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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ROCHELLE NICOLE D. LESSARD,
Defendant-Appellant.

OPINION

Cite as: 2019 Guam 10

Supreme Court Case No.: CRA18-007
Superior Court Case No.: CM0397-17

Appeal from the Superior Court of Guam
Argued and submitted on March 11, 2019
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Rochelle Lessard appeals from a Judgment of Conviction entered in the Superior Court. She argues that reversal is required based upon an allegedly erroneous jury instruction and prosecutorial misconduct. For the reasons below, we vacate in part, affirm in part, and remand for further proceedings not inconsistent with this Opinion.

I. FACTUAL AND PROCEDURAL HISTORY

[2] The People charged Lessard with one count of Driving While Under the Influence (as a Misdemeanor) and one count of Reckless Driving with Property Damage (as a Petty Misdemeanor) following a motor vehicle accident and a failed field sobriety test. During trial, Lessard attempted to present evidence that would have purportedly shown that she suffered a concussion on the night in question by calling to the stand an employee in the medical records department of Guam Memorial Hospital (“GMH”). During questioning, Lessard produced what were purported to be medical records from a visit to GMH three days after her arrest. Lessard’s counsel asked the GMH employee: “[A]re you able to say why [Lessard] was seeking treatment?” Transcript (“Tr.”) at 64 (Cont’d Jury Trial, May 3, 2018). The People objected because the employee testified she did not have personal knowledge regarding why Lessard was seen at GMH. *Id.* at 64-65. The trial court sustained this objection. *Id.* at 65. Lessard’s counsel ended her questioning and did not attempt to introduce the records into evidence. In addition, Lessard did not call her treating physician to the stand.

[3] In charging the jury, the trial court gave a “weaker and less satisfactory evidence” instruction limited to evidence offered by the prosecution:

Production of All Evidence is Not Required. Neither side is required to call as witnesses all persons who may have been present at, or have knowledge of, any of the events disclosed by the evidence. Neither side is required to produce all objects or documents mentioned or suggested by the evidence. *If weaker or less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the People to offer, the evidence offered may be viewed with distrust.*

Tr. at 10 (Jury Instrs. & Verdict, May 4, 2018) (emphasis added); *see also* Record on Appeal (“RA”), tab 58 at 19 (Jury Instrs., May 3, 2018). There is no record of Lessard objecting to this instruction.

[4] In closing summation, the People focused on this “weaker and less satisfactory evidence” instruction and Lessard’s failure to present testimony from her treating physician:

Now, [defense counsel] has highlighted for you that we called one police officer. And she’s implying that while they called about six people, we called two; we put on a weak case. She calls it an extremely weak case.

Okay. There is a jury instruction, so, I’m happy this got brought up. “Production of all evidence is not required,” and you will get this. “Neither side is required to call as witnesses all persons who may have been present at, or have knowledge of any of the events disclosed by the evidence. Neither side is required to produce all objects or documents mentioned or suggested by the evidence.”

Now, you’ll see the next part where it says that if weaker evidence is offered and stronger evidence could have been offered by the People, you may view the evidence with distrust.

Okay. What does that mean? I’m not required to come in here and call every single person that was there. We’d be here for weeks. All officers, all the EMTs, all of her family members, the bartender, everybody, because that’s not what the law requires. The law requires me to prove my case beyond a reasonable doubt. It does not require me to call every single person who was at the scene, nor is that efficient.

Because when you think about it this can go both ways; why didn’t they present the doctor that saw Ms. Lessard? Why didn’t they present the nurse that saw her? They could have told me that she had a concussion, that when a person maybe is concussed they’re going to, you know, fail the test. They could have called the other people, but that’s not an argument I’m going to make to you. I’m

not going to say, “Well, she didn’t have a concussion because they didn’t call the doctor to tell you that.” That’s not how this works.

You get to see all the evidence that was presented, not what wasn’t presented. Not, well, the bartender could have come in here a year later and talked about, maybe, how much she drank. Well, she wasn’t. Just like the doctor wasn’t here, just like her nurse wasn’t here. You have the evidence that you have. Okay?

Tr. at 248-49 (Cont’d Jury Trial, May 3, 2018) (emphases added). Lessard did not object to these statements contemporaneously or at the end of the prosecution’s closing argument. Nor did Lessard request curative instructions.

[5] At the conclusion of trial, the jury found Lessard guilty on one count of Driving While Under the Influence (as a Misdemeanor) and one count of Reckless Driving with Property Damage (as a Petty Misdemeanor). Lessard timely filed a notice of appeal.

II. JURISDICTION

[6] We have 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. 116-29 (2019)); 7 GCA §§ 3107(b), 3108(a) (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.” *People v. Aldan*, 2018 Guam 19 ¶ 11. Likewise, we review claims of prosecutorial misconduct for plain error when a defendant fails to object at trial. *See People v. Mendiola*, 2010 Guam 5 ¶ 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.’” *Aldan*, 2018 Guam 19 ¶ 13 (quoting *People v. Gargarita*, 2015 Guam 28 ¶ 11).

IV. ANALYSIS

A. The “Weaker and Less Satisfactory Evidence” Instruction Was Not Plain Error

[8] We recently addressed the constitutionality of a “weaker and less satisfactory evidence” instruction in *People v. Aldan*, 2018 Guam 19. There, we found the following instruction to be plain error in the context of a criminal case: “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.” *Aldan*, 2018 Guam 19 ¶¶ 7, 12 (emphases added). While the model jury instructions intend this instruction to apply only to the prosecution, the trial court in *Aldan* granted the prosecution’s request to make this instruction equally applicable to both parties. *See id.* ¶ 7. Here, the “weaker and less satisfactory evidence” instruction given by the trial court limited this language to apply only to the People, rather than equally applying to both the prosecution and defense: “If weaker or less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the People to offer, the evidence offered may be viewed with distrust.” Tr. at 10 (Jury Instrs. & Verdict, May 4, 2018) (emphasis added); *see also* RA, tab 58 at 19 (Jury Instrs.). Lessard argues that even this more limited instruction was plain reversible error.

[9] Although *Aldan* is not directly controlling on the facts presented here, in that case we disapproved of including a “weaker and less satisfactory evidence” instruction when charging the jury in a criminal case, except in rare circumstances. *See Aldan*, 2018 Guam 19 ¶ 15. We cited with approval *People v. Cuff*, 55 P. 407 (Cal. 1898), where the California Supreme Court stated: “In criminal cases the proper occasions [for giving a ‘weaker and less satisfactory evidence’ instruction] are so few, and the improper occasions are so many, that it were best that they should be given rarely, if at all.” *Cuff*, 55 P. at 408. Likewise, we noted that the Oregon

Supreme Court has found “that issuance of the ‘weaker and less satisfactory evidence’ jury instruction is error except in cases where the defendant presents an affirmative defense.” *Aldan*, 2018 Guam 19 ¶ 14 (citing *State v. Mains*, 669 P.2d 1112, 1117 (Or. 1983) (en banc)).

[10] Despite the strong disapproval of such an instruction, we also recognized in *Aldan* that “[t]here may be circumstances where the instruction may not involve constitutionally impermissible burden-shifting.” 2018 Guam 19 ¶ 20. We specifically left open the question of whether a “weaker and less satisfactory evidence” instruction was *always* prohibited in criminal cases. *See id.* ¶ 19. We stated that while some courts have “prohibited the instruction in all criminal cases, we are not prepared to extend the prohibition on the instruction as far. . . . [I]t may be better practice to avoid the instruction altogether in criminal cases, [but] our focus in this opinion is on the constitutionality of the instruction in this case.” *Id.* In refraining from resolving this question, we identified a handful of times when courts have permitted giving such an instruction. *See id.* ¶ 20. Importantly, we noted several prior cases where such an instruction was deemed permissible because the instruction was “a modified version applying only to the government.” *Id.* ¶ 20 (citing *State v. Patton*, 303 P.2d 513, 515 (Or. 1956) (en banc); *State v. Brock*, 633 P.2d 805, 809 (Or. Ct. App. 1981) (en banc)); *see also State v. Holleman*, 357 P.2d 264, 265 (Or. 1960). That is the case presented here.

[11] To establish reversible plain error, Lessard must first establish that the jury instructions were erroneous. *See Aldan*, 2018 Guam 19 ¶ 13. We find that on the facts of this case, and standing alone, it was not error for the court to give the “weaker and less satisfactory evidence” instruction to the jury. While such an instruction should generally be left for situations in which the defendant presents an affirmative defense, *see id.* ¶ 21, absent any unique factors, an instruction applying only to the government is permissible, *see id.* ¶ 20. Case law from other

jurisdictions indicates that such a limited instruction is often sought by defendants—not the prosecution—because such an instruction is generally perceived to inure to the defendant’s benefit. *See, e.g., State v. West*, 410 P.3d 382, 383-85 (Or. Ct. App. 2017). We continue to caution both lower courts and litigants that using a “weaker and less satisfactory evidence” instruction in a criminal case is strongly disfavored, even where limited solely to the prosecution, as the instruction will often confuse rather than clarify the burdens in a criminal prosecution. *See Cuff*, 55 P. at 408. But on the facts of this case, we cannot say that the instruction was in error. For this reason, Lessard has failed to establish that the trial court’s jury instructions, standing alone, were plainly erroneous.

B. The People Committed Prosecutorial Misconduct, But This Error Affected Lessard’s Substantial Rights Only With Respect to Her Conviction for Driving While Under the Influence

[12] As with Lessard’s assertion of instructional error, our recent decision in *Aldan* also weighs heavily on our consideration of Lessard’s claim of prosecutorial misconduct. “To succeed on a claim of prosecutorial misconduct, a petitioner must demonstrate that the ‘prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Mendiola*, 2010 Guam 5 ¶ 12 (quoting *People v. Evaristo*, 1999 Guam 22 ¶ 20); *see also People v. Cruz*, 2016 Guam 15 ¶¶ 19-33 (analyzing whether prosecution’s statements during closing argument impermissibly violated defendant’s right against self-incrimination).

1. The Prosecution’s Statements Constituted Clear and Obvious Error Under Current Law

[13] We held in *Aldan* that giving a “weaker and less satisfactory evidence” instruction equally applicable to both parties eased the government’s burden to prove guilt beyond a reasonable doubt “by giving the government a head start over” the defendant. *Aldan*, 2018

Guam 19 ¶ 21. This, we held, violated the defendant’s constitutionally-protected presumption of innocence and “improperly shifted the burden of proof” to the defendant. *See id.* ¶¶ 21-22. While we also held this violated the defendant’s right to remain silent, *see id.* ¶ 21, we are not concerned with this constitutionally-protected right in this appeal because Lessard took the stand in her own defense. Regardless, both of these protections are well-entrenched, and a violation of either will satisfy the “clear or obvious” prong of a plain error analysis. *See id.* ¶ 25.

[14] During closing arguments, the defense argued that the prosecution put on a weak evidentiary case and, as a result, failed to meet its burden to prove Lessard’s guilt beyond a reasonable doubt. The prosecution attempted to rebut this argument by asserting that the People did not have to put on every available witness or produce all the available evidence to prove Lessard’s guilt. In doing so, the prosecution specifically referenced the “weaker and less satisfactory evidence” jury instruction. This was permissible. *See, e.g., United States v. Bagley*, 772 F.2d 482, 494-95 (9th Cir. 1985). The prosecution, however, went beyond merely referencing the court’s instruction by stating:

Because when you think about it [the “weaker and less satisfactory” jury instruction] can go both ways; why didn’t [the defense] present the doctor that saw Ms. Lessard? Why didn’t they present the nurse that saw her? They could have told me that she had a concussion, that when a person maybe is concussed they’re going to, you know, fail the test. They could have called the other people, but that’s not an argument I’m going to make to you. I’m not going to say, “Well, she didn’t have a concussion because they didn’t call the doctor to tell you that.” That’s not how this works.

You get to see all the evidence that was presented, not what wasn’t presented. Not, well, the bartender could have come in here a year later and talked about, maybe, how much she drank. Well, she wasn’t. Just like the doctor wasn’t here, just like her nurse wasn’t here. You have the evidence that you have. Okay?

Tr. at 249 (Cont’d Jury Trial, May 3, 2018) (emphases added). These statements by the prosecutor attempted to turn the “weaker and less satisfactory evidence” instruction limited to

the prosecution into an instruction applicable to both parties. Such an instruction violates a defendant's due process rights. See *Aldan*, 2018 Guam 19 ¶¶ 21-22.

[15] As a general proposition, “a prosecutor’s comment on defendant’s failure to present exculpatory evidence, standing alone, does not shift the burden of proof to defendant.” *People v. Vilorio*, No. 92-00023A, 1993 WL 470409, at *4 (D. Guam App. Div. Oct. 12, 1993) (citing *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993)), *aff’d*, 56 F.3d 73 (Table) (9th Cir. May 19, 1995); see also *People v. Blas*, 2015 Guam 30 ¶¶ 31-33. On the facts of this case, however, the prosecutor’s comments on Lessard’s failure to present certain proof do not stand alone; the prosecutor directly tied these comments to a plainly erroneous interpretation of the court’s jury instructions. In *Aldan*, we stated that “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.” 2018 Guam 19 ¶ 30. It must be equally true that a prosecutor is prohibited from drawing the jury’s attention to an instruction, interpreting the instruction for the jury in a constitutionally problematic way, and then commenting on the defendant’s failure related to that erroneous interpretation. See *Blas*, 2015 Guam 30 ¶ 33 (suggesting prosecutor’s comments would be reversible misconduct where they would “induce[] the jury to make a decision on a basis other than the merits of the evidence and the court’s instructions of law” (quoting *People v. Collins*, 250 P.3d 668, 679 (Colo. App. 2010))); cf. *HRC Guam Co. v. Bayview II L.L.C.*, 2017 Guam 25 ¶ 107 (finding, in civil case, that an attorney mischaracterizing jury instructions constituted misconduct). While the giving of the “weaker and less satisfactory evidence” instruction was not erroneous, that instruction coupled with the prosecutor’s improper statements effectively denied Lessard due process by impermissibly shifting the burden of proof to her.

This error was plain under current law.¹ See *Blas*, 2015 Guam 30 ¶ 31 (“It is improper for the prosecution to ‘suggest that the defendant has the burden to produce evidence.’” (quoting *United States v. Balter*, 91 F.3d 427, 441 (3d Cir. 1996))).

2. Lessard’s Substantial Rights Were Affected With Respect to Her Conviction for Driving While Under the Influence, and We Vacate That Conviction to Protect the Integrity of the Legal System

[16] To establish that she is entitled to reversal, Lessard has the added burden of demonstrating that the error affected her substantial rights. See *Aldan*, 2018 Guam 19 ¶ 13. This requires Lessard to establish “a reasonable probability” that but for the claimed error the result of the proceeding would have been different. *People v. Taisacan*, 2018 Guam 23 ¶ 37 (collecting cases); see also *United States v. Durham*, 902 F.3d 1180, 1226 (10th Cir. 2018) (applying “reasonable probability” standard to improper statements made by prosecution); *United States v. Welshans*, 892 F.3d 566, 573 (3d Cir. 2018) (same). Put differently, Lessard must establish that, upon a review of the entire record, “the probability of a different result is ‘sufficient to undermine confidence in the outcome’ of the proceeding.” *People v. Quitugua*, 2009 Guam 10 ¶ 36 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). “We have previously held that errors do not affect substantial rights when the prosecution presented overwhelming evidence of guilt regarding the issue or element affected by the claimed error.” *People v. Kanistus*, 2017 Guam 26 ¶ 28; see also *People v. Fegurgur*, DCA Nos. 85-00016A, 84-00073A, SC Nos. 130F-84, 133F-84, 1986 WL 68511, at *5 (D. Guam App. Div. Feb. 25, 1986).

[17] Lessard argues that the prosecution’s statements during closing effectively “deprived her of the right to rely on the state of the evidence and the reasonable doubt standard.” Appellant’s

¹ An error is plain so long as it is clear or obvious at the time of appellate review. See *Henderson v. United States*, 568 U.S. 266, 268-69 (2013); cf. *People v. Felder*, 2012 Guam 8 ¶ 21 (following a similar but distinct rule set forth in *Johnson v. United States*, 520 U.S. 461, 467-68 (1997)). Therefore, the fact that *Aldan* was not decided at the time of trial is irrelevant to our analysis.

Br. at 12 (Sept. 26, 2018). The People argue that the evidence was overwhelming and that Lessard would have been convicted regardless of the prosecutor’s arguments during closing. We find that Lessard has not met her burden of establishing a reasonable probability that but for the prosecution’s improper comments during closing, she would have been acquitted on the charge of Reckless Driving with Property Damage. But we further find that because the prosecution directly tied its constitutionally-infirm interpretation of the court’s “weaker and less satisfactory evidence” instruction to Lessard’s failure to present medical testimony, and the evidence on that charge was not overwhelming, there is a reasonable probability that the jury would have acquitted her of Driving While Under the Influence had the prosecution not made these improper statements.

a. Reckless Driving With Property Damage

[18] To be found guilty of Reckless Driving with Property Damage, a person must be found to have (1) driven a vehicle, (2) upon a highway, (3) in willful or wanton disregard for the safety of persons or property, (4) which proximately caused a collision resulting in property damages. *See* 16 GCA § 9107(a), (c) (as amended by Pub. L. 31-208:3 (May 9, 2012)); *see also* *People v. Manila*, 2005 Guam 6 ¶ 40; *People v. Maysho*, 2005 Guam 4 ¶¶ 9-23. At trial, it was uncontested that Lessard got into the driver’s seat of her van, drove it into the building in front of which it was parked, then backed up, and hit a car parked behind her. Lessard attempted to blame this accident on mechanical defects of the van. During closing, the prosecution highlighted that, by defendant’s own admission, the vehicle she was driving was not safe to drive on the public roadways.² The prosecution thus relied on the mechanical defects of the van, and

² The prosecution argued the following on the issue of recklessness:

Lessard's knowledge of them, to establish Lessard's willful or wanton disregard for the safety of persons or property. *See, e.g., State v. Conyers*, 506 N.W.2d 442, 444-45 (Iowa 1993) (ruling evidence of defendant driving car with mechanical defects, including faulty braking system, was sufficient to convict defendant of reckless driving under statute substantively identical to 16 GCA § 9107(a)); *Commonwealth v. Fabian*, 60 A.3d 146, 155-56 (Pa. Super. Ct. 2013) (knowledge of faulty brake system of van sufficient to establish *mens rea* of recklessness to support voluntary manslaughter conviction); *State v. Laub*, 621 N.E.2d 585, 587-88 (Ohio Ct. App. 1993) (driving unroadworthy vehicle can support conviction incorporating elements of reckless driving). It was unnecessary for the prosecution to rely upon Lessard's alleged intoxication to establish her recklessness. *See Manila*, 2005 Guam 6 ¶ 41 ("The DUI offense requires proof that the defendant was impaired by alcohol, while the Reckless Driving charge does not.").

[19] Whether Lessard suffered a concussion or whether she was intoxicated, there is no reasonable probability that the jury would have acquitted Lessard on the charge of reckless driving had the prosecution not made improper comments during closing. Nothing in the prosecutor's improper statements related to the roadworthiness of Lessard's vehicle, and the prosecution did not attempt to tie this argument back to the charge of reckless driving. *See*

The next two parts that you'll have to consider on [sic] whether she drove [the van] [i]n willful or wanton disregard for the safety of persons or property. Sounds like a lot. Okay? And you're going to get a further instruction from the Court on -- on, specifically, what that means.

But when you're deliberating, I want you to think about this, when a person gets into a vehicle, okay, and they're under the influence of alcohol, and they get into a vehicle that allegedly has a ton of defects, that was so unsafe to drive that the Defense has essentially have [sic] blamed this whole accident on the vehicle.

So, if it's the vehicle's fault, why is someone driving that vehicle? Why is someone attempting to get into that car and drive across Route 1, home, when this vehicle is so unsafe? Disregard for the safety of public, persons, or property.

Aldan, 2018 Guam 19 ¶ 30 (finding prejudice where prosecutor drew attention to missing evidence related to charge). Although the prosecution made a passing reference to Lessard's alleged intoxication during its arguments regarding reckless driving, this does not change our decision regarding whether Lessard's substantial rights were affected by the prosecution's comments. See *United States v. Marcus*, 560 U.S. 258, 260, 262 (2010) (rejecting "any possibility" test for reversal as inconsistent with the third and fourth prong of plain error review).

[20] The evidence of Lessard's recklessness was overwhelming. See *Kanistus*, 2017 Guam 26 ¶ 28; see also *Fegurgur*, 1986 WL 68511, at *5. Lessard herself testified that the van she was driving had a litany of defects. Among them, the van's faulty starting mechanism required a screwdriver be used to start the vehicle; it leaked fluids; it shifted gears without the driver pressing the brake pedal; it would not move when taking a foot off of the brake pedal, or pressing the gas pedal lightly, requiring the driver to push hard on the gas pedal—even in reverse—to start the van in motion; and there was a crack on the windshield. Lessard was familiar with the vehicle and had a history with its defects. On at least one occasion, she was driving when she accidentally threw the car in reverse because of the faulty gear shift. She further testified to two accidents she was in while driving the van, including one where she dented the driver-side door and another where she "backed into a tree." Tr. at 155 (Cont'd Jury Trial, May 3, 2018). Lessard further testified that her boyfriend did not believe driving the van was safe.

[21] Besides the mechanical defects, Lessard also admitted that the van had tinted windows that were "very dark," and she was driving after sundown while it was "very dark" outside. *Id.* at 78-79. Because of this, Lessard could not back out of the parking spot she was in without sticking her head outside the vehicle because she "couldn't see behind [her] at all, it was too dim,

and it was really dark from behind.” *Id.* at 81. Lessard testified that while looking out the side window—and with her foot on the gas pedal because the van would not reverse without her stepping on the gas—she hit the gear shift with her elbow, putting the car into drive. Her foot, however, got “stuck on to the plastic frame of . . . where the gas pedal is,” so she could not brake in time. *Id.* When she first hit the concrete parking block in front of her, this caused her “seatbelt [to] snap[] off.” *Id.* at 82. These admissions by Lessard present evidence upon which no reasonable probability exists that a jury would have found a lack of a willful or wanton disregard that the van she was driving was unroadworthy and potentially placed the property and the safety of others in danger. *See Maysho*, 2005 Guam 4 ¶¶ 12-13 (defining willful and wanton under 16 GCA § 9107).

[22] But that is not all. To compound any problems associated with driving an unroadworthy vehicle, Lessard then admitted to continuing to drive the car after being thrown into the windshield upon hitting the building. By her own admission, after being “crunched in front of the glass” at the front of her car, she “came back down, felt really dizzy, headache, I wanted to puke but I couldn’t, I didn’t want to,” and—despite being in this condition—she proceeded to again drive the car, this time hitting a car parked behind her. *See Tr.* at 82-83, 165 (Cont’d Jury Trial, May 3, 2018). This further establishes Lessard’s recklessness. There is no reasonable probability the improper comments made by the prosecution would have changed the outcome of Lessard’s conviction for Reckless Driving with Property Damage.

b. Driving While Under the Influence

[23] Unlike Lessard’s conviction for Reckless Driving with Property Damage, we find that the prosecution’s improper statements affected Lessard’s substantial rights regarding her conviction for Driving While Under the Influence. The evidence of Lessard’s guilt on this charge was not

overwhelming, and the prosecution directly tied its improper comments to this charge. To be found guilty of driving while under the influence, the prosecution had the burden of proving, among other things, that Lessard was impaired by alcohol. *See* 16 GCA § 18102 (2005); *see also Manila*, 2005 Guam 6 ¶ 40. The evidence that the People submitted to prove this element was not nearly as overwhelming as the evidence regarding Lessard’s recklessness in getting behind the wheel of an unroadworthy vehicle. The People, for example, did not elicit any evidence that Lessard consumed more than two drinks on the night in question, and no chemical testing was admitted showing that Lessard was under the influence at the time of the incident. There is competing evidence regarding whether Lessard attempted but could not complete a breathalyzer test because of her injuries, or whether she refused a test because she admitted she was over the legal limit.

[24] The strongest evidence put forth by the prosecution to prove Lessard’s intoxication was that Lessard failed a field sobriety test. The field sobriety test, however, is the evidence that would have been directly called into question by the testimony from the physician who purportedly treated Lessard for a concussion. This lack of testimony from the treating physician, or other evidence that Lessard suffered a concussion, is what was highlighted by the prosecution’s improper comments. By drawing attention to the prosecution’s constitutionally-infirm interpretation of the “weaker and less satisfactory evidence” instruction and then “specifically citing the evidence that it believed [the defendant] should have presented, the prosecution emphasized the error.” *Aldan*, 2018 Guam 19 ¶ 30. This increases the likelihood that Lessard’s substantial rights were affected. *See id.* Here, we find there is a reasonable probability that, based upon the prosecutor’s comments, the jury shifted the burden to Lessard to

prove she was *not* intoxicated in violation of her Fifth Amendment right to a presumption of innocence.

[25] The People assert that other jury instructions mitigated any potential harm to Lessard. We, however, rejected essentially the identical argument in *Aldan*: “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.” *Id.* ¶ 28. “[T]he existence of . . . curative instructions is not dispositive” where the prosecution draws “an inference of guilt” from a defendant’s “failure to present contradictory evidence” to that presented by the prosecution. *Cruz*, 2016 Guam 15 ¶ 29 (analyzing prosecutorial misconduct under harmless error standard). In light of our recent decision in *Aldan*, and on the facts of this case, there is a reasonable probability that the jury would have acquitted Lessard on the charge of Driving While Under the Influence had the prosecution not improperly attempted to shift the burden of proof onto Lessard regarding elements of that charge.

[26] Finally, the prosecution’s statements impugned the integrity of the legal system “by eroding fundamental protections related to the burden of proof and a defendant’s rights and responsibilities at trial.” *Aldan*, 2018 Guam 19 ¶ 32. While reversal under plain error review is permissive, not mandatory, we use our discretion and vacate Lessard’s conviction for Driving While Under the Influence because the “weaker and less satisfactory evidence” jury instruction, coupled with the improper comments of the prosecution, effectively denied Lessard due process.³

³ Lessard has also raised claims of evidentiary error and a due process violation related to the trial court’s purported failure to admit her medical records into evidence. Lessard’s counsel, however, never actually attempted to move the medical records into evidence. *See* Tr. at 57-65 (Cont’d Jury Trial, May 3, 2018). Where a party “d[oes] not offer [a document] into evidence and secure a ruling from the court as to its admissibility,” that party “waive[s] any error by the court in its exclusion.” *Parker v. Parker*, 593 S.W.2d 857, 860 (Tex. Civ. App. 1980); *see also Moff v. State*, 131 S.W.3d 485, 489 (Tex. Crim. App. 2004).

V. CONCLUSION

[27] We **AFFIRM** Lessard's conviction for Reckless Driving with Property Damage, **VACATE** Lessard's conviction for Driving While Under the Influence, and **REMAND** for further proceedings not inconsistent with this Opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice