sex, Irene received repeated phone calls from another man, which interrupted the romantic encounter and led to a disagreement between the couple. They exited the car and began arguing outside the club, where Gargarita became concerned that Irene had had too much to drink. Irene walked across the street to the parking lot of another night club, and Gargarita followed in Irene's car.

[3] In the parking lot, Gargarita asked Irene to call her uncle to get a ride home, but Irene wanted to call Anthony. Gargarita asked her not to, arguing that he would become upset if he found out they were together. Irene became so upset that she fell to the ground crying. This prompted a group of passing women to stop and make sure she was alright. The women continued to observe as Irene convinced Gargarita to let her call Anthony. She called and told

him over speakerphone that she would be home in half an hour. Gargarita then called Irene's uncle to ask for a ride for her.

[4] Sometime after, Anthony arrived at the parking lot in an SUV. He jumped out of the car and, without saying a word, attacked Gargarita. After watching the two men exchange punches, the onlooking women called the police. Irene tried to break up the fight, but was inadvertently knocked unconscious by the combatants. Eventually the fight moved to the ground, and Gargarita was able to gain the advantage and get on top of Anthony, who lay face-down on the pavement. Gargarita put his right arm around Anthony's neck, choking him. After a short time of being choked, Anthony passed out. One of the women approached and told Gargarita to stop choking Anthony because he was already unconscious. She had to forcefully pull Gargarita off to stop him from choking Anthony further.

[5] The women checked on Anthony and determined that he was not breathing properly. They performed CPR but were unable to permanently resuscitate him. The police arrived, followed by paramedics, who took Anthony to the hospital. The police arrested Gargarita.

[6] Anthony was pronounced dead shortly after. The chief medical examiner determined that the cause of death was asphyxia, or obstruction of the blood vessel carrying oxygen to the brain. Gargarita was charged with murder. Gargarita pleaded not guilty and raised a defense of self-defense.

[7] In its jury instructions, the trial court included the statutory definitions of justification, self-defense, and deadly force. Gargarita did not object to the instructions as given.

[8] Gargarita was acquitted of murder but found guilty of the lesser included offense of manslaughter. He was sentenced to fifteen years of imprisonment with five years suspended.

[9] This appeal followed.

II. JURISDICTION

[10] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-49 (2015)), and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[11] Jury instructions are reviewed for plain error when, as here, no objection to the instructions was made at trial. *People v. Felder*, 2012 Guam 8 ¶ 8. Plain error is highly prejudicial error, which this court “will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.” *Id.* ¶ 19 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11).

[12] We consider whether the proffered instructions accurately stated the relevant law under a *de novo* standard. *See People v. Diego*, 2013 Guam 15 ¶ 9. In doing so, “a single jury instruction should not be judged in artificial isolation. Instead, instructions should be considered and reviewed as a whole. . . . [I]nstructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions.” *People v. Jones*, 2006 Guam 13 ¶ 28 (citations and internal quotation marks omitted).

IV. ANALYSIS

A. Whether the Trial Court Committed Error in Instructing the Jury on the Issue of Self-Defense

[13] Gargarita claims that the jury instructions given by the trial court on the issue of self-defense were inconsistent and misleading, thus constituting plain error. Under the first prong of the plain error standard, we must determine whether the court’s instructions regarding the issue of self-defense amounted to error. Given that Gargarita invoked the defense of self-defense and there was evidence at trial that Anthony was the initial aggressor, an instruction to the jury on

self-defense was required. *See People v. Root*, 2005 Guam 16 ¶ 28 (defendant entitled to jury instruction on self-defense if there is evidence in record to support it). In accordance with this requirement, the trial court gave the following instructions relevant to self-defense:

Justification defined. In a prosecution for a criminal offense, justification is a defense. When raised at trial, the prosecution has the burden of disproving a justification beyond a reasonable doubt.

Self-defense defined and limited. The use of force upon or toward another person is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. The use of deadly force is not justifiable unless the defendant believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or rape or sodomy compelled by force or threat, nor is it justifiable of the defendant with the purpose of causing death or serious bodily harm provoke the use of force against himself in the same encounter or the defendant knows that he can avoid the necessity of using such force with complete safety by retreating.

Deadly force defined. Deadly force means force which a person with the intent of causing or which he knows to create a substantial risk of causing death or serious bodily injury. Intentionally firing a firearm in the direction of another person or at a moving vehicle constitutes deadly force. A threat to cause death or serious bodily injury does not constitute deadly force so long as the defendant's intent is limited to creating an apprehension that he will use deadly force if necessary.

Transcript (“Tr.”) at 87-88 (Jury Trial – Day 4, Aug. 22, 2014). Gargarita contends that these instructions were misleading, inconsistent, and confusing in that they failed to clearly inform the jury that self-defense is a justification defense that the People had the burden of disproving beyond a reasonable doubt and that a verdict of “not guilty” was required if the People failed to meet that burden.¹

[14] We consider whether the proffered instructions accurately stated the relevant law under a *de novo* standard. *See Diego*, 2013 Guam 15 ¶ 9. In doing so, “a single jury instruction should

¹ Gargarita also maintains that the trial court impermissibly instructed the jury that, as a matter of law, Gargarita employed “deadly force.” As we agree with Gargarita’s first basis for error, we need not address this argument.

not be judged in artificial isolation. Instead, instructions should be considered and reviewed as a whole. . . . [I]nstructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions.” *Jones*, 2006 Guam 13 ¶ 28 (citations and internal quotation marks omitted). As self-defense is a justification defense, once the issue of self-defense has been raised, the prosecution bears the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense in committing any offense. *See* 9 GCA §§ 7.78, 7.84 (2005); *State v. Jenewicz*, 940 A.2d 269, 275 n.4 (N.J. 2008) (“After a defendant raises a claim of self-defense, the burden of proof shifts to the [prosecution] to disprove the defense beyond a reasonable doubt.”).

[15] Considering the instructions given in this case, we agree with Gargarita that they were misleading and confusing to the point of error for two reasons. First, although the jury was informed that the People bore the burden of disproving a justification defense, the trial court did not explicitly state that self-defense is a justification defense, leading to the distinct possibility that the jury failed to make the connection between a justification defense and self-defense. Without drawing that link, the jury may have improperly placed the onus on Gargarita to prove that the force he used against the victim was lawful.²

[16] Second, the trial court’s instructions did not state that the jury was obligated to acquit Gargarita if the prosecution failed to meet its burden on the issue of self-defense even if all the elements of the charges against him were proved. Such an instruction is pivotal because it ensures the jury takes the appropriate step of reaching a “not guilty” verdict in the event that a reasonable doubt remains with regard to whether the defendant acted in self-defense. Even when

² Neither the prosecutor nor Gargarita’s trial counsel mentioned that it was the Government’s burden to prove beyond a reasonable doubt that Gargarita had not acted in self-defense. *See* Tr. at 29-61 (Jury Trial - Day 4).

reviewing the instructions as a whole, we cannot conclude that the jury was properly informed of its responsibilities in adjudicating the issue of self-defense.

[17] Our decision in this case comports with jury instruction guidelines provided by other important jurisdictions. Our self-defense statute is derived from three sources: New Jersey, California, and Massachusetts. 9 GCA § 7.84 SOURCE. In New Jersey, the model instructions are as follows:

The State has the burden to prove to you beyond a reasonable doubt that the defense of self defense is untrue. This defense only applies if all the conditions or elements previously described exist. The defense must be rejected if the State disproves any of the conditions beyond a reasonable doubt. . . . If the State carries its burden then you must disallow the defense. If the State does not satisfy this burden and you do have a reasonable doubt, then it must be resolved in favor of the defendant and you must allow the claim of self-defense and acquit the defendant.

N.J. Model Jury Charge (Criminal) 2C:3-4 “Justification – Self Defense” (June 2015). Thus, New Jersey’s model instructions clearly state that the prosecution bears the burden of disproving self-defense. Further, they include a specific instruction that failure by the prosecution to disprove self-defense beyond a reasonable doubt must lead to an acquittal. Massachusetts’ model instruction is similarly specific regarding the consequences of the state failing to disprove self-defense beyond a reasonable doubt:

A person is allowed to act in self-defense. If evidence of self-defense is present, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

Mass. Crim. Model Jury Instr. 9.260 (2009) (emphasis omitted). California’s instruction also provides as much:

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter).

Judicial Council for Cal. Crim. Jury Instr. No. 505 (2012). Other jurisdictions have provided similar guidelines in their model instructions. *See* N.M.R.A., Crim. U.J.I. 14-5171 (“The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. If you have a reasonable doubt as to whether the defendant acted in self-defense you must find the defendant not guilty.”); Haw. Rev. Crim. Jury Instr. 7.01A (“The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justified. If the prosecution does not meet its burden, then you must find the defendant not guilty.”). While we recognize that these instructions do not carry the authoritative weight of case law or statute, we nonetheless are persuaded that they shed light on how to effectively instruct the jury with regards to self-defense and stand in stark contrast to the convoluted instructions given in this case.

[18] The dissent argues that the instructions, read as a whole, are sufficiently clear. In our view, however, the immediate juxtaposition of an instruction defining “justification” and an instruction defining “self-defense,” with no connection drawn between the two, only served to further confuse the issues presented to the jury. Furthermore, although the court was not required to list the disproof of self-defense as an element of murder or manslaughter, the instructions regarding those offenses nonetheless provided an opportunity for the court to clarify the prosecution’s burden with regard to self-defense to the jury. Instead, the court was silent, allowing for the possibility of confusion.

[19] Accordingly, we are convinced that the trial court committed error, satisfying the first prong of the plain error standard of review.

B. Whether the Error was Clear or Obvious Under Current Law.

[20] Next, we must consider whether the instructional error was clear or obvious under current law.

[A] determination of whether an error is “clear” for purposes of the plain error analysis does not require the existence of precedent exactly on point. . . . [T]he “plainness” of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking. This rule is particularly appropriate for our jurisdiction, whose case law consists of [less than twenty] years of Guam Supreme Court precedent. It would be unfair to require defendants to demonstrate plain error with a case directly on point given that many issues have not yet been resolved by this court.

People v. Perry, 2009 Guam 4 ¶ 32 (citation and internal quotation marks omitted).

[21] Despite the fact that no Guam appellate court has provided specific guidance as to the content of a jury instruction on self-defense, we are nonetheless persuaded that the error in this case was clear. It is well-settled that a court must provide an instruction on self-defense when the evidence presented at trial warrants it. *See Root*, 2005 Guam 16 ¶ 28. It is similarly well-settled that jury instructions must lucidly and accurately state the law. *See Diego*, 2013 Guam 15 ¶ 28 (reviewing whether jury instruction constituted a misstatement of the law). Thus, Guam law clearly requires straightforward and accurate instructions as to self-defense in cases such as this where the evidence demands them. *See State v. Richard*, 7 A.3d 1195, 1203 (N.H. 2010) (inadequate jury instruction regarding self-defense was clear or obvious error under second prong of plain error review).

[22] Accordingly, Gargarita has satisfied the second prong of the plain error standard of review.

C. Whether the Error Affected Substantial Rights

[23] Next, we must consider whether the clear instructional error affected Gargarita's substantial rights.

Under the plain error analysis, once a clear error has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case). Therefore, in the absence of evidence in the record to show the defendant was prejudiced, the government will prevail. To be prejudicial, the [error] must constitute a mistake so serious that but for it the [defendant] probably would have been acquitted.

People v. Fegarido, 2014 Guam 29 ¶ 41 (citations and internal quotation marks omitted). "In deciding whether a defect in a jury instruction is 'plain error,' we must examine the entire record before us and determine whether the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *United States v. Jackson*, 569 F.2d 1003, 1010 (7th Cir. 1978) (citations omitted).

[24] Gargarita argues that in this case, the error was prejudicial because the case hinged on the jury clearly understanding its role in determining whether he acted in justifiable self-defense. He points to that fact that the evidence clearly showed that the victim was the initial aggressor. He also asserts that the prosecution did not clearly establish that he used deadly force, as there was no evidence showing that he choked the victim for three minutes, the amount of time that the expert witness stated was necessary to kill the victim.

[25] The People argue that the overwhelming evidence of guilt demonstrates that Gargarita was not prejudiced by any error. The People cite to two cases in support of this argument. Appellee's Br. at 14 (Mar. 11, 2015). First, they direct our attention to the Seventh Circuit case *United States v. Jackson*, 569 F.2d 1003, *cert. denied*, 437 U.S. 907 (1978). In that case, the court found no plain error because the court did provide some instruction on self-defense, defense counsel stated that the prosecution had the burden of proof on the issue of self-defense

during closing arguments, and the evidence of guilt was overwhelming. *Id.* at 1010. In addressing the overwhelming nature of the evidence, the court noted that “the defendant . . . punch[ed] the officer in the face four or five times and then grab[bed] him by the hair and hit his head another four or five times on a steel rail, all the while screaming that he was going to kill the officer.” *Id.*

[26] Second, the People cite to *Richard*, 7 A.3d 1195, a New Hampshire Supreme Court case. In that case, the court found that the trial court committed instructional error regarding self-defense in an assault case, but concluded that it did not amount to plain error under the fourth prong of plain error review because the evidence that the defendant did not act in self-defense was overwhelming. *Id.* at 1203. The court noted that the defendant was intoxicated, burst into the room of the victim, and hit him the face with a pole. *Id.*

[27] We agree with Gargarita that both of the cases relied upon by the People are distinguishable. Here, Gargarita’s counsel did not specifically mention during his closing argument that the People bore the burden of proof as to self-defense. Although the dissent notes that the jury was informed by defense counsel that “[Gargarita] doesn’t have to prove anything” and that “the Government . . . has to make all the allegations and prove all the facts from the witnesses or evidence,” Tr. at 44 (Jury Trial - Day 4), defense counsel did not explain to the jury that it was the prosecution’s burden to *disprove* Gargarita’s theory of self-defense.

[28] Further, the evidence in both cases cited by the People overwhelmingly showed that the defendant used force far above what could be considered reasonable. In this case, we do not view the evidence to be overwhelming in the People’s favor, as the difference in force used to choke a person to unconsciousness and to choke a person to death is a much finer line than the difference between reasonable force and hitting a person in the face with a metal pole or

slamming a person's head several times against steel rail. Moreover, unlike in the cases cited by the People, it was clear from the testimony of both prosecution and defense witnesses that the victim was the initial aggressor. Tr. at 31, 47 (Jury Trial - Day 1, Aug. 19, 2014); Tr. at 37 (Jury Trial - Day 3, Aug. 21, 2014).

[29] Courts have found an inadequate instruction regarding reasonable doubt to constitute plain error in cases where the defendant relies primarily on a theory of self-defense and the evidence does not clearly demonstrate that the defense does not apply. In *State v. Garcia*, a Utah appellate court found plain error where the court gave an instruction that may have led the jury to believe that the defendant bore the burden of proving he was acting in self-defense. 18 P.3d 1123, 1128-29 (Utah Ct. App. 2001). The defendant shot the victim when he thought the victim was reaching for a gun. In considering whether the defendant was prejudiced, the court concluded that “[h]ad the burden of proof of self-defense been adequately explained to the jury, it is reasonably likely that the jury could have entertained a reasonable doubt as to whether Garcia acted in self-defense, thus requiring acquittal.” *Id.* at 1129.

[30] In *Government of Virgin Islands v. Smith*, 949 F.2d 677, 684 (3d Cir. 1991), the Third Circuit Court of Appeals found plain error where the trial court failed to instruct the jury on the burden of proof on self-defense. The court stated:

The error was critical here because [the defendant's] entire case rested on his claim of self-defense. . . . Moreover, the conflicting evidence on the issue increased the importance of the missing jury instruction. . . . Here, we believe that a fair reading of the evidence reveals a plausible case for self-defense which, combined with the possibility that the jury misallocated the burden of proof, requires that [the defendant] be accorded a new trial.

Id. (citations omitted). In that case, there was conflicting testimony concerning the sequence of events leading to the defendant shooting the victim. *Id.* at 679, 686.

[31] Having examined the entire record before us, we conclude that, like these two cases, the erroneous instruction given by the trial court affected Gargarita's substantial rights. Although the prosecution's principle witness was not directly contradicted by the defendant's evidence, her account did not conclusively disprove that Gargarita acted in self-defense to the point that no reasonable juror could maintain a reasonable doubt concerning the issue. Furthermore, as Gargarita points out, there was some question as to the amount of time he choked the victim and whether it would typically be sufficient to cause death. Even if it was conclusively shown that Gargarita choked the victim for three minutes,³ a layperson cannot be assumed to know the amount of time that choking a person will lead to death or to know with certainty the amount of time that has passed when in the midst of a violent struggle.

[32] The dissent argues the jury's verdict acquitting Gargarita of murder but finding him guilty of manslaughter is indicative of its understanding of the complex legal issues involved in the case. We cannot agree, as we do not know the reasoning behind the jury's verdict. The only difference between the crime of murder and manslaughter as applicable in this case is whether the death occurred "under circumstances manifesting extreme indifference to the value of human life." *See* 9 GCA §§ 16.40(a)(2) (defining murder), 16.50 (defining manslaughter) (2005). If we are to assume that the jury understood the court's instructions and found beyond a reasonable doubt that Gargarita was not acting in self-defense, it is difficult to fathom how his choking a prone victim to death would not be found to manifest an extreme indifference to the value of human life. More plausible, we think, is a scenario where the jury acquitted Gargarita of murder

³ At trial, the chief medical examiner testified that a person's brain cells will die after three minutes of being choked so as to cut off the flow of oxygen to the brain. Tr. at 62 (Jury Trial – Day 1). He also testified that a person will be rendered unconscious after two minutes of being choked in this manner. *Id.* at 62-63.

because they believed he was acting in self-defense, but did not understand that such a finding required an acquittal on the charge of manslaughter as well.

[33] Accordingly, we are persuaded that the court's deficient instructions caused prejudice so as to affect Gargarita's substantial rights. Therefore, Gargarita has satisfied the third prong of plain error review.

D. Whether Reversal is Necessary to Prevent a Miscarriage of Justice or to Maintain the Integrity of the Judicial Process

[34] Finally, we must consider whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.

If the forfeited error is plain and affects substantial rights, the court of appeals has authority to order correction, but is not required to do so. It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level. The plain error rule allows a reviewing court to exercise its discretion and notice a forfeited error 'in those circumstances in which a miscarriage of justice would otherwise result' – that is, where the defendant is actually innocent. But plain error is not limited to cases where the putative error causes the conviction of an innocent person; it also applies to cases where the putative error affects the fairness or integrity of the trial.

People v. Quitugua, 2009 Guam 10 ¶¶ 47-48 (citations and internal quotation marks omitted).

[35] In *Quitugua*, we concluded that correcting a trial court's failure to inform the defendant of the mandatory parole term required by her guilty plea was not necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.* at 51. This conclusion was based on the fact that the defendant did "not assert that had she been advised of the parole term in her plea colloquy she would have pleaded differently" and "had notice of the parole term via the plea agreement and discussion at the plea hearing." *Id.* Further, "there [was] nothing in the record to indicate that the government would have had difficulty proving her guilt

in trial, or that [she] had a choice among multiple plea agreements that might have been adversely influenced by the omission in the plea colloquy.” *Id.*

[36] We consider the case at hand to be readily distinguishable from *Quitugua*, as any error here cannot be considered “technical.” *See id.* ¶ 49. Rather, the instructional error went to a pivotal issue in the case and may have been the difference between a finding of guilt or innocence. Thus, the fairness of the trial was directly affected by the quality of the court’s instructions on self-defense.

[37] This case is more akin to an Appeals Court of Massachusetts case, *Commonwealth v. Desmarais*, wherein the court, after determining that the trial court provided an erroneous instruction regarding the complainant’s capacity to consent in a rape case, was faced with the question of whether the error “resulted in a substantial risk of a miscarriage of justice.” No. 07-P-1799, 2008 WL 4975827, at *2 (Mass. App. Ct. 2008). The court determined that there was such a risk “[b]ecause the complainant’s ability to consent to sex was the central issue in this case” and there was “no basis to conclude that defense counsel’s failure to object to this instruction, one that was not beneficial to the defendant, was a reasoned tactical decision.” *Id.*

[38] Here, self-defense was the central issue in the case. Although the jury was informed that People bore the burden of disproving a justification defense, the trial court did not explicitly state that self-defense is a justification defense, leading to the distinct possibility that the jury failed to make the connection between a justification defense and self-defense. Without drawing that link, the jury may have improperly placed the onus on Gargarita to prove that the force he used against the victim was lawful. The trial court also did not state that the jury was obligated to acquit Gargarita if the prosecution failed to meet its burden on the issue of self-defense even if all the elements of the charges against him were proved. Such an instruction is pivotal because it

ensures the jury takes the appropriate step of reaching a “not guilty” verdict in the event that a reasonable doubt remains with regard to whether the defendant acted in self-defense. Further, there is no basis to conclude that Gargarita’s counsel failed to request clearer instructions on self-defense for tactical reasons. Thus, like in *Desmarais*, a miscarriage of justice was a likely result of erroneous jury instructions.

[39] Accordingly, Gargarita has satisfied the fourth prong of plain error.

V. CONCLUSION

[40] Having determined that all four prongs of plain error review are satisfied, we **REVERSE** the conviction of manslaughter and **REMAND** for a new trial.

Original Signed : Katherine A. Maraman
By

Original Signed : Robert J. Torres
By

KATHERINE A. MARAMAN
Associate Justice

ROBERT J. TORRES
Chief Justice

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

SEP 17 2015

By: Charlene I. Santos
Deputy Clerk
Supreme Court of Guam

CARBULLIDO, J., dissenting:

[41] The trial court adequately instructed the jury on the issue of self-defense and therefore did not commit error. Furthermore, Gargarita has not demonstrated that he was prejudiced so as to affect his substantial rights. Without these necessary showings, Gargarita has not established plain error. Accordingly, I respectfully dissent, as I would affirm his manslaughter conviction.

[42] Considering the first prong of the plain error standard of review, the majority concludes the court's instructions were erroneous because they did not explicitly state (1) that self-defense is a justification defense that must be proven by the prosecution beyond a reasonable doubt and (2) that the jury was obligated to acquit Gargarita if the prosecution failed to meet that burden.

[43] With regard to the majority's first basis for error, I believe the instructions sufficiently informed the jury of the People's burden regarding self-defense. In this case, it is particularly important that the instructions be read as a whole, rather than in isolation, as our precedent requires. *See Jones*, 2006 Guam 13 ¶ 28. In immediate succession, the court instructed the jury that "[w]hen raised at trial, the prosecution has the burden of disproving a justification beyond a reasonable doubt" and, in the next instruction, that "[t]he use of force upon or toward another person is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Tr. at 87-88 (Jury Trial – Day 4). While a more explicit link between a justification defense and self-defense could have been drawn, I nonetheless fail to see how a reasonable jury presented with these instructions could conclude that Gargarita bore the burden of proving that he acted in self-defense. Thus, the instructions were sufficient.

[44] Concerning the majority's second basis of error, I am aware of no authority requiring an instruction informing the jury that the defendant must be acquitted if the prosecution fails to

meet its burden with regard to the issue of self-defense. As the majority recognizes, the model instructions to which it cites do not constitute law, but merely guidelines for the courts of the jurisdictions in question.⁴ Departure from the model instructions is not by itself a basis for reversal, even in the jurisdiction that has adopted them, so long as the given instructions fairly and adequately instructed the jurors on the applicable law. *See United States v. Cornelison*, 717 F.3d 623, 628 (8th Cir. 2013) (“[M]odel instructions are not binding on . . . courts . . . but are merely helpful suggestions to assist [them].”). Without some authority recognizing instructions such as those given in this case to be erroneous, I would conclude that it was proper for the trial court to allow the jury to logically infer the consequences of its findings on the issue of self-defense.

[45] Thus, I do not consider the trial court’s instructions regarding the issue of self-defense to have resulted in error, and I would reject Gargarita’s claim of instructional error under the first prong of the plain error standard of review. Furthermore, even if I were to accept the majority’s conclusion that the instructions were misleading to the point of error, I would conclude that Gargarita’s claim also fails to satisfy the third prong of the plain error standard, as he has not established that his substantial rights were affected by any error.

[46] In order for Gargarita to establish that his substantial rights were affected, he must demonstrate that giving the desired self-defense jury instructions would have likely resulted in an acquittal. *See Fegarido*, 2014 Guam 29 ¶ 41. We have previously held that errors do not affect substantial rights when the prosecution presented overwhelming evidence of guilt regarding the issue or element affected by the claimed error. *See Perry*, 2009 Guam 4 ¶¶ 43, 46, 49.

⁴ I note that the Ninth Circuit’s model jury instructions merely state that “[t]he government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense,” without any specific directive to the jury that it must acquit if the government fails to meet its burden. 9th Cir. Model Crim. Instr. 6.8 (2010).

[47] In this case, the People's principle witness testified that after Gargarita had the victim prone and restrained on the ground, he continued to choke the victim, even after he was clearly unconscious and "wasn't moving at all." Tr. at 37 (Jury Trial – Day 1). She emphasized that she "repeatedly over and over again" told him to let go and after thirty seconds had to apply "strong force" in order to stop him from continuing to choke the victim. *Id.* at 38-39. Further, Gargarita admitted on cross-examination that he persisted in choking the victim even after the bystander told him to stop. Tr. at 68-69 (Jury Trial – Day 3). Given the victim's prone position and the obvious danger of depriving a human being of air for several uninterrupted seconds, I consider the evidence to be overwhelming that the force Gargarita applied was not justifiable under the circumstances.

[48] We have also held errors to not affect substantial rights when the record reflects that the consequences of any error were mitigated by other factors and there is a reasonable probability it did not impact the proceedings. *See Quitugua*, 2009 Guam 10 ¶¶ 42-43 (reasonable probability that defendant was aware of parole term despite not being expressly advised). In this case, defense counsel reminded the jury during his closing argument that "[Gargarita] doesn't have to prove anything. It's the Government who has to make all the allegations and prove all the facts from the witnesses or evidence." Tr. at 44 (Jury Trial – Day 4). Thus, even if the instructions were confusing as to who carried the burden regarding the issue of self-defense, the jury was straightforwardly informed by Gargarita's counsel that it was the People who carried the burden of proof on all issues.

[49] Additionally, the jury's understanding of its role and responsibilities was made evident in its decision to acquit Gargarita of murder while finding him guilty of manslaughter. This outcome reflects the jury's ability to digest the nuances of a complex legal framework in a way

that a murder conviction or total acquittal would not. Hence, there is no cause to require a new trial based on instructions that were at worst hard to understand, but not misleading or so conspicuously defective as to warrant an objection from Gargarita's defense counsel.

[50] In sum, I would affirm the manslaughter conviction as Gargarita has not established plain error. The jury instructions with which he takes issue were not erroneous, and any deficiency therein did not affect his substantial rights.

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

F. PHILIP CARBULLIDO
Associate Justice

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

SEP 17 2015

By: Charlene T. Santos
Deputy Clerk
Supreme Court of Guam