**IN THE SUPREME COURT OF GUAM**

**THE PEOPLE OF GUAM,**
Plaintiff-Appellee,

**v.**

**DENNIS CASTRO ALDAN**
**aka DANNY CHRISTOPHER CASTRO,**
Defendant-Appellant.

Supreme Court Case No. CRA17-010
Superior Court Case No. CF0244-16

# OPINION

**Cite as: 2018 Guam 19**

Appeal from the Superior Court of Guam
Argued and Submitted on February 19, 2018
Hagåtña, Guam

Appearing for Defendant-Appellant:
Stephen P. Hattori, *Esq.* (briefed)
Theresa G. Rojas, *Esq.* (argued)
Public Defender Service Corporation
779 Route 4
Sinajana, GU 96910

Appearing for the Plaintiff-Appellee:
Christine S. Tenorio, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
590 S. Marine Corps Dr., Ste. 801
Tamuning, GU 96913

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

**TORRES, J.:**

**[1]** Defendant-Appellant Dennis Castro Aldan a/k/a Danny Christopher Castro ("Aldan") appeals a final judgment of conviction for (1) theft by receiving a stolen motor vehicle; (2) possession of a schedule II controlled substance; (3) unauthorized use of a motor vehicle; (4) falsifying evidence; (5) impersonation; and (6) fraudulent vehicle identification.

**[2]** Aldan alleges, among other things, that the trial court erred in giving Jury Instruction 3B, which shifted the burden of proof by instructing that the defendant's failure to present evidence can be held against him. We conclude that the giving of Jury Instruction 3B constitutes plain error. Pursuant to the following opinion, we vacate the judgment of conviction and decline to reach the additional allegations of error.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**[3]** In March 2016, after going outside for a coffee break, Alma Bueno's brother and his girlfriend discovered that Bueno's 2010 Toyota Corolla was missing. The police put out an All-Points Bulletin for the vehicle.

**[4]** About six weeks later, a patrolling officer came across a Toyota Corolla with a suspicious license plate in the parking lot of a game room. The vehicle fit the description of the missing car, and the license plate was suspicious because it was an older design on a newer model car. The patrolling officer discovered that the plates were registered to a Honda CR-X. The patrolling officer requested backup, and two other officers responded to the request. As the officers entered the game room to investigate, Aldan walked out. One of the officers approached Aldan, who identified himself as "Daniel Christopher Castro," and Aldan consented to a pat-

down search. During the search, the officers discovered a lanyard with car keys and a couple of packets that tested presumptively positive for methamphetamine. The officers used the car keys to unlock the Corolla with suspicious license plates. The officers confirmed that the Vehicle Identification Number ("VIN") matched the Corolla reported by Bueno as stolen.

**[5]** Upon determining that the car was stolen, the officers placed Aldan under arrest, orally provided *Miranda* warnings, and subsequently interrogated him. Aldan informed one of the officers that his girlfriend Maria Cruz from Barrigada gave him the car and that the license plate was already attached. During processing, Aldan's fingerprints returned a match for "Dennis Castro Aldan," not Daniel Christopher Castro. Aldan, however, signed the custody receipt as "Danny C. Castro."

**[6]** The case proceeded to trial. After the People called their final witness, the defense rested without calling any witnesses.

**[7]** At the jury instruction conference, the prosecutor objected to Instruction 3B—Production of All Evidence is Not Required. The original instruction read: "If weak or less satisfactory evidence is offered by the Government, when it appears that stronger and more satisfactory evidence was within the power of the Government, the evidence should be viewed with distrust." Transcript ("Tr.") at 6 (Closing Args. & Jury Instrs., June 17, 2016). The prosecutor argued that the instruction should mirror the language of 6 GCA § 8101, upon which the instruction is based, and sought to replace the term "the Government" with "any party." The defense did not object, and the court granted the change. After the change, Instruction 3B read in its entirety:

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence, or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

> If weaker and less satisfactory evidence is offered by a party, when it appears that stronger and more satisfactory evidence was within the power of a party, the evidence offered should be viewed with distrust.

Tr. at 75 (Closing Args. & Jury Instrs.); Record on Appeal ("RA"), tab 50 (Jury Instr. No. 3B, June 20, 2016).

**[8]** During closing arguments, the defense maintained that the prosecutor could have called Maria Cruz to the stand to help determine whether Aldan actually stole the car. Defense counsel also argued "that interchangeable names are very common on Guam," to suggest that Aldan may not have provided false information to police when he identified himself as Danny C. Castro. Tr. at 42-43 (Closing Args. & Jury Instrs.). In rebuttal, the prosecutor questioned why Aldan did not call his girlfriend Maria Cruz or "his mama" to confirm his story and asked: "Why is [defense counsel] the person who is making all these theories up and presenting them to you?" *Id.* at 51-52. The prosecutor also highlighted Instruction 3B and stated that it "is relevant to this particular offense [of theft]." *Id.*

**[9]** Aldan was convicted by the jury on all counts of the indictment, and timely appealed his convictions.

## II. JURISDICTION

**[10]** This court has jurisdiction over appeals from final judgments of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-231 (2018)); 8 GCA §§ 130.10, 130.15(a) (2005).

## III. STANDARD OF REVIEW

**[11]** 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). 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). In reviewing allegations of error, we "will not address issues unnecessary to the resolution of the case." *Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33 (collecting cases).

## IV. ANALYSIS

**[12]** In this case, we must address the appropriateness of a jury instruction that tracks the language of a Guam statute. Specifically, we address whether the giving of a "weaker and less satisfactory evidence" instruction, *see* Jury Instruction 3B, which tracks almost verbatim 6 GCA § 8101, constitutes plain error in a criminal case by improperly shifting the burden of proof to the defendant and infringing upon his constitutional rights.

### A. The Giving of Jury Instruction 3B Constitutes Plain Error in this Case

**[13]** Aldan did not object to Jury Instruction 3B at trial. Therefore, our analysis is limited to plain error review. *Gargarita*, 2015 Guam 28 ¶ 11. Reversal under a plain error standard is granted only when: "(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.* (quoting *Felder*, 2012 Guam 8 ¶ 19). The party alleging plain error has the burden of proving it. *People v. Quitugua*, 2009 Guam 10 ¶ 11. Under the circumstances of this case, we find that Aldan has met this burden. We now examine each element.

#### 1. The giving of Jury Instruction 3B was error.

**[14]** Generally, a jury instruction that accurately tracks the language of the statute is sufficient to inform the jury of its duties. *See Diego*, 2013 Guam 15 ¶ 28; *People v. Demapan*, 2004 Guam 24 ¶ 20. However, "simply tracking the language of the . . . statute will generally not suffice" when the statute does not completely or accurately state the law. *People v. Torres*, 2014 Guam 8 ¶ 27 (analyzing the issue under the sufficiency of the language in an indictment). Aldan alleges

that Jury Instruction 3B, despite tracking the statutory language of 6 GCA § 8101, improperly suggested that he had an obligation to refute the prosecution's evidence. *See* Appellant's Br. at 14 (Oct. 10, 2017). The instruction, Aldan contends, essentially gives the jury the impression that uncontroverted evidence presented by the government must be taken as true. *Id.* at 14. Aldan further argues that this infringes upon his right to remain silent. *Id.* at 15. He urges us to follow the Oregon Supreme Court on this issue. *Id.* at 14. The Oregon Supreme Court has held that issuance of the "weaker and less satisfactory evidence" jury instruction is error except in cases where the defendant presents an affirmative defense. *See State v. Mains*, 669 P.2d 1112, 1117 (Or. 1983) (en banc). The People respond that since the instruction tracks the language of 6 GCA § 8101, it is not erroneous. Appellee's Br. at 19 (Nov. 8, 2017). We agree that the rule from *Mains*, and related cases, is good law insofar as we determine that simply tracking statutory language does not insulate the "weaker and less satisfactory evidence" instruction from claims of constitutional error. *See People v. Cox*, 2018 Guam 16 ¶ 41 ("Merely tracking the statute alone is not sufficient to save an otherwise constitutionally flawed jury instruction.").

**[15]** In *Mains*, the court reiterated that "the 'weaker and less satisfactory evidence' instruction . . . should not be given in criminal cases whether or not the defendant takes the stand, except in those rare instances where because of an asserted defense the defendant has the burden of proof on an issue in the case." 669 P.2d at 1117. The court found no error in *Mains*, however, because the defendant raised a "mental disease or defect" defense, which meant that no impermissible burden-shifting occurred. *Id.* The Oregon Court of Appeals has also noted that the "weaker and less satisfactory evidence" instruction, limited to evidence offered by the prosecution, should be given when requested by the defendant and appropriate under the facts of the case. *See State v. Brock*, 633 P.2d 805, 809 (Or. Ct. App. 1981) (en banc). Some jurisdictions conclude that it is

not error to refuse the instruction in a criminal case even when the defendant has requested it. *See, e.g.*, *United States v. Berríos-Bonilla*, 822 F.3d 25, 33-34 (1st Cir. 2016); *Drummond v. State*, 326 S.E.2d 787, 788 (Ga. Ct. App. 1985); *City of Great Falls v. Morris*, 134 P.3d 692, 696 (Mont. 2006). While we need not determine whether these other exceptions are the law in Guam, *see infra* ¶ 20, they are helpful to demonstrating how rarely the "weaker and less satisfactory evidence" instruction should be given in criminal cases.

**[16]** The People respond to *Mains* and other cases disapproving of the "weaker and less satisfactory evidence" instruction by noting that California case law does not state that the instruction should never be given or that it can only be given against the prosecution. Appellee's Br. at 20 (citing *People v. Cuff*, 55 P. 407, 408 (Cal. 1898)). A close inspection of *Cuff* reveals that this is not true.

**[17]** California, like Guam, has an evidentiary statute upon which the "weaker and less satisfactory evidence" instruction was based. *Compare* Cal. Evid. Code § 412 (West 2018) (previously codified at Cal. Civ. Proc. Code § 2061), *with* 6 GCA § 8101 (2005). Guam's original version of the evidentiary statute was, in fact, drawn directly from California. *See* Guam Code Civ. Proc. § 2061 (1970). Nonetheless, despite the existence of this statutory language, the *Cuff* court disapproved of California's similar instruction. *See* 55 P. at 408. The court found that "[t]he danger lurking in these subdivisions of the [statute] is found in the fact that they attempt to deal with the weight and effect of evidence,—matters for the jury, and not matters for legislative action." *Id.* Ultimately, the California Supreme Court reversed Cuff's conviction, in part, because the trial court had given the "weaker and less satisfactory evidence" instruction. *Id.* at 408-09.

**[18]** While the *Cuff* court observed that the California statute allowed for the giving of the instruction "upon all proper occasions," it also observed that "[i]n criminal cases the proper occasions are so few, and the improper occasions are so many, that it were best that they should be given rarely, if at all." *Id.* at 408. The *Cuff* court cited the exception mentioned in *People v. O'Brien*, 31 P. 45, 48 (Cal. 1892), as the only proper occasion. *Cuff*, 55 P. at 408. The instruction in *O'Brien* mirrored a provision in former California Civil Procedure Code section 2061 dealing with accomplice testimony; specifically, the instruction provided that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." 31 P. at 48. This exact language is found in 6 GCA § 8101(4). The *O'Brien* court held that the instruction was improper in that case because the accomplice was called as a witness for the defense, and that the occasion where it may be proper to give such an instruction is "in a case where the witness has been called by the people." 31 P. at 48. Thus, *O'Brien* and *Cuff* limit the use of former section 2061 in criminal cases to the provision regarding accomplice testimony, and only where the accomplice-witness is called by the People. As such, California case law does not support the People's position. Ultimately, the People's instructional maneuver either invites the jury to distrust the defendant's evidence—or lack thereof—or it draws the jury's attention to the defendant's failure to testify.

**[19]** Other cases have considered and outlined the specific dangers Aldan faced when the "weaker and less satisfactory evidence" instruction was given to the jury. For example, the *Drummond* court, in refusing the instruction requested by the defendant, highlighted the inherent dangers of the instruction and cautioned error in all cases where the instruction is given because "it could place a burden upon the defendants in a criminal case to prove their innocence by best evidence." 326 S.E.2d at 788 (citation omitted). *Drummond* accurately addressed the danger of

burden-shifting that courts face when giving the instruction. However, while the *Drummond* court prohibited the instruction in all criminal cases, we are not prepared to extend the prohibition on the instruction as far. While it may be better practice to avoid the instruction altogether in criminal cases, our focus in this opinion is on the constitutionality of the instruction in this case.

**[20]** There may be circumstances where the instruction may not involve constitutionally impermissible burden-shifting. For example, a modified instruction against the government has been required in some cases when the government spoiled or destroyed evidence. *See, e.g.*, *State v. Willits*, 393 P.2d 274, 276 (Ariz. 1964); *State v. Thomson*, 278 P.2d 142, 149 (Or. 1954) (en banc) (rejected on other grounds in *State v. McLean*, 468 P.2d 521, 525-26 (Or. 1970) (en banc)) (advising the trial court to avoid the "weaker and less satisfactory evidence" instruction on remand to avoid shifting the burden to the defendant). Additionally, the "weaker and less satisfactory evidence" instruction has been permitted in criminal cases where the defendant asserts an affirmative defense for which he or she bears the burden of proof, *see, e.g.*, *Mains*, 669 P.2d at 1117, and where a modified version applying only to the government is given, *see, e.g.*, *State v. Patton*, 303 P.2d 513, 515 (Or. 1956) (en banc) (cautioning against the giving of the instruction in a criminal case "unless it is limited to the evidence offered by the state"); *Brock*, 633 P.2d at 809 (holding that where instruction is limited to evidence offered by the state, defendant's request for instruction should be granted when there is evidence to support the instruction). We need not and do not reach today the propriety of the instruction in these other scenarios, as they are inapplicable to the case at hand.

**[21]** Since none of the potential exceptions to the general prohibition against this instruction apply, the error in providing the instruction is even more evident. In addition to the non-

modified version being given, Aldan did not assert an affirmative defense or request the instruction. Aldan put on no evidence, but merely attempted to argue based on the evidence presented by the People. Even though the jury here may have been informed that Aldan was not required to put on evidence and the burden is ultimately on the People to prove each element of the offenses charged, *see, e.g.*, Tr. at 68-69, 70, 81-82 (Closing Args. & Jury Instrs.), those instructions do nothing to cure the harm from an instruction that suggests the defendant's failure to put on stronger or more satisfactory evidence *should be viewed with distrust*. Even when viewing the instructions as a whole, *see Gargarita*, 2015 Guam 28 ¶ 14, we cannot conclude that the jury was properly instructed. While the jury was instructed that the government bore the ultimate burden, the "weaker and less satisfactory evidence" instruction erroneously eased that burden by giving the government a head start over Aldan. The instruction is constitutionally infirm because it violates Aldan's right to remain silent, *see* U.S. Const. amend. V; *Griffin v. California*, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."), and runs afoul of the presumption of innocence, *cf. Flores v. State*, 896 P.2d 558, 560-63 (Okla. Crim. App. 1995) (finding missing presumption of innocence instruction to constitute error).

**[22]** Because the instruction improperly shifted the burden of proof to Aldan, it constitutes error. We must now determine whether the error was clear or obvious under current law.

**2. The error was clear and obvious under current law.**

**[23]** The second step of plain error review is to determine whether the error was clear or obvious under current law.

> [A] determination of whether an error is "clear" for purposes of the plain error analysis does not require the existence of precedent exactly on point. . . . "[T]he 'plainness' of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking."

*People v. Perry*, 2009 Guam 4 ¶ 32 (second alteration in original) (quoting *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003); *see also Gargarita*, 2015 Guam 28 ¶ 20 (quoting *Perry*, 2009 Guam 4 ¶ 32).

**[24]** First, Aldan's right to bring a constitutional challenge to the statute warrants further elaboration. We acknowledge the People's position that since Jury Instruction 3B tracks the language of 6 GCA § 8101, any error is not clear and obvious under existing law. Appellee's Br. at 23. Indeed, we have upheld jury instructions that track relevant statutory language. *See, e.g.*, *People v. Baluyot*, 2016 Guam 20 ¶ 14 (citations omitted); *Diego*, 2013 Guam 15 ¶ 28; *Demapan*, 2004 Guam 24 ¶ 20; *cf. People v. Jones*, 2006 Guam 13 ¶ 23. However, merely tracking the language of a statute does not shield an instruction from claims of constitutional error. *See Cox*, 2018 Guam 16 ¶ 41; c*f. Class v. United States*, 138 S. Ct. 798, 803 (2018) (holding that a waiver of the right to appeal in a plea agreement does not waive the right to challenge the constitutionality of the statute of conviction). It is an elementary principle of American law that statutes inconsistent with the Constitution are void. *Marbury v. Madison*, 5 U.S. 137, 180 (1803). It would be inconsistent with *Marbury* to hold that a statute's language can displace rights guaranteed to a criminal defendant under the Constitution as incorporated by the Organic Act or under the Organic Act itself. *See* 48 U.S.C.A. § 1421b (Westlaw through Pub. L. 115-231 (2018)). Nor, in *Baluyot*, *Diego,* or *Demapan*, did this court consider a constitutional challenge to the instruction. Those cases involved challenges to instructions as not

accurately stating the elements of the crimes charged. *See Baluyot*, 2016 Guam 20 ¶ 10; *Diego*, 2013 Guam 15 ¶ 22; *Demapan*, 2004 Guam 24 ¶ 6. This rule is consistent with our case law on insufficient indictments that track the statutory language. *Torres*, 2014 Guam 8 ¶ 27 ("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."). Thus, our prior cases do not present any bar to Aldan's current allegation that the statute is unconstitutional as applied.

**[25]** Second, the constitutional rights Aldan asserts on appeal have been well-entrenched in case law. Highly relevant to this second prong of the plain error analysis is the fact that *Cuff* was decided prior to the turn of the twentieth century. The current law in California has disapproved of this instruction in criminal cases for over 120 years. Other jurisdictions have also disapproved of the giving of this instruction in criminal cases. *See, e.g.*, *Drummond*, 326 S.E.2d at 788; *Mains*, 669 P.2d at 1117. The notion that the instruction should only "rarely" be given is not a new principle of law or an area of law that remains unsettled, which potentially excuses error, *see, e.g.*, *United States v. Salinas*, 480 F.3d 750, 759 (5th Cir. 2007) (finding no plain error because the law remained unsettled), but it is a rule that has been deeply entrenched in the law. Due to the long and unequivocal disapproval of the instruction and the lack of "proper occasion" here, *see supra* Part IV.A.1, the error in Aldan's case is clear and obvious under current law.

**3. The giving of Jury Instruction 3B affected Aldan's substantial rights.**

**[26]** The third part of plain error review involves determining whether the error affected the defendant's substantial rights. A defendant's substantial rights are impacted when it appears that the error contributes to the verdict obtained. *See Perry*, 2009 Guam 4 ¶ 34; *Gargarita*, 2015 Guam 28 ¶ 23 (quoting *United States v. Jackson*, 569 F.2d 1003, 1010 (7th Cir. 1978)). In plain

error review, the defendant bears the burden of proving this prejudice. *Quitugua*, 2009 Guam 10 ¶ 31. The right to remain silent, the presumption of innocence, and the right to a fair trial are all substantial protections enshrined in the Constitution and the Organic Act of Guam. *See* U.S. Const. amends. IV-VIII; 48 U.S.C.A. § 1421b; *Coffin v. United States*, 156 U.S. 432, 453 (1895). A criminal defendant has a right to "sit on his hands." *See, e.g.*, *People v. Milham*, 205 Cal. Rptr. 688, 700 (Ct. App. 1984). In other words, a fundamental tenet of our criminal justice system is that a defendant may put the government to proof of its case and need not put on any evidence. *See id.* at 699-700. Aldan essentially argues that Jury Instruction 3B undermined these fundamental protections and influenced the jury's verdict by inviting its members to distrust his choice not to present evidence.

**[27]** Aldan sought to put the People to proof of their case. Aldan did not present any evidence or take the stand in his defense. His attorney merely presented arguments based on the testimony and evidence solicited during the prosecution's case-in-chief. This appears to be a rational choice based on the evidence presented by the People. Much of the evidence was circumstantial. As to the intent element of each charge, the jury was required to make significant inferences based on the absence of direct testimony. For example, on the theft charge, the evidence was a set of keys to the Corolla found on Aldan's person, which required the jury to infer that Aldan knew the vehicle had been stolen or believed it probably had been stolen. For the impersonation charge, the evidence was that Aldan simply provided an alias to the police, which required the jury to infer from the circumstances that the identity was false and that the defendant intended to defraud the police. To make up for its primarily circumstantial case, the People highlighted Jury Instruction 3B and told the jury to consider that Aldan did not present witnesses. Tr. at 51-52 (Closing Args. & Jury Instrs.). Due to the primarily circumstantial nature of much of the

evidence, especially related to intent, we are not convinced that the jury's conclusion was not materially altered by the trial court's instruction that the jury should distrust the defense's evidence or lack thereof, and by extension the defense's theory of the case.

**[28]** The prosecutor's heavy reliance on Jury Instruction 3B in his rebuttal closing arguments compounded the error. *See, e.g.*, *City of Cape Girardeau v. Jones*, 725 S.W.2d 904, 907-08 (Mo. Ct. App. 1987) (finding that, under plain error review, a prosecutor's statement that a jury should not hold the defendants' failure to testify against them violated the defendants' Fifth Amendment right against self-incrimination). The prosecutor emphasized the instruction and indicated that the defendant should have been able to put witnesses on the stand to support his story. The prosecutor stated the defendant could have called his girlfriend or "his mama" to testify in support of his story. Tr. at 51-52 (Closing Args. & Jury Instrs.). The prosecutor also accused the defense attorney of "making all these theories up." *Id.* While the prosecutor also stated that the defendant was under no obligation to present evidence, it is inappropriate for a prosecutor to draw attention to a defendant's exercise of his right not to testify or present evidence by overemphasizing the defendant's right during argument. *See Jones*, 725 S.W.2d at 907-08. Mere acknowledgment of the People's burden of proof and the defendant's right to not present evidence does not cure the emphasis placed on the improper instruction and its application by the prosecutor.

**[29]** The People rely on *State v. Betts*, 384 P.2d 198 (Or. 1963), for the proposition that the "weaker and less satisfactory evidence" instruction does not constitute reversible error "when the court also instructs . . . that the jury can draw no unfavorable inference from the defendant's failure to testify." *Betts*, 384 P.2d at 203. While Aldan's jury was instructed that "no inference of any kind may be drawn from the failure of the defendant to testify," Tr. at 82 (Closing Args.

& Jury Instrs.), we still conclude that the error affected Aldan's substantial rights because of the different circumstances Aldan faced. First, even the *Betts* court reminds us that the instruction should not be given unless limited to the government's case. 384 P.2d at 202. Second, when read as a whole, the instructions impermissibly ease the government's burden. *See supra* Part IV.A.1. Third, in *Betts*, the evidence against the defendant, who was convicted of negligent homicide with a motor vehicle, included objective measures such as "the extent of damage to the automobile, skid marks and the distance the vehicle travel[ed]." 384 P.2d at 202. The evidence against Aldan was largely circumstantial. Finally and perhaps most significantly, was the prosecutor's reliance on and emphasis of the improper instruction. Tr. at 51 (Closing Args. & Jury Instrs.). The jury was specifically urged to convict the defendant by relying on the instruction.[1]

**[30]** This is not to say that a prosecutor cannot make arguments fairly based on the evidence; but, a prosecutor is not free to draw the jury's attention to a plainly erroneous instruction and comment on the defendant's failures related to that instruction. By drawing attention to the improper instruction—Jury Instruction 3B—and specifically citing the evidence that it believed Aldan should have presented, the prosecution emphasized the error. This contributes to our conclusion that the erroneous instruction affected Aldan's substantial rights. Instead of respecting Aldan's choice to not present evidence and requiring the People to satisfy its burden of proof, the court instructed the jury to effectively distrust the defendant because of this choice, and the prosecutor prejudicially overemphasized this instruction. This likely had an impact on the outcome. Because the giving and emphasizing of Jury Instruction 3B affected Aldan's

[1] Depending on the jury's interpretation of the instruction, the effect could be quite significant. Some courts have interpreted the instruction as one indicating willful destruction of evidence. *See, e.g.*, *Pueblo v. Acosta Escobar*, 1 P.R. Offic. Trans. 1196, 1202-03 & n.3 (P.R. 1974).

substantial rights, we conclude he has satisfied his burden under the third prong of the plain error analysis.

**4. Reversal is necessary to maintain the integrity of the judicial process.**

**[31]** Reversal for plain error is not mandatory. *Felder*, 2012 Guam 8 ¶ 36 (citing 8 GCA § 130.50(b) (2005)). Plain error reversals are discretionary, not as a matter of right, and should be employed only to correct a miscarriage of justice or maintain the integrity of the judicial process. *See id.* ¶ 37. Pursuant to 8 GCA § 130.50(b), we have authority to correct errors that have affected substantial rights. *See id.* ¶ 36; *Jones*, 2006 Guam 13 ¶ 47. Reversal may be necessary to maintain the integrity of the judicial process when the trial court fails to properly instruct the jury on fundamental aspects of a crime and evidence. *See, e.g.*, *Jones*, 2006 Guam 13 ¶ 48 (citing *United States v. Bear*, 439 F.3d 565, 570 (9th Cir. 2006)).

**[32]** In addition to the likely impact on the outcome, the error here also undermines confidence in the justice system by eroding fundamental protections related to the burden of proof and a defendant's rights and responsibilities at trial, as well as by infringing on Aldan's right to remain silent. We, therefore, determine that the giving of Jury Instruction 3B undermined the integrity of the judicial process. This court will not sanction a jury instruction that directs jurors to doubt the credibility of a criminal defendant simply based on his exercise of his right not to present evidence. The giving of such an instruction undermines public confidence in the fairness of the trial and the judicial process as a whole. It is difficult, if not impossible, to say that Aldan received a fair trial based on the application of the "weaker and less satisfactory evidence" instruction in this case and the prosecution's emphasis of it to bolster an otherwise circumstantial case. Reversal is necessary to protect Aldan's right to a fair trial and

protect the institutional and procedural integrity of the judiciary. Aldan has satisfied this fourth prong of the plain error analysis.

**B. We Need Not Reach Aldan's Claims of Prosecutorial Misconduct**

**[33]** Aldan also raises questions of prosecutorial misconduct based on comments made during closing arguments. However, because we are reversing his convictions due to an error in the jury instructions, we need not reach the merits of these questions. *See Hemlani*, 2015 Guam 16 ¶ 33 (citations omitted).

## V. CONCLUSION

**[34]** Because it was plain error to provide Jury Instruction 3B, we **REVERSE** the judgment of conviction and **REMAND** for a new trial.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice