IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

AFIO COX,
Defendant-Appellant.

Supreme Court Case No.: CRA15-027
Superior Court Case No.: CF0026-12

OPINION

Cite as: 2018 Guam 16

Appeal from the Superior Court of Guam
Argued and submitted on February 18, 2016
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Afio Cox appeals from final judgment of conviction on two counts of Vehicular Homicide While Intoxicated (as a Second Degree Felony), two counts[2] of Vehicular Homicide (as a Second Degree Felony), one count of Driving While Under the Influence of Alcohol with Injuries (as a Third Degree Felony), one count of Driving While Under the Influence of Alcohol with Injuries (BAC) (as a Third Degree Felony), one count of Driving while Under the Influence of Alcohol (as a Misdemeanor), and one count of Driving While Under the Influence of Alcohol (BAC) (as a Misdemeanor). The convictions arise out of a single-vehicle accident where Cox was the driver and his passenger died.

[2] Cox argues on appeal that the trial court's failure to instruct the jury *sua sponte* on the justification of self-defense and the court's instruction regarding the presumption of intoxication were plain error.[3] The People argue that the jury was properly instructed. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

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

[2] There is a discrepancy between the trial documents and the Notice of Appeal regarding the number of counts for the Second Charge, Vehicular Homicide (As a Second Degree Felony). The Notice of Appeal states that Cox was convicted of three counts. Yet the transcripts and the Transmittal of Record reveal that there were in fact only two counts. For reasons attributable to clerical error, the two counts are mistakenly numbered as one and three, even though there were in fact only two counts.

[3] At oral argument, Cox conceded that a third issue concerning the trial court's limited inquiry into his waiver of the privilege against compelled self-incrimination was not plain error. Therefore, we need not address it.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Cox drove his girlfriend Maria Guevarra home after a night out at several bars where they consumed alcoholic beverages. On the way home, the two began arguing. Cox testified that while he was driving, Guevarra punched him twice, slapped his hands, and yanked the steering wheel, causing them to cross two traffic lanes and crash into a power pole on the side of the road. Guevarra died on impact as the result of a broken neck, an injury consistent with an unexpected collision.

[4] Investigation revealed the car drove straight into the pole, and there were no skid marks on the road, suggesting that the crash may have been intentional and the driver did not attempt to slow or stop the vehicle. Evidence showed Cox's blood alcohol concentration level ("BAC") after the accident was over the legal limit of 0.08%.[4]

[5] Cox was found guilty of multiple counts of Vehicular Homicide and Driving While Under the Influence of Alcohol ("DUI"). The trial court entered final judgment, and Cox timely appealed.

II. JURISDICTION

[6] This court has jurisdiction over appeals from final judgments of conviction. *See* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-223 (2018)); 7 GCA §§ 3107, 3108(b) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[7] We review jury instructions for plain error when no objection was made at trial. *See People v. Gargarita*, 2015 Guam 28 ¶ 11 (citing *People v. Felder*, 2012 Guam 8 ¶ 8); *see also*

[4] The parties stipulated to an exhibit showing a BAC equivalent to 0.106%.

Felder, 2012 Guam 8 ¶¶ 13-18 (explaining why harmless error does not apply when no objection was made). When considering "whether the proffered instructions accurately stated the relevant law," we review "under a *de novo* standard." *Gargarita*, 2015 Guam 28 ¶ 12 (citing *People v. Diego*, 2013 Guam 15 ¶ 9).

IV. ANALYSIS

A. The Trial Court's Omission of a Jury Instruction on Self-Defense Was Not Plain Error

[8] Cox argues that the trial court's failure to instruct the jury on a justification of self-defense was plain error. *See* Appellant's Br. at 3-5 (Oct. 8, 2015). The People argue that the trial court did not err because Cox did not invoke self-defense at trial and presented no evidence to support the justification. *See* Appellee's Br. at 5-9 (Nov. 30, 2015). Specifically, the People argue that Cox's theory of the case and evidence do not support the "use of force" necessary to qualify for self-defense. *See id.* at 5-6. Cox replies that defensive actions such as deflecting punches may satisfy the definition of "use of force upon or toward" another person in self-defense. *See* Appellant's Reply Br. at 1-4 (Dec. 9, 2015). Cox did not request a self-defense instruction at trial and did not object to the omission of a self-defense instruction. Therefore, we review for plain error. *See Gargarita*, 2015 Guam 28 ¶ 11 (citation omitted).

1. Cox's self-defense theory does not excuse liability under the elements of the Fifth and Sixth Charges.

[9] Under the Fifth and Sixth Charges, the People prosecuted Cox for two misdemeanors under 16 GCA § 18102(a) and (b). Record on Appeal ("RA"), tab 59 at 4 (2d Superseding Indictment, Oct. 17, 2013); *see also* 16 GCA § 18102(a)-(b) (as amended by P.L. 30-156:6 (July 8, 2010)). These two charges require proving only that Cox operated or was in physical control of a motor vehicle, while either under the influence of alcohol, in the case of section 18102(a), or

while having a BAC level of 0.08% or more, in the case of section 18102(b). *See* 16 GCA § 18102(a)-(b); *see also People v. Manila*, 2005 Guam 6 ¶ 40. For these misdemeanors, Cox's conduct that served as a basis for his convictions cannot reasonably be justified under any self-defense theory. Therefore, the question before us is whether a self-defense instruction should have been given with respect to the First, Second, Third and Fourth Charges.

2. The failure to instruct on self-defense was not plain error where the defendant did not present a self-defense theory at trial but instead relied on the theory that he did not commit the crime.

[10] A court must provide a "straightforward and accurate" instruction on the justification of self-defense where the evidence demands it. *Gargarita*, 2015 Guam 28 ¶ 21 (citation omitted). Yet, "[c]ourts are not bound to present every conceivable defense potentially suggested by the evidence." *People v. Camacho*, 1999 Guam 27 ¶ 20 (citing *United States v. Span*, 970 F.2d 573, 576-78 (9th Cir. 1992)); *see also People v. Root*, 2005 Guam 16 ¶ 28 ("[T]he standard is that 'an instruction must be given if there is evidence upon which the jury could rationally sustain the defense.'" (quoting *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984))). We have previously declined to find plain error where a defendant "did not present a self-defense theory at trial but instead relied upon the alternative theory that he did not commit the crime." *Camacho*, 1999 Guam 27 ¶ 21; *cf. People v. Barton*, 906 P.2d 531, 535 (Cal. 1995) ("A trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses . . . aris[es] 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (quoting *People v. Sedeno*, 518 P.2d 913, 921 (Cal. 1974) (en banc), *overruled on other grounds by People v. Breverman*, 960 P.2d 1094 (Cal. 1998))); *State v. Kiehl*, 78 N.E.3d 1226, 1231-34

(Ohio Ct. App. 2016) (finding no instructional error in part because defenses of self-defense and accident were inconsistent), *appeal denied*, 87 N.E.3d 221 (Ohio 2017).

[11] At trial, Cox testified that he and Guevarra were arguing inside the vehicle after leaving the bar where she worked. Tr. at 45-46 (Jury Trial, Oct. 31, 2013). Cox testified that, during this argument, she punched him twice and that he held his face at one point. *Id.* at 47-48. He further testified that Guevarra then slapped his hands and "yanked the [steering] wheel," and that they "hit the power pole after she yanked the wheel." *Id.* at 48. Cox now argues on appeal that his testimony invoked self-defense and that:

> The jury could infer that [he] believed that the force he used to block his girlfriend's strikes was necessary to protect his face, that [Guevarra's] strikes were the proximate cause of [him] temporarily releasing his hands from the steering wheel which enabled [Guevarra] to "yank" the steering wheel from his control causing the vehicle to collide with the telephone pole.

Appellant's Br. at 3-4 (citations omitted). Cox argues the act of raising his hands to protect his face constitutes the "use of force upon or toward" another person, and that therefore the trial court committed plain error by failing to instruct on self-defense pursuant to 9 GCA § 7.84. *See, e.g.*, Appellant's Reply Br. at 1-4. We are not persuaded.

[12] Cox's testimony and the theory advanced by his counsel indicate that he was claiming that he did not *cause* the accident, but rather that Guevarra's actions were the proximate cause of the accident. During trial, Cox's testimony, as well as his counsel's questioning and closing argument, focused on the factual issues of whether Cox attempted to stop and whether Guevarra grabbed the steering wheel—*i.e.*, issues of proximate cause—but did not raise any theory of self-defense. Tr. at 37-38, 41, 43-46 (Jury Trial, Nov. 6, 2013); Tr. at 11-14, 21-26, 48, 50, 54-57 (Jury Trial, Oct. 31, 2013); Tr. at 86-95, 106-107, 119-125 (Jury Trial, Oct. 30, 2013). Defense

counsel argued at length regarding issues of intoxication, motivation and cause, but never introduced any issues particular to a self-defense theory. Tr. at 32-48 (Jury Trial, Nov. 6, 2013); *cf. United States v. Napue*, 401 F.2d 107, 110-12 (7th Cir. 1968) (finding omission of jury instruction was harmless error in light of factual circumstances and counsel's closing argument); *United States v. Thomas*, 484 F.2d 909, 912 (6th Cir. 1973) (same). The pertinent testimony proffered by Cox and other witnesses, and his counsel's closing arguments, were squarely aimed at negating the element of *proximate cause* rather than presenting an affirmative justification; and the jury was properly instructed with respect to the element of cause. *See* Tr. at 77-78, 81-84 (Jury Trial, Nov. 6, 2013).

[13] Thus, Cox's theory on appeal—that he acted in self-defense—is essentially incompatible with the defense theory he presented at trial—that he did not commit the crime. It is inconsistent to say that he did not cause the accident while simultaneously claiming that he was justified in causing it. Therefore, we find the trial court did not commit plain error in failing to grant the instruction. *See Camacho*, 1999 Guam 27 ¶ 21; *cf. Jackson*, 726 F.2d at 1468 (finding no error in failing to give self-defense instruction); *Hall v. United States*, 46 F.3d 855, 857 (8th Cir. 1995) (same); *State v. Bogenreif*, 465 N.W.2d 777, 781 (S.D. 1991) (same).

B. The Trial Court's Jury Instructions Regarding Presumptions of Intoxication Were Plain Error

[14] "The [United States] Supreme Court has delineated three types of criminal presumptions: 1) permissive, 2) mandatory rebuttable, and 3) mandatory conclusive." *McLean v. Moran*, 963 F.2d 1306, 1308 (9th Cir. 1992) (citing *Francis v. Franklin*, 471 U.S. 307, 314 & n.2 (1985); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 157 & n.16 (1979)). A permissive presumption allows—but does not require—the jury to infer proof of an elemental fact from

proof of a basic fact and "does not shift the burden of production or persuasion to the defendant." *Id.* (citing *Ulster Cty.*, 442 U.S. at 157). In contrast, a mandatory rebuttable presumption tells the jury that it must find the presumed element upon proof of the basic fact, unless the defendant provides some evidence to rebut the presumed connection between the two facts; if the defendant produces such evidence, then the ultimate burden of persuasion returns to the prosecution. *Id.* (citing *Ulster Cty.*, 442 U.S. at 157). A mandatory rebuttable presumption is not *per se* unconstitutional, but such a presumption may create constitutional problems if it shifts to the defendant the prosecution's burden of persuasion to prove the facts of each element of the crime beyond a reasonable doubt. *See id.* at 1308-09. A mandatory conclusive presumption goes a step further and removes the presumed element from the case after the prosecution has proven predicate facts that give rise to the presumption, effectively eliminating the jury's fact-finding role. *Id.* at 1309 (citing *Francis*, 471 U.S. at 314 n.2).

[15] Cox argues that the trial court committed plain error with Jury Instructions 6E and 6G. He alleges these instructions improperly created a rebuttable presumption not contemplated by 16 GCA § 18103. Appellant's Br. at 6-7. Jury Instruction 6E stated, in relevant part:

> The amount of alcohol in the person's blood . . . *shall give rise to the following presumptions affecting the burden of proof*. . . .
>
> If there was . . . 0.08 percent, or more by weight of alcohol in the person's blood, *it shall be presumed that the person was under the influence of alcohol* or under the influence of an alcoholic beverage at the time of the alleged offense.

Tr. at 79-80 (Jury Trial, Nov. 6, 2013) (emphases added). Jury Instruction 6G stated, in relevant part:

> In any prosecution arising out of acts involving the driving or operating or [sic] a motor vehicle while under the influence of alcohol causing bodily injury to a person other than the driver . . . *it is a rebuttable presumption* that the person with

> . . . 0.08 percent, or more by weight of alcohol in his or her blood . . . is under the influence of alcohol if the person had . . . 0.08 percent, or more by weight of alcohol in his or her blood at the time of the performance of a blood or breath test within three hours after driving.

Id. at 80-81 (emphasis added). Cox broadly posits that these two instructions constituted plain error because the language regarding presumptions inaccurately conflated 16 GCA §§ 18102 and 18103, thereby confusing the jury as to the burden of proof. Appellant's Reply Br. at 7-8. Cox essentially argues that, while the statutory presumptions may be only evidentiary in nature, the jury instructions failed to properly allocate the burden of proof and thus violated his constitutional right to a presumption of innocence. *See* Appellant's Br. at 6. The People counter that the instruction accurately tracked the applicable statutory language and, even if erroneous, any error did not prejudice Cox's substantial rights. *See* Appellee's Br. at 9.

[16] Because Cox did not object to the relevant instructions at trial, we review for plain error. *See Gargarita*, 2015 Guam 28 ¶ 11 (citing *Felder*, 2012 Guam 8 ¶ 8). To the extent "[w]e [are] consider[ing] whether the proffered instructions accurately stated the relevant law [then we review] under a *de novo* standard." *Id.* at 12 (citing *Diego*, 2013 Guam 15 ¶ 9). We review jury instructions as a whole rather than in isolation. *Id.* (quoting *People v. Jones*, 2006 Guam 13 ¶ 28); *see also Estelle v. McGuire*, 502 U.S. 62, 72 (1991) ("It is well established that the [jury] instruction[s] 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973))).

[17] The "presumptions" referred to in 16 GCA §§ 18102 and 18103 have an evidentiary function. Both sections "enable[] the factfinder to proceed by inferential reasoning from one fact to another." *Commonwealth v. MacPherson*, 752 A.2d 384, 389 (Pa. 2000). Evidentiary tools

like this are "commonly and often interchangeably known as 'inferences' or 'presumptions.'" *Id.*; *see generally* D.E. Evins, Annotation, *Construction and Application of Statutes Creating Presumption or Other Inference of Intoxication from Specified Percentages of Alcohol Present in System*, 16 A.L.R. 3d 748 (1967).

[18] The United States Supreme Court has stated:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

Ulster Cty., 442 U.S. at 156 (citations omitted). Evidentiary presumptions that have "the effect of relieving the [prosecution] of its burden of persuasion beyond a reasonable doubt of every essential element of a crime" are prohibited as a violation of the Due Process Clause. *Francis*, 471 U.S. at 313 (collecting cases).

[19] The constitutionality of a presumption in a jury instruction depends on the nature of the presumption, which "requires careful attention to the words actually spoken to the jury." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) (citing *Ulster Cty.*, 442 U.S. at 157-59 & n.16), *overruled in part on other grounds by Boyde v. California*, 494 U.S. 370, 380 (1990). In determining the nature of a presumption in an individual case, "the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it." *Ulster Cty.*, 442 U.S. at 157 n.16; *see also Brown v.*

State, 910 A.2d 571, 582 (Md. Ct. Spec. App. 2006) ("The [United States] Supreme Court made clear . . . that the way the jury is instructed concerning a statutory evidentiary presumption is often dispositive of the constitutional challenge." (collecting cases)). Even if a facially constitutional statute supplies the presumption, the jury instruction may nonetheless unconstitutionally apply it as a mandatory conclusive presumption. *See, e.g.*, *McLean*, 963 F.2d at 1310 (holding jury instruction was unconstitutional as a mandatory conclusive presumption without reaching issue of constitutionality of statute).

[20] Cox cites *People v. Demapan* for the proposition that "[i]t is plain error when the trial court's instructions inaccurately track the language of the statute." Appellant's Br. at 6 (citing *Demapan*, 2004 Guam 24). *Demapan*, however, should not be read to mean that *merely tracking statutory language alone* determines whether a jury instruction was plain error. Rather, in *Demapan*—which involved jury instructions regarding the crime of burglary under 9 GCA § 37.20—we stated that the "trial court's instructions on entry with intent accurately tracked the burglary statute *and were sufficient for the jury to understand that Demapan's intent to commit theft was to be proven to exist concurrently with his entry*" (as such concurrent intent was a required element of burglary). 2004 Guam 24 ¶ 20 (emphasis added). This italicized language cannot be ignored, as Cox does, because inaccurately tracking statutory language alone—especially when the deviations are inconsequential—is not *per se* fatal if the instructions are otherwise sufficient to inform the jury of its duty to find facts proving the elements of a crime beyond a reasonable doubt. Reversal is required where the defendant's rights were violated under the Due Process Clause, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." *In re Winship*, 397 U.S. 358, 364 (1970).

[21] Therefore, here we must determine (1) the nature of the presumption in Guam's DUI statute, (2) the nature of the presumptions in the contested jury instructions, and (3) whether those presumptions run afoul of constitutional Due Process protections.

1. Jury Instruction 6E was error.

[22] In analyzing the use of presumptions in criminal cases, courts distinguish statutes from the jury instructions derived therefrom, because the constitutional analysis focuses on the way the jury is instructed. *See, e.g.*, *McLean*, 963 F.2d at 1310. Courts construing the presumptions in DUI statutes may in some cases hold that the *statutes* create *permissive* inferences while also holding *jury instructions* derived therefrom unconstitutionally burden defendant as a *mandatory* presumption. *See, e.g.*, *Brown*, 910 A.2d at 585 ("When a constitutional problem does arise, it is due not to the statute itself, but to an improper jury instruction based on it."). "Indeed, even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference." *Barnes v. People*, 735 P.2d 869, 872-73 (Colo. 1987) (en banc) (citations omitted); *see also Salazar v. State*, 505 So. 2d 1287, 1291-92 (Ala. Crim. App. 1986) ("The courts construing this type of [statutory] presumption have consistently held it to be rebuttable and not conclusive. . . . [B]ut in this case, the court simply failed to explain that this presumption is rebuttable." (citations omitted)); *People v. Roder*, 658 P.2d 1302, 1309-13 (Cal. 1983) (en banc) (holding statutory presumption permissive but instruction applied an unconstitutional mandatory presumption); *Busch v. State*, 547 So. 2d 245, 246 (Fla. Dist. Ct. App. 1989) ("[W]e find the statute per se is not unconstitutional and falls within the prerogative of the legislature. We do agree, however, that

the statute may lead to the use of a jury instruction that is unconstitutional . . . ." (citations omitted)); *State v. Tiedemann*, 790 P.2d 340, 341-42 (Haw. Ct. App. 1990) (same); *State v. Dacey*, 418 A.2d 856, 858-59 (Vt. 1980) (same).

a. Jury Instruction 6E created a mandatory conclusive presumption.

[23] Jury Instruction 6E, in its entirety, reads:

> 6E, driving while intoxicated, presumptions defined. Upon the trial of any criminal action arising out of acts alleged to have been committed by any person while driving or being in actual physical control of a vehicle while under the influence of an alcoholic beverage as charged in the fourth and sixth charge of the indictment.
>
> The amount of alcohol in the person's blood or breath *shall give rise to the following presumptions affecting the burden of proof*. If there was at the time less than eight one hundredths of one percent, 0.08 percent, by weight of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense.
>
> If there was at that time eight one hundredths of one percent, 0.08 percent, or more by weight of alcohol in the person's blood, *it shall be presumed that the person was under the influence* of alcohol or *under the influence* of an alcoholic beverage at the time of the alleged offense.

Tr. at 79-80 (Jury Trial, Nov. 6, 2013) (emphases added); *see also* RA, tab 79 at Instr. No. 6E (Jury Instrs.).[5] The statute from which Jury Instruction 6E is derived, states in relevant part:

> (a) Upon the trial of any criminal action, or preliminary proceeding in a criminal action, arising out of acts alleged to have been committed by any person while driving or being in actual physical control of a vehicle while under the influence of an alcoholic beverage in violation of subsections (b) or (d) of § 18102 of this Chapter, the amount of alcohol in the person's blood at the time of the test as shown by an analysis of that person's blood or breath *shall give rise to the following presumptions affecting the burden of proof*[:]

[5] The instructions read to the jury in open court parallel in all pertinent respects the written copies given to the jurors. *Compare* Tr. at 58-86 (Jury Trial, Nov. 6, 2013), *with* RA, tab 79 (Jury Instrs., Nov. 7, 2013).

> (1) If there was at that time less than eight one-hundredths of one percent (0.08%) by weight of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense.
>
> (2) If there was at that time eight one-hundredths of one percent (0.08%) or more by weight of alcohol in the person's blood, *it shall be presumed that the person was under the influence* of an alcoholic beverage at the time of the alleged offense.
>
> . . . .
>
> The provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.

16 GCA § 18103 (2005) (emphases added). While Cox's trial counsel pointed out that referring to the statutory numbering scheme was problematic, he did not otherwise object to the presumption. *See* Tr. at 30-34 (Jury Trial, Nov. 5, 2013). The trial court included generic instructions related to the burden of proof, *see* Tr. at 61-63 (Jury Trial, Nov. 6, 2013), and to inferences, *id.* at 70-72, but these additional instructions did not further explain the burden of proof or the presumptions referred to in Jury Instruction 6E.

[24] Jury Instruction 6E applies a presumption that defendant is "under the influence" if his BAC was 0.08% or higher. The following charges required a finding that Cox was intoxicated or under the influence: (1) each of the two counts under the First Charge (Vehicular Homicide While Intoxicated (as a Second Degree Felony)); (2) the single count under the Third Charge (Driving While Under the Influence of Alcohol with Injuries (as a Third Degree Felony)); and (3) the single count under the Fifth Charge (Driving while Under the Influence of Alcohol (as a Misdemeanor)). *See* Tr. at 81-82, 83, 84 (Jury Instructions 7A and 7B, encompassing First

Charge; 7E, encompassing Third Charge; 7G, encompassing Fifth Charge) (Jury Trial, Nov. 6, 2013); *see also* RA, tab 79 at Instr. Nos. 7A-7G (Jury Instrs.).

[25] For the First Charge, we note a discrepancy between the jury instruction and the statute. The two counts under the First Charge plainly instructed the jury that driving or operating a vehicle while intoxicated was a required element. *See* Tr. at 81-82 (Jury Trial, Nov. 6, 2013); *see also* RA, tab 79 at Instr. Nos. 6B, 7A, 7B (Jury Instrs.). However, 16 GCA § 18111(b), the statute on which the counts under the First Charge are based, requires in part that defendant was "driving a vehicle in violation of § 18102 of this Chapter[.]" 16 GCA § 18111(b) (2005). Section 18102 includes both *per se* BAC-based crimes and "under the influence" crimes. In other words, 16 GCA § 18111(b) allows for convictions based on either BAC violations, or driving while under the influence—assuming the other elements are met—but Jury Instructions 7A and 7B specifically instructed that driving or operating a vehicle while "intoxicated" was the pertinent element for the counts under the First Charge. *See* Tr. at 78, 81, 82 (Jury Trial, Nov. 6, 2013). The fact that the jury was specifically instructed that driving a vehicle while *intoxicated* was a required element of the counts under the First Charge effectively acted as a mechanism to directly apply Jury Instruction 6E to the First Charge counts, because by its terms the presumptions in 6E extended to "any criminal action arising out of acts" committed by a person "*while intoxicated*." *See* Tr. at 79:13-18 (Jury Trial, Nov. 6, 2013) (emphasis added).

[26] The Second, Fourth and Sixth Charges were either based on DUI *per se* offenses under section 18102 subsections (b) or (d), or are based on the Vehicular Homicide offense under section 18111(a), none of which requires proof of being "under the influence" or "intoxication." *See* Tr. at 82-84 (Jury Trial, Nov. 6, 2013); *see also* 16 GCA §§ 18102(b), (d), 18111(a).

[27] Jury Instruction 6E does not indicate on its face the nature of the presumption—permissive, rebuttable, or conclusive. Tr. at 80-81 (Jury Trial, Nov. 6, 2013). Jury Instruction 6E also plainly states its presumption affects the "burden of proof." *Id.* The trial court provided no explanation of this phrase or how the presumption should interact with the burden of proof. Jury Instruction 3F contains a generic description of "inferences," but we do not find that a jury would have found it helpful in resolving the question of whether the presumption in Jury Instruction 6E is permissive—which by its terms affected the "burden of proof." *Cf. Barnes*, 735 P.2d at 872 ("The term 'presumption' is one of the most ambiguous terms in the legal lexicon."); *see also* Tr. at 61-63 (Jury Trial, Nov. 6, 2013) (Jury Instr. 3F).

[28] Further, while Jury Instruction 6E generally tracks 16 GCA § 18103(a), it *omits* any indication of whether the language at the end of section 18103 applies. This language states "[t]he provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense."[6] 16 GCA § 18103(b). Jury Instruction 6E failed to include any similar qualification, *see* Tr. at 79-

[6] While the word "subsection" in this sentence could be read to imply that that paragraph applies solely to section 18103(b)—and not section 18103(a)—such a construction is constitutionally problematic. That is because to construe the language at the end of section 18103 as limiting the ability of the defendant to introduce competent evidence that might negate the presumption referred to in section 18103(a) would plainly undermine constitutional due process. *See People v. Cook*, 1978 WL 13496, at *2 (D. Guam App. Div. Apr. 21, 1978); *see also Brown*, 910 A.2d at 583 ("[W]e avoid construing a statute as unconstitutional, if, by any construction, it can be sustained." (citation and internal quotation marks omitted)); *McNeal*, 210 P.3d at 430-31. We also note that the California Vehicle Code contains a provision similar to 16 GCA § 18103, yet it applies substantially identical language to the entire statutory section, and not just one subsection. *Compare* Cal. Veh. Code § 23610 (West 2017) (originally enacted at Cal. Veh. Code § 23155) ("This section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense."), *with* 16 GCA § 18103 ("The provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.").

80 (Jury Trial, Nov. 6, 2013), which would have made it clear that the defendant "is entitled to offer 'other competent evidence' relevant to whether he was actually under the influence of alcohol." *People v. McNeal*, 210 P.3d 420, 430 (Cal. 2009).

[29] Despite the statutory language of 16 GCA § 18103 creating a permissive inference, we conclude Jury Instruction 6E applies the statute as an impermissible, mandatory presumption. Although Jury Instruction 6E is perhaps susceptible to interpretation as a permissive inference, taken as a whole it is at best ambiguous because it told the jury that upon finding the basic facts it shall presume Cox was under the influence. *Cf. Roder*, 658 P.2d at 1310 (finding jury instruction "did not inform the jury that if it found the basic facts it could, but was not required to, infer" that a particular element of the crime was met). The court specifically directed the jury that this presumption "affected the burden of proof," which is constitutionally troublesome. *See* Tr. at 79 (Jury Trial, Nov. 6, 2013).

[30] Our holding is also consistent with California's interpretation and practice. California's DUI statute parallels 16 GCA § 18103, yet California's model jury instructions based thereon are carefully drafted to *exclude* any references to the statutory presumptions affecting the "burden of proof." *See* Cal. Crim. Jury Instr. ("CALCRIM") 2110, bench notes (Jud. Council of Cal. 2018) (Driving Under the Influence, Cal. Veh. Code § 23152(a)); *People v. Milham*, 205 Cal. Rptr. 688, 700 (Ct. App. 1984) (expressing concern regarding statutory presumptions reflected in California Jury Instruction 12.61.1). The pertinent portion of CALCRIM 2110 states:

> If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.

CALCRIM 2110.[7] The permissive language expressed by CALCRIM 2110 contrasts with the clearly mandatory instruction that was expressed by Jury Instruction 6E.

b. Jury Instruction 6E runs afoul of constitutional due process.

[31] Having found that Jury Instruction 6E contained a mandatory conclusive presumption, we turn to the question of whether it violated Cox's constitutionally protected presumption of innocence. If the charge as a whole is ambiguous, the question is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380).

[32] Here, we find it reasonably likely a juror would have relied on the presumption in convicting Cox of the charges affected by Jury Instruction 6E, which are the First, Third and Fifth Charges. It is likely the challenged jury instruction would have been understood to create a mandatory, conclusive presumption that shifted the burden of proof. The charge, read as a whole, does not explain or cure that error, which includes the statement that a BAC over 0.08% "shall" give rise to a presumption "affecting the burden of proof." *See* Tr. at 79:19-21 (Jury Trial, Nov. 6, 2013); *cf. Carella v. California*, 491 U.S. 263, 265 (1989) ("[T]he instructions in this case were phrased as commands, for those instructions were explicit and unqualified to that effect and were not explained elsewhere in the jury charge to be merely permissive.").

[7] The bench notes to CALCRIM 2110 also recognize the problem the *Milham* and *Roder* courts were grappling with:

> The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. In accordance with *Roder*, the instructions have been written as permissive inferences.

CALCRIM 2110, bench notes (Jud. Council of Cal. 2018) (internal citations omitted); *see also Roder*, 658 P.2d at 1309-13; *Milham*, 205 Cal. Rptr. at 700.

[33] Jury Instruction 3F contains a rather generic explanation of "inferences." *See* Tr. at 70-72 (Jury Trial, Nov. 6, 2013). We do not find that this sufficiently cured the flawed instruction. A rational juror might still decide to rely exclusively on the mandatory presumption in Jury Instruction 6E to conclude Cox drove under the influence. *Cf. Carella*, 491 U.S. at 266 ("These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which [Defendant] was charged."). Without sufficiently specific and curative instructions, the jurors could have thought that they were required to presume Cox was under the influence. This would improperly shift to Cox what is the People's burden to prove the facts of each element beyond a reasonable doubt. *See, e.g.*, *Francis*, 471 U.S. at 325; *Sandstrom*, 442 U.S. at 524; *McLean*, 963 F.2d at 1308-09; *Salazar*, 505 So. 2d at 1292 (holding court did not provide adequate instruction to jurors as to statutory presumption of being under influence); *Tiedemann*, 790 P.2d at 342 (vacating conviction where trial court read verbatim statutory language but failed to provide a specific instruction that jury was not required to presume intoxication from BAC results exceeding 0.10%).

[34] We also must address the First Charge's counts in more detail because of the way the instructions for those counts failed to track the statutory language. *See supra* Part IV.B.1.a. Title 16 GCA § 18111(b) allows for convictions based on a BAC finding or a finding of being under the influence. *See* 16 GCA § 18111(b). Jury Instructions 7A and 7B, however, foreclosed any First Charge convictions based on BAC levels—and instead required intoxication, Tr. at 81-82 (Jury Trial, Nov. 6, 2013), thus triggering the application of the presumptions contained in Jury Instruction 6E, *see id.* at 79 (extending presumptions to "any criminal action arising out of

acts" committed by a person "while intoxicated"). For the First Charge counts, a factfinder could therefore believe that Cox was presumed conclusively intoxicated and that the prosecution's burden on the matter had been met, irrespective of any predicate facts—such as BAC levels—that might underlie the presumption of intoxication. Moreover, the trial court failed to include any reference to the final paragraph of 16 GCA § 18103, which might have made it clear Cox was not limited in introducing evidence that controverted the point. *See Carella*, 491 U.S. at 266 (finding a mandatory presumption "directly foreclosed independent jury consideration of whether the facts proved established certain elements" and "also relieved the State of its burden of proof"); *Connecticut v. Johnson*, 460 U.S. 73, 84-85 (1983) (finding a conclusive presumption "would have led [the jury] to ignore the evidence in finding that the State had proved [defendant] guilty beyond a reasonable doubt," and "renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence").

[35] Therefore, we find that the language in Jury Instruction 6E regarding presumptions was obvious error with respect to the First Charge, Third Charge and Fifth Charge. *See* Tr. at 78 (Jury Trial, Nov. 6, 2013) (defining Vehicular Homicide While Intoxicated as driving a vehicle under the influence); *id.* at 81-82, 83, 84 (instructing jury that intoxication, or being under the influence, is essential element of First, Third and Fifth Charges). We find that the error affected Cox's substantial rights in that the jury likely understood the instruction in a way that would have misallocated the burden of proof. *See Carella*, 491 U.S. at 265-66. In examining the record as a whole, Cox's substantial rights were prejudiced because the "instructional mistake had a probable impact on the jury's finding." *Gargarita*, 2015 Guam 28 ¶ 23 (citation and

internal quotation marks omitted). We find reversal necessary to maintain the integrity of the proceedings because the "fairness of the trial was directly affected by the quality of the court's instructions." *Id.* ¶ 36.

[36] Therefore, we vacate Cox's convictions for: (1) each of the two counts under the First Charge (Vehicular Homicide While Intoxicated (As a Second Degree Felony)); (2) the single count under the Third Charge (Driving While Under the Influence of Alcohol with Injuries (As a Third Degree Felony)); and (3) the single count under the Fifth Charge (Driving while Under the Influence of Alcohol (as a Misdemeanor)).

[37] We affirm Cox's convictions related to the following charges, which were unaffected by the improper presumption in Jury Instruction 6E as they are *per se*, BAC-based offenses: (1) the two counts under the Second Charge (Vehicular Homicide (As a Second Degree Felony)); (2) the single count under the Fourth Charge (Driving While Under the Influence of Alcohol with Injuries (BAC) (As a Third Degree Felony)); (3) the single count under the Sixth Charge (Driving While Under the Influence of Alcohol (BAC) (As a Misdemeanor)).

2. Jury Instruction 6G.

[38] Cox also asserts the "rebuttable presumption" in Jury Instruction 6G confused the jury. Appellant's Br. at 6-8. We address this argument only in passing because the affected charges are vacated on other grounds. *See supra* Part IV.B.1. Jury Instruction 6G is the only instruction that mentions an explicitly "rebuttable" presumption, and it generally—but not identically—tracks the language of 16 GCA § 18102(e). *Compare* Tr. at 80-81 (Jury Trial, Nov. 6, 2013), *with* 16 GCA § 18102(e).

[39] Under 16 GCA § 18102(e), the rebuttable presumption applies to any prosecution under "this Section," that is, 16 GCA § 18102, which includes the third, fourth, fifth, and sixth charges against Cox.[8] The statute is clear that the rebuttable presumption is, specifically, a presumption that the defendant is "under the influence of alcohol" at the time of operating or being in physical control of a motor vehicle. *See* 16 GCA § 18102(e). Therefore, the presumption applies to charges subsumed under 16 GCA § 18102 that have being "under the influence of alcohol" as an element. These include only the third and fifth charges in the Second Superseding Indictment, which relate to 16 GCA § 18102(c) and (a), respectively. *See* RA, tab 59 at 2 (2d Superseding Indictment). We need not reach the merits of whether Jury Instruction 6G confused the jury because the third and fifth charges are vacated on other grounds, as discussed above.

3. Presumptions that relate to required elements of a crime should be explained to the jury as being permissive.

[40] In our supervisory capacity, we comment on the problem of the use of the word "presumption" in jury instructions. In criminal cases, the jury should be instructed on the permissive nature of any presumption that relates to a required element of the crime. *See Commonwealth v. Moreira*, 434 N.E.2d 196, 200 (Mass. 1982) ("The safer course, perhaps, is to avoid the use of the word 'presumption,' in any context which includes the burden of proof in criminal cases."). Such presumptions must be explained as inferences that the jury is free to accept or reject and which do not place any burden on the defendant to produce evidence or witnesses. Here, Jury Instruction 3F, which contained a generic list of inferences, may have

[8] Namely, Driving While Under the Influence of Alcohol with Injuries (as a Third Degree Felony) under 16 GCA §§ 18102(c) and 18110; Driving While Under the Influence of Alcohol with Injuries (BAC) (as a Third Degree Felony) under 16 GCA §§ 18102(d) and 18110; Driving while Under the Influence of Alcohol (as a Misdemeanor) under 16 GCA § 18102(a); and Driving While Under the Influence of Alcohol (BAC) (as a Misdemeanor) under 16 GCA § 18102(b). RA, tab 59 at 2 (2d Superseding Indictment).

been an attempt to address this problem, but it insufficiently cured the offending instructions. *Cf. Milham*, 205 Cal. Rptr. at 700. Perhaps the more prudent course would have been to sever the words "burden of proof" altogether—à la the Model California Jury Instructions—and to specifically explain that the presumptions in Jury Instructions 6E and 6G were permissive inferences that could be accepted or rejected by the jury and shifted no burden of proof to the defendant.

[41] We are cognizant of the challenge this creates, especially where the trial courts generally attempt to track the statute's language when giving jury instructions. We understand that juries may—and, indeed, generally must—draw inferences from evidence. Nonetheless, trial courts should be especially alert for instances where the language of a statutory "presumption" in a criminal case may undermine jury instructions elsewhere that inform the jury as to its duty to find all elements beyond a reasonable doubt. We emphasize that our holding in this case is not to be read inconsistently with our decision in *Demapan*, where we held jury instructions must accurately track the relevant statute *and* be sufficient to inform the jury of its duty to find facts proving the elements of a crime beyond a reasonable doubt. 2004 Guam 24 ¶ 20; *see also supra* Part IV.B. Merely tracking the statute alone is not sufficient to save an otherwise constitutionally flawed jury instruction. When grappling with transforming statutory language into criminal jury instructions, trial courts should therefore fashion appropriate and targeted modifications or explanations of any "presumptions" in order to avoid constitutional infirmities. *See Roder*, 658 P.2d at 1312-13 (recognizing that "the transformation of the statutory . . . presumption into a permissible inference appears quite reasonable and feasible," and although it

may require "the careful framing of jury instructions," the statute should be construed as authorizing only a permissive inference).

V. CONCLUSION

[42] For the foregoing reasons, we **AFFIRM** the trial court's decision not to issue a self-defense instruction. Nevertheless, we **VACATE** Cox's convictions related to the First Charge, Third Charge, and Fifth Charge, and **AFFIRM** his convictions related to the Second Charge, Fourth Charge, and Sixth Charge. We **REMAND** for proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice