IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

BADOBINO SABLAN TAISACAN,
Defendant-Appellant.

Supreme Court Case No.: CRA17-006
Superior Court Case No.: CF0005-16

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 14, 2018
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Badobino Sablan Taisacan appeals from the Judgment convicting him on two counts of Burglary (as a Second Degree Felony), one count of Felony Vehicle Identification (as a Third Degree Felony), one count of Theft of Property (as a Third Degree Felony), and one count of Theft of Property (as a Misdemeanor). Taisacan raises three general arguments. First, he asserts that the handwritten interlineations in the superseding indictment denied him statutory and due process rights. Second, Taisacan argues that there was insufficient evidence to convict him on each of the five counts contained in the superseding indictment and that there were material variances between the superseding indictment and the facts alleged at trial. Third, he claims that the trial court's use of the word "promising" instead of "promoting" in instructing the jury on the elements of burglary was plain error warranting reversal. For the reasons discussed below, we affirm his conviction on all counts.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Taisacan was indicted in connection with two reported burglaries occurring on September 3, 2013, and December 25, 2013. The initial indictment charged Taisacan with five separate counts of burglary. Three of these counts related to the September break-in. The indictment identified the properties alleged to have been burglarized in relation to this incident as (i) "V. Pachinko in the Cinema building, Tamuning, Guam"; (ii) "New V Game Room in the Cinema building, Tamuning, Guam"; and (iii) "Uncle Paul's Noodle House in the Cinema building, Tamuning, Guam." RA, tab 2 at 2 (Indictment, Jan. 8, 2016). The two remaining burglary

counts related to the December burglary. Taisacan was charged in these counts with burglarizing "Kaeo Tavern in the Cinema building, Tamuning, Guam" and "White Dry Cleaners in the Cinema building, Tamuning, Guam." *Id.* at 3. The initial indictment also charged two counts of theft of property—one count related to each of the September and December burglaries—and one count of felony vehicle identification, which resulted from observations of the Guam Police Department and admissions made by Taisacan during his arrest.

[3] Three days before trial, the People obtained a superseding indictment. The superseding indictment continued to charge Taisacan with one count of Felony Vehicle Identification (as a Third Degree Felony) and two counts of Theft of Property (as a Third Degree Felony). However, the superseding indictment charged only two counts of Burglary (as a Second Degree Felony), instead of the original five counts charged in the initial indictment. The superseding indictment charged that Taisacan had burglarized "the Cinema Arcade, Tamuning, Guam" on both September 3, 2013, and December 25, 2013. *See* RA, tab 49 (Superseding Indictment, May 13, 2016). In a handwritten notation on the superseding indictment, initialed by the prosecutor, the word "Arcade" was crossed off and replaced with "Arcade Building" on both counts of burglary. *Id.* There is no indication in the record whether this alteration was made before or after the grand jury returned its true bill on the superseding indictment, but the version filed on the docket on May 13, 2016, clearly contained the handwritten interlineation. Jury selection was initially set to begin on May 16. Instead of proceeding with jury selection, however, the court arraigned Taisacan on the superseding indictment. Taisacan did not object to the substance of the superseding indictment, or to the specific handwritten alteration, at that time.

[4] The trial started with jury selection and opening statements three days later. Prior to the jurors being sworn, during a discussion of preliminary matters, the court indicated that it would read the superseding indictment to the jurors and asked: "And the amendment here is 'Cinema Arcade Building'; is that right?" Transcripts ("Tr.") at 4 (Jury Trial – Day 1, May 19, 2016). The People responded by stating: "Yes. I probably shouldn't have messed with it, but when I was listening to the superceding [sic] testimony, they called it 'Cinema building,' and when my investigator spoke with the owners, they called it 'Cinema Arcade,' so I just interlineated 'building,' and made it 'Cinema Arcade Building,' just to be clear." *Id.* Taisacan did not object at this time, and the jurors were then sworn in.

[5] Among the prosecution's key witnesses was Freddy DeGracia, who was Taisacan's co-defendant turned cooperating witness. DeGracia testified that he burglarized the Cinema Plaza building on September 3, 2013, with the help of Taisacan and a third accomplice, Darrell Muna. DeGracia also testified that he and Taisacan again burglarized the building in December 2013. According to DeGracia's testimony, and contrary to the facts alleged in the superseding indictment, Muna was not involved in the December incident.

[6] After the People rested their case, Taisacan moved for a judgment of acquittal. The court denied Taisacan's motion.

[7] Following the close of evidence, the court and parties convened to discuss the jury instructions. In the written jury instructions, the trial court listed the third and fourth elements of the offense of burglary as follows: "3. Did, with the intention of *promising* or assisting in the commission of burglary; 4. Induce or aid each other to enter or surreptitiously remain in a building, that is, the Cinema Arcade Building, Tamuning, Guam." RA, tab 60 at 50 ¶ 6A, 51 ¶

6B (Jury Instrs., May 25, 2016) (emphasis added). These instructions were read verbatim to the jury. Taisacan did not object to these instructions at either the charging conference or when the instructions were read to the jury.

[8] In addition to the jury instruction regarding the elements of the crime of burglary, the court also included a jury instruction regarding "Guilt Established By Complicity." Tr. at 51 (Jury Trial, May 25, 2016); RA, tab 60 at 41 ¶ 5E (Jury Instrs., May 25, 2016). This paragraph of the jury instructions stated, in part: "A person is guilty of an offense if, with the intention of *promoting* or assisting in the commission of the offense, he induces or aids another person to commit the offense." Tr. at 53 (Jury Trial, May 25, 2016) (emphasis added). The People made clear throughout their closing statement that their theory of burglary was based on the concept of complicity. Both the original and superseding indictments also provided Taisacan notice of this theory, as both specifically reference 9 GCA § 4.60, which is the statutory basis for accomplice liability under Guam law.

[9] The jury returned a guilty verdict on two counts of Burglary (as a Second Degree Felony), one count of Felony Vehicle Identification (as a Third Degree Felony), one count of Theft of Property (as a Third Degree Felony), and one count of the lesser-included offense of Theft of Property (as a Misdemeanor). The court sentenced Taisacan to serve five years on each count of burglary, with each sentence to run consecutively. In addition, the court sentenced Taisacan to serve three years on the count of felony vehicle identification, five years on the felony count of theft of property, and one year on the misdemeanor count of theft of property, all of which run concurrently with the sentence imposed for the two counts of burglary. After entry of judgment, this appeal timely followed.

II. JURISDICTION

[10] This court has jurisdiction over appeals from a final judgment of conviction rendered in the Superior Court of Guam. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-231 (2018)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. ANALYSIS

A. Taisacan Waived His Right to Object to Any Defect in the Superseding Indictment by Failing to Raise This Issue Before Trial

[11] The "failure to raise objections to defects in the indictment or institution of the prosecution in a timely fashion, without good cause, precludes appellate review." *People v. White*, 2005 Guam 20 ¶ 16; *see also People v. Diaz*, 2007 Guam 3 ¶ 51 ("[O]nly certain objections to an indictment may be made for the first time on appeal."). This rule is based upon Guam's criminal procedure law, which provides, in relevant part:

> The following *shall* be raised prior to trial:
>
> (a) Defenses and objections based on defects in the institution of the prosecution;
>
> (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

8 GCA § 65.15(a)-(b) (2005) (emphasis added). Additionally, 8 GCA § 65.45 provides:

> Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to § 65.15, or prior to any extension thereof made by the court, shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver.

8 GCA § 65.45 (2005); *see also People v. Jones*, 2006 Guam 13 ¶ 10 ("Generally, objections to the indictment should be made prior to trial; such failure to object constitutes a waiver in the

absence of a showing by the defendant of good cause." (citing *White*, 2005 Guam 20 ¶ 14)). The People argue that these provisions bar Taisacan's appeal because he failed to appropriately object to the handwritten alteration on the superseding indictment prior to trial. *See* Appellee's Br. at 6-7 (Nov. 22, 2017). Taisacan argues that waiver does not apply here because he was "denied the opportunity to object to the amendment" due to the People's failure to make an application to amend the indictment. Appellant's Reply Br. at 3 (Dec. 6, 2017).

[12] We have previously stated that exceptions to this waiver rule are "limited," *see Diaz*, 2007 Guam 3 ¶ 51, and we have never before found good cause to excuse the delay in objecting to an indictment. The superseding indictment, in this case, was issued on May 13, 2016, *see* RA, tab 49 (Superseding Indictment), and Taisacan received notice of it before the beginning of jury selection, *see* RA, tab 50 (Penal Summons, May 13, 2016); Tr. at 2 (Pre-trial Hr'g, May 16, 2016). At the pre-trial hearing on May 16, 2016—and before jury selection commenced—Taisacan did not object to the handwritten interlineation on the indictment. *See* Tr. at 2-3, 20-21 (Pre-trial Hr'g). Taisacan argues that because no motion was made to amend the indictment before trial, he could not object. *See* Appellant's Br. at 3-4 (Oct. 23, 2017). He had ample opportunity to object, however, when he was arraigned on the superseding indictment. Taisacan has not alleged that he was unaware of the handwritten notation at his arraignment or prior to trial. A review of the record indicates that the superseding indictment filed in the Superior Court on May 13, 2016, contained the handwritten alteration. It is *not* the case that Taisacan received a copy of the superseding indictment, was arraigned on that indictment, and *then* the People unilaterally made handwritten amendments. After his arraignment, when the court raised this

issue *sua sponte* prior to the jurors being sworn, Taisacan still did not object. *See* Tr. at 4-7 (Jury Trial, May 19, 2016).

[13] We have previously found that the time restrictions set forth for objecting to an indictment in 8 GCA § 65.15 should be strictly adhered to because, under a more permissive posture, "there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial" and "[s]trong tactical considerations" otherwise "militate in favor of delaying the raising of the claim." *White*, 2005 Guam 20 ¶ 16 (quoting *Davis v. United States*, 411 U.S. 233, 241 (1973)). We see no reason to deviate from this reasoning on the facts of this case.

[14] Taisacan had at least two opportunities to object on the record—once during his arraignment and at least once more, on a separate day, prior to the jury being sworn in. On these facts, Taisacan has not established good cause to excuse his failure to object. *See People v. Mesa*, Crim. No. 89-00161A, 1990 WL 320355, at *2 (D. Guam App. Div. Oct. 24, 1990) (finding trial court erred in not holding that defendant had waived post-trial objection to indictment by failing to raise issue prior to trial). He has therefore waived this issue for purposes of appellate review. *See State v. Miller*, 757 So. 2d 744, 746 (La. Ct. App. 2000) (where a name on bill of information was crossed off and defendant's real name was handwritten, holding defendant waived objection); *Cridiso v. State*, 956 So. 2d 281, 286-87 (Miss. Ct. App. 2006) ("The change of the specific name of the store from 'Fuelman' to 'Fuelmart' clearly would have been an amendment to the form of the indictment, and thus would have been proper. Therefore, this issue is procedurally barred [by defendant's failure to raise this issue below]." (citation omitted)).

B. There Was Sufficient Evidence of Guilt for the Jury to Convict Taisacan, and There Was No Material Variance Between the Indictment and the Proof Presented by the People at Trial That Affected Taisacan's Substantial Rights

[15] Taisacan next argues on appeal that there was insufficient evidence presented at trial to convict Taisacan of the crimes for which he was indicted. *See, e.g.*, Appellant's Br. at 21-33. Alternatively, Taisacan argues that there was a material variance between the facts alleged in the indictment and those facts presented at trial. *See id.*

[16] "A variance has been defined 'in criminal procedure, [as] a difference between the allegations in a charging instrument and the proof actually introduced at trial.'" *Diaz*, 2007 Guam 3 ¶ 36 (alteration in original) (quoting *Variance*, *Black's Law Dictionary* (8th ed. 2004)). Generally, the "[a]nalysis of a material variance claim consists of two separate but related inquiries." *People v. Taitano*, 2015 Guam 33 ¶ 11. First, "[t]o the extent that the variance concerns a lack of proof at trial regarding the essential elements of an indictment, it functions as an attack on the sufficiency of evidence supporting a conviction." *Id.* (citations omitted); *see also Diaz*, 2007 Guam 3 ¶ 10. Second, "a claim of variance [may] also function[] as a challenge based on the deprivation of due process rights," such as the right to receive "proper notice of charges and [the] protection against double jeopardy." *Taitano*, 2015 Guam 33 ¶ 11 (citations omitted).

1. There Was Sufficient Evidence of Taisacan's Guilt Presented at Trial

[17] Questions regarding the sufficiency of the evidence are "reviewed *de novo*." *People v. Wusstig*, 2015 Guam 21 ¶ 8 (citing *People v. Diego*, 2013 Guam 15 ¶¶ 9, 30).[1] Under this

[1] We noted in *Diaz* that where the defendant fails to raise a variance claim in the trial court, we review only for plain error. *See* 2007 Guam 3 ¶ 38. Taisacan did not raise a variance claim below, but the People on appeal argue that the court should use a *de novo* standard of review. *See, e.g.*, Appellee's Br. at 20 (stating that the standard

standard, "we review the evidence in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Diego*, 2013 Guam 15 ¶ 30 (quoting *People v. George*, 2012 Guam 22 ¶ 49). "This is a 'highly deferential standard of review.'" *Wusstig*, 2015 Guam 21 ¶ 8 (quoting *People v. Tenorio*, 2007 Guam 19 ¶ 9). When reviewing the sufficiency of the evidence, "[i]t is not the province of the court . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *People v. Song*, 2012 Guam 21 ¶ 29 (quoting *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)). We are "concerned with the existence or nonexistence of evidence, not its weight." *Id.* (citing *State v. Weston*, 625 S.E.2d 641, 648 (S.C. 2006)). "[I]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." *Id.* (quoting *State v. Elmore*, 628 S.E.2d 271, 273 (S.C. Ct. App. 2006)); *see also Taitano*, 2015 Guam 33 ¶ 12 ("When reviewing a jury conviction for sufficiency, the only relevant question is 'whether that finding was so insupportable as to fall below the threshold of bare rationality.'" (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012))); *George*, 2012 Guam 22 ¶ 51.

[18] A variance between the facts alleged in an indictment and the facts presented at trial that does not directly relate to a specific element of the offense does not justify reversal based upon the sufficiency of the evidence. *See Taitano*, 2015 Guam 33 ¶¶ 14-17 (finding variance between the location and time of offense listed in indictment and the facts presented at trial did not justify reversal for insufficiency because they are not elements of the offense); *see also Diaz*, 2007

of review is *de novo*). Because Taisacan has not established error under the more lenient *de novo* standard, we assume solely for purposes of this appeal that a *de novo* standard is appropriate.

Guam 3 ¶ 41 ("When time is not an essential element [of the offense], 'the variance between proof is irrelevant so long as the defendants were afforded adequate notice of the charges against them.'" (quoting *United States v. Laykin*, 886 F.2d 1534, 1543 (9th Cir. 1989))). Rather, the court's review is limited to whether there is sufficient evidence to support each element of the crime or crimes for which the defendant is convicted.

a. There was sufficient evidence of burglary and theft

[19] Under Guam law, "[a] person is guilty of burglary if he enters or surreptitiously remains in any . . . building . . . with intent to commit a crime therein, unless the premises are at the time open to the public or the defendant is licensed or privileged to enter . . . ." 9 GCA § 37.20(a) (as amended by P.L. 32-162:4 (May 23, 2014)); *see also People v. McKinney*, 2016 Guam 3 ¶ 18. Pursuant to 9 GCA § 43.30(a), "[a] person is guilty of *theft* if he unlawfully takes or obtains or exercises unlawful control over, movable property of another with intent to deprive him thereof." 9 GCA § 43.30(a) (2005). Under an accomplice theory of criminal liability, a person is guilty of a criminal offense "if, with the intention of promoting or assisting in the commission of the offense, he induces or aids another person to commit the offense." 9 GCA § 4.60 (2005).

[20] At trial, DeGracia testified, *inter alia*, that concerning the September 2013 burglary: (1) he broke into the "game room" at the Cinema Plaza, Tr. at 21 (Jury Trial, May 20, 2016); (2) that he "took the cashbox from the pachinko machines," *id.*; (3) Muna came up with the plan to burglarize the Cinema Plaza, and Taisacan asked DeGracia to join the plan "to break into the game room, and take money from the cash box," *id.* at 22-23; (4) Muna, Taisacan, and DeGracia all "jumped over the wall" and entered Uncle Paul's Noodle House "[b]y prying the backdoor," *id.* at 23; (5) that once in Uncle Paul's Noodle House, DeGracia and Taisacan used a crowbar to

get through the dry wall between the noodle house and the pachinko place, *id.*; (6) that both DeGracia and Taisacan entered the pachinko room and took cash totaling $1,500, while Muna provided look out, *id.* at 24; (7) this occurred during the night, while the building was not open to the public, *id.* at 25; and (8) the parties divided the money three ways and departed the scene in Taisacan's car, *id.* In addition to DeGracia's testimony, a number of business owners and employees of the various shops that were victimized testified that a break-in occurred on September 3, 2013—the same day DeGracia admitted to burglarizing the Cinema Plaza with Taisacan. *See* Tr. at 15-62, 77-84 (Jury Trial, May 19, 2016).

[21] With respect to the December 2013 incident, DeGracia testified: (1) he and Taisacan developed a plan to burglarize the Cinema Plaza building, Tr. at 26 (Jury Trial, May 20, 2016); (2) Muna was not involved in this incident, *id.*; (3) DeGracia entered the building through an air ventilation system that was found by Taisacan, *id.* at 27; (4) both the dry cleaners and the karaoke bar that DeGracia entered were closed at the time, *id.* at 27-28; (5) Taisacan and DeGracia drove Taisacan's car to the building and both jumped over the wall, *id.* at 28; (6) only DeGracia entered the property, but Taisacan helped lift him up into the ventilation system, *id.*; (7) once in the dry cleaners, DeGracia made a hole in the wall, went into the karaoke bar, and "took the money again, from the machine," *id.* at 29; (8) around $500-600 was taken from the machines, which he and Taisacan shared, *id.*; and (9) following the burglary, Taisacan dropped DeGracia at his home, *id.* Again, the relevant business owners confirmed that a burglary of their businesses occurred on the date testified to by DeGracia, and their testimony was corroborative of DeGracia's. *See* Tr. at 82-84, 124-44 (Jury Trial, May 20, 2016).

[22] The testimony of DeGracia and that of the victims was sufficient to support Taisacan's conviction for burglary and theft with respect to both the September 2013 and December 2013 incidents. *See, e.g.*, *McKinney*, 2016 Guam 3 ¶¶ 18-28 (finding sufficient evidence of burglary and theft); *People v. Cruz*, D.C. Crim. No. 77-018A, 1979 WL 15123, at *1 (D. Guam App. Div. July 13, 1979) (finding sufficient evidence of burglary and petty theft); *Burkhard v. People*, Crim. No. 77-007-A, 1978 WL 13498, at *1 (D. Guam App. Div. Apr. 21, 1978) (same). In sum, DeGracia testified that Taisacan personally entered the Cinema Plaza and took money from the pachinko machine during the September 2013 incident. *See* Tr. at 24 (Jury Trial, May 20, 2016). And while there was no evidence adduced at trial that Taisacan personally entered the karaoke bar during the December 2013 incident, DeGracia's testimony nevertheless indicates that Taisacan was an accomplice under 9 GCA § 4.60 in that he hoisted DeGracia through the ventilation system, received a share of the stolen funds, and otherwise participated in the burglary and theft. *See id.* at 26-29. Taisacan ignores DeGracia's testimony and points to the lack of testimony by the business owners about specific amounts of money taken during each burglary. In doing so, Taisacan "attempts to argue the evidence in a light most favorable to the defense" and "misconstrues the standard by trying to re-argue that there is reasonable doubt." *George*, 2012 Guam 22 ¶ 55; *see also People v. Finik*, 2017 Guam 21 ¶ 23.

[23] Taisacan also argues that the superseding indictment failed to allege, and the People failed to prove at trial, a specific theft or any amount of theft to support the charge of burglary. *See* Appellant's Br. at 22-26. While both counts of burglary contained in the superseding indictment allege that Taisacan had the intent to commit theft, to establish the crime of burglary "[t]he prosecution was not required to prove theft; it was required to prove that [defendant] had

the *intent* to commit theft." *People v. Demapan*, 2004 Guam 24 ¶ 14 (emphasis added); *see also People v. Joshua*, 2015 Guam 32 ¶ 42. "[T]heft is not a statutory element of burglary . . . ." *Demapan*, 2004 Guam 24 ¶ 14. That said, "[t]here is no better proof that [defendant] entered the [building] with intent to commit [a crime] than a showing he did in fact commit [the crime] after his entry." *McKinney*, 2016 Guam 3 ¶ 19 (first and second alterations in original) (quoting *People v. Abilez*, 161 P.3d 58, 85 (Cal. 2007)).[2]

[24] Taisacan further argues that the testimony of DeGracia was unreliable. *See* Appellant's Br. at 29-30. This argument, however, does not serve as a basis upon which this court may reverse for insufficient evidence of guilt. *See Wusstig*, 2015 Guam 21 ¶ 26; *People v. Mendiola*, 2014 Guam 17 ¶ 28; *People v. Enriquez*, 2014 Guam 11 ¶ 22; *Diego*, 2013 Guam 15 ¶ 38; *George*, 2012 Guam 22 ¶ 56.

[25] For these reasons, we find that the record contains sufficient evidence to support Taisacan's burglary and theft convictions, and none of the sufficiency arguments raised by Taisacan warrant reversal on appeal.

b. There was sufficient evidence of felony vehicle identification

[26] Taisacan was also charged with Felony Vehicle Identification under 16 GCA § 9102(a). Both the superseding indictment and the jury instructions indicated that an essential element of this crime is "knowingly driv[ing] a motor vehicle on a highway." *See* RA, tab 49 at 2 (Superseding Indictment); Tr. at 54-55 (Jury Trial, May 25, 2016). Taisacan argues on appeal

[2] Taisacan also argues that a victim of the theft was not clearly identified in the indictment. Establishing the identity of the victim, however, is not a specific element of the offense of theft of property. *See* 9 GCA § 43.30(a); *see also State v. Woodward*, 66 P.3d 556, 559 (Or. Ct. App. 2003) ("[T]he identity of the victim is not a material element of the crime of theft." (citation omitted)); *State v. McReynolds*, 71 P.3d 663, 675 (Wash. Ct. App. 2003) ("It has long been the rule in Washington that the identity of the property's owner is not an element of crimes involving larceny or theft."); *cf. People v. Woods*, 75 Cal. Rptr. 2d 917, 920 (Ct. App. 1998) (holding that, in a prosecution for burglary, the identity of the victim is not an element of the offense).

that the People failed to prove this purported element of the offense or that it occurred on January 24, 2014, as alleged in the indictment. *See* Appellant's Br. at 30-31. We do not need to decide whether "knowingly driv[ing] a motor vehicle on the highway" is actually an element of felony vehicle identification under 16 GCA § 9102(a). *See* 16 GCA § 9102(a) (2005). Assuming that this instruction was erroneous (i.e., that this is not actually an element of the offense), any error would be harmless or otherwise not prejudice Taisacan. By incorrectly adding an additional essential element to the offense, the court would have increased the burden placed upon the People, which would have inured to Taisacan's benefit. *See, e.g.*, *United States v. Lancaster*, 968 F.2d 1250, 1254 (D.C. Cir. 1992); *State v. Blackmon*, 587 S.W.2d 292, 294 (Mo. Ct. App. 1979); *Davis v. State*, 916 P.2d 251, 259-60 (Okla. Crim. App. 1996).

[27] Officer Peter Paulino testified during trial that on January 24, 2014, he observed Taisacan's Chevy Equinox bearing plates that did not match the vehicle, and Taisacan admitted to receiving the license plate on the vehicle from his son, attaching it to his vehicle even though it was not assigned to that vehicle, and that he knew it was against the law to do so. Tr. at 24-27 (Jury Trial, May 23, 2016). Officer Paulino additionally testified that Taisacan admitted he had been operating the vehicle from the time "since he obtained . . . that [unassigned] license plate." *Id.* at 27. While no testimony was admitted during trial that Taisacan actually drove the vehicle on January 24, 2014, the date of the crime as alleged in the indictment, this is irrelevant to our sufficiency analysis.

[28] We previously addressed an argument similar to that which Taisacan raises here in *Diaz*, 2007 Guam 3. There, the defendant argued that the date alleged in the indictment for the offense of theft was inaccurate, a material variance therefore existed, and the government had failed to

present sufficient evidence to support his conviction. *See id.* ¶ 34. We rejected this argument, finding that "where time is not an element of a crime, '[p]roof of any date before the return of the indictment and within the statute of limitations is sufficient'" to support a conviction. *Id.* ¶ 40 (alteration in original) (quoting *People v. Atoigue*, DCA No. CR91-95A, 1992 WL 245628, at *7 (D. Guam App. Div. Sept. 11, 1992)); *see also Taitano*, 2015 Guam 33 ¶¶ 14-17. Time is not an element of felony vehicle identification under 16 GCA § 9102(a). Here, evidence was admitted that Taisacan placed the unregistered license plate on his vehicle in 2013 and knowingly drove the vehicle bearing the wrong license plate at some point between 2013, when he received it, and January 24, 2014, the day he spoke with the police. Tr. at 24-27 (Jury Trial, May 23, 2016). This window is both before the superseding indictment was issued on May 13, 2015, *see* RA, tab 49 at 3 (Superseding Indictment), and within the three-year statute of limitations, *see* 8 GCA § 10.20(c) (2005). This is sufficient evidence to sustain Taisacan's conviction on this charge.

2. There is No Material Variance Between the Facts Alleged in the Indictment and the Proof Presented at Trial

[29] An indictment serves a dual function: *first*, it provides the written statement of a grand jury accusing a person of an offense upon a finding of probable cause; *second*, it serves as the government's primary pleading to provide the defendant notice of the charges he or she faces. *People v. San Nicolas*, 2013 Guam 21 ¶ 12; *see also Batiste v. State*, 785 S.W.2d 432, 434 (Tex. Ct. App. 1990) (same); 8 GCA § 50.54 (as amended by P.L. 29-042:1 (Jan. 2, 2008)); 8 GCA § 55.10 (2005). "A variance between an allegation [in an indictment] and proof presented [at trial] is a reversible error if it affects the substantial rights of a defendant by either: (1) taking them by surprise and hindering their ability to present a defense, or (2) exposing them to the risk of another prosecution for the same offense." *Taitano*, 2015 Guam 33 ¶ 18 (citing *People v.*

Campbell, 2006 Guam 14 ¶ 12). "Where the variance is not 'material' and does not 'affect the substantial rights' of the accused," there is no Fifth Amendment violation. *Diaz*, 2007 Guam 3 ¶ 39 (quoting *United States v. Cina*, 699 F.2d 853, 857 (7th Cir. 1983)). "We begin this analysis by determining whether or not a variance occurred . . . ." *Taitano*, 2015 Guam 33 ¶ 19.

[30] A number of Taisacan's specific arguments concern evidence presented at trial regarding facts that were not specifically alleged in the superseding indictment—namely, the identity of the victim, a specific theft, the location of the theft, and the amount of a specific theft. *See* Appellant's Br. at 22-29. This is not a true variance, as the evidence presented at trial is not in direct conflict with the facts alleged—or, in this case, the absence of facts alleged—in the superseding indictment. *See, e.g.*, *United States v. Tankersley*, 492 F.2d 962, 966 (7th Cir. 1974) (finding that where indictment was silent as to whether explosive parts were assembled, proof at trial regarding whether the device was assembled "was not at variance with the charge"). In any event, as noted above, none of these facts relate to an essential element of the crimes for which Taisacan was convicted.

[31] Even if there was a variance in this regard, Taisacan had sufficient notice of the facts that would be presented at trial. When a criminal defendant alleges a material variance, a court determining whether the defendant had proper notice of the charges against him or her "may look to sources other than the indictment for evidence of adequate notice, including 'a complaint, an arrest warrant, or a bill of particulars,' as well as information provided 'during the course of a preliminary hearing.'" *Taitano*, 2015 Guam 33 ¶ 19 (quoting *Sheppard v. Rees*, 909 F.2d 1234, 1236 n.2 (9th Cir. 1990)). The original indictment, in this case, listed the specific establishments that were alleged to have been burglarized and the identity of the theft victims. *See* RA, tab 2

(Indictment). This is not a case, like *Taitano*, where the facts presented at trial related to an entirely separate incident for which the People failed to obtain an indictment. *See Taitano*, 2015 Guam 33 ¶ 21.

[32] The only potential variance between the superseding indictment and the facts alleged at trial is the allegation that Muna was involved in the December 2013 incident.[3] *Compare* RA, tab 49 (Superseding Indictment), *with* Tr. at 26 (Jury Trial, May 20, 2016) (DeGracia testimony), *and* Tr. at 20 (Jury Trial, May 19, 2016) (People's opening statement). Taisacan, however, has not identified any way in which he was prejudiced by this variance. *See Diaz*, 2007 Guam 3 ¶ 41. For example, Taisacan has not "provide[d] concrete examples of how his defense would have differed to refute allegations" that only he and DeGracia were involved in the December incident. *Taitano*, 2015 Guam 33 ¶ 22. "There is no evidence that [Taisacan] was surprised by the evidence at trial or inadequately protected against being placed in jeopardy again for the same offense." *Diaz*, 2007 Guam 3 ¶ 41. Taisacan's defense at trial was that he was simply not involved in the alleged burglaries and thefts. *See* Tr. at 26 (Jury Trial, May 25, 2016). It is difficult to see how this defense would have changed had the superseding indictment indicated that only DeGracia and Taisacan were involved in the December 2013 burglary. Taisacan had adequate notice of the charges against him. Therefore, any variance between the facts alleged in the indictment and those presented at trial were immaterial and did not rise to the level of a constitutional violation.

[3] Where facts are included in an indictment solely for purposes of providing the defendant notice and do not purport (either correctly or incorrectly) to be an element of the offense charged, the prosecution is not required to prove those extraneous facts in order for this court to uphold a conviction. *See Taitano*, 2015 Guam 33 ¶¶ 14-17; *Diaz*, 2007 Guam 3 ¶ 41.

C. The Trial Court's Improper Use of the Word "Promising" Instead of "Promoting" When Instructing the Jury on the Charge of Burglary Was Not Plain Error

[33] Taisacan's final argument on appeal is that reversal is required as a result of the trial court improperly using the word "promising" instead of "promoting" when instructing the jury on the charge of burglary. *See* Appellant's Br. at 33-36. The People argue in opposition that Taisacan was not prejudiced by what they frame as a typographical error, and reversal is therefore inappropriate. *See* Appellee's Br. at 27-30.

[34] Where, like here, "no objections to jury instructions [we]re made at the time of trial, the standard of review is plain error." *People v. Cruz*, 2016 Guam 15 ¶ 17; *see also Felder*, 2012 Guam 8 ¶¶ 13-18. This is "not a run-of-the-mill remedy"; rather, "it is invoked only in exceptional circumstances." *People v. Quenga*, 2015 Guam 39 ¶ 89 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 52)); *Jones*, 2006 Guam 13 ¶ 48 ("Reversal under plain error review is rare."). Accordingly, "[w]e 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." *Cruz*, 2016 Guam 15 ¶ 17 (alteration in original) (quoting *Quitugua*, 2009 Guam 10 ¶ 11). Ultimately, the "test for reviewing jury instructions for plain error" boils down to a simple question: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Jones*, 2006 Guam 13 ¶ 27 (quoting *Jones v. United States*, 527 U.S. 373, 390 (1999)).

[35] In reviewing the record for instructional errors, we review jury instructions as a whole. *Jones*, 2006 Guam 13 ¶ 28; *see also People v. Kanistus*, 2017 Guam 26 ¶ 12 (citations omitted). The trial court set forth the elements of the first count of burglary as follows:

> The People must prove beyond a reasonable doubt that the defendant, Badobino Sablan Taisacan: (1) On or about September 3, 2013; (2) In Guam; (3) Did, with the intention of *promising* or assisting in the commission of burglary; (4) Induce or aid each other to enter or surreptitiously remain in a building, that is, the Cinema Arcade Building, in Tamuning, Guam; (5) With the intent to commit the crime of theft therein, at a time when the premises were neither open to the public, nor the defendant licensed or privileged to so enter.

Tr. at 53 (Jury Trial, May 25, 2016) (emphasis added). Identical language, other than the applicable date, was used by the court in instructing on the second count of burglary. *Id.* at 54. The third element of this offense charged by the court is based upon Guam's accomplice liability statute, 9 GCA § 4.60, which states in pertinent part: "A person is guilty of an offense if, with the intention of *promoting* or assisting in the commission of the offense, he induces or aids another person to commit the offense." 9 GCA § 4.60 (emphasis added). Although the court incorrectly used the word "promising" instead of "promoting" in instructing on the crime of burglary, the trial court separately (and correctly) instructed the jury on accomplice liability. *See* Tr. at 51 (Jury Trial, May 25, 2016) ("Guilt Established By Complicity"). Moreover, the court accurately instructed the jury on accomplice liability—using the correct word, "promoting"—as it applied to the charges of theft of property, *see id.* at 57-58, which served as the predicate intent offense[4] for each burglary charge, *see* RA, tab 49 (Superseding Indictment).

[36] Viewing the jury instructions in their entirety, *see Kanistus*, 2017 Guam 26 ¶ 12, it is not clear to the court whether, on the facts of this case, inaccurately using one word—what might be considered a typographical error—was a legal error. *See State v. Swiney*, 137 N.W.2d 808, 813 (Neb. 1965) ("An instruction will not be held erroneous because of mere typographical error

[4] That is, the People asserted that Taisacan and his co-defendants intended to enter and stay on the premises with the intent to commit theft. *See* 9 GCA § 37.20(a) ("A person is guilty of burglary if he enters or surreptitiously remains in any . . . building . . . *with intent to commit a crime* therein. . . ." (emphasis added)).

which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining."); *see also Jones*, 2006 Guam 13 ¶ 28. Nor are we certain that any such potential error is clear and obvious under current law. *Cf. Kanistus*, 2017 Guam 26 ¶ 18; *People v. Gargarita*, 2015 Guam 28 ¶ 18. The People, however, do not contest on appeal that the instructions were in error. *See generally* Appellee's Br. at 27-30. We therefore assume for purposes of our analysis that the instructions were erroneous and that this error was clear and obvious under current law, but we do not directly decide these issues. Instead, our analysis must focus on the last two prongs of the plain error analysis—i.e., whether the error affected Taisacan's substantial rights and whether failure to reverse would result in a miscarriage of justice or impugn the integrity of the legal system. *See, e.g., Cruz*, 2016 Guam 15 ¶ 17.

[37] An erroneous instruction regarding an element of the offense, including an erroneous instruction on an aspect of accomplice liability, does not amount to a structural error mandating automatic reversal. *See People v. Perry*, 2009 Guam 4 ¶ 39 (citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *see also California v. Roy*, 519 U.S. 2, 5-6 (1996). Under plain error review, Taisacan bears the burden of establishing "that the error was prejudicial (i.e., that it affected the outcome of the case)." *Felder*, 2012 Guam 8 ¶ 22. In the context of this case, where the constitutionality of jury instructions is challenged, this requires Taisacan to establish "that there [is] a reasonable probability that the error affected the outcome of the trial." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (citing *United States v. Olano*, 507 U.S. 725, 734-35 (1993)); *see also United States v. Dobson*, 419 F.3d 231, 240 (3d Cir. 2005); *United States v. Phipps*, 319 F.3d 177, 190 (5th Cir. 2003). Taisacan fails to meet this burden. His only argument in this respect is that the element of "'promoting' was contested an[d] unsupported by overwhelming

evidence," Appellant's Br. at 36; *see also id.* at 34 ("The evidence at trial was disputed and certainly not overwhelming."); Reply Br. at 7 ("The omitted element 'promoting' was contested and unsupported by overwhelming evidence."), and that "DeGracia's testimony was unreliable," Reply Br. at 8. Such argument falls short of that needed to establish prejudicial error. *See People v. Hill*, 2018 Guam 3 ¶¶ 13-14 (finding defendant "must make a specific showing of prejudice" under plain error review); *see also Perry*, 2009 Guam 4 ¶ 49 ("[W]here . . . it would appear that the jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses, then there is no error affecting substantial rights."). Taisacan has therefore failed to establish that the jury instructions amounted to plain error. In light of our finding on the third prong of the plain error analysis, we need not address whether the fourth prong was satisfied. *See Hill*, 2018 Guam ¶ 14.

V. CONCLUSION

[38] For the reasons set forth above, we **AFFIRM** the Judgment of Conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice