IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

PAUL JOHN SANTOS,
Defendant-Appellant.

Supreme Court Case No.: CRA17-008
Superior Court Case No.: CF0488-14

OPINION

Cite as: 2020 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2018
Hagåtña, Guam

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

MARAMAN, C.J.:

[1] Defendant-Appellant Paul John Santos appeals from a final judgment convicting him of multiple counts of Criminal Sexual Conduct, Bribery, Official Misconduct, and Abetting Prostitution. For the reasons stated herein, we vacate Santos's convictions for one count of First Degree Criminal Sexual Conduct, for Third Degree Criminal Sexual Conduct, and for Bribery, and we affirm the remainder of the convictions that Santos challenges.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Santos was a police officer with the Guam Police Department ("GPD"). The Federal Bureau of Investigation ("FBI") received a complaint that the victim, K.M., had been sexually assaulted by a GPD officer. Two FBI agents met with K.M. at the hotel where she was staying. The agents took K.M. to the Healing Hearts Crisis Center to have a sexual assault kit done, where the examination showed lacerations on her labia minora. After the examination, the agents took K.M. back to the hotel, and she consented to their search of her room. The agents recovered a used condom; subsequent testing identified K.M.'s DNA on the exterior and Santos's DNA on the interior of the condom.

[3] Hotel employees provided the agents with the number of the GPD vehicle at the hotel on the night K.M. was assaulted, and the vehicle was later verified to have been assigned to Santos. Witnesses identified Santos in the hotel's surveillance video and indicated Santos had specifically asked hotel staff about K.M.'s room.

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

[4] K.M. testified that Santos was in uniform when he came to her hotel room and that he told her she could go to jail for prostitution. She testified that she told Santos she was trying to earn money to get home and that he responded that "it would be a shame if [she] didn't make it home." Transcripts ("Tr.") at 50 (Jury Trial, Dec. 20, 2016). She said that Santos also told her, "if I take you to jail, then you'll never see your family again." *Id.* at 51. According to K.M., Santos then asked her what she would do to prevent this from happening, to which K.M. replied, "Whatever you want." *Id.* at 52. K.M. testified that at this point Santos began to undress. After they had both undressed, Santos directed her to sit on the bed, then grabbed the back of her hair and guided her face towards his penis. K.M. said that Santos was violent and that he hurt her. After oral sex, Santos put on a condom and engaged in sexual intercourse with K.M. from behind. During the sexual intercourse, Santos inserted his fingers into her anus. K.M. said that the sexual intercourse was violent and that Santos "kept telling [her] he was doing [her] a favor[,] . . . that [she] should be grateful because he was doing [her] a favor." *Id.* at 59. K.M. stated that Santos did not pay her and that she would not have had sex with him if he had not been a police officer.

[5] The FBI agents interviewed Santos at the Guam airport upon his return from the Philippines. The agents provided warnings under both *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Miranda v. Arizona*, 384 U.S. 436 (1966), before discussing the incident with Santos. Santos signed the *Garrity* Notice of Rights form and waived his *Miranda* rights. Santos said that he had received an anonymous tip of prostitution and had gone to the hotel based on that tip. Santos confirmed that he was in uniform when he went to the hotel and that he had his badge on. He also confirmed that he was on patrol at the time. Santos admitted to having sex with K.M., but said that it was consensual and that she initiated it. He denied telling K.M. he

would arrest her unless she had sex with him. He told the agents he did not pay K.M. Santos told agents he told K.M., before her allegedly initiating the sexual contact, "I'm going to summon you to the precinct." Tr. at 71 (Jury Trial, Dec. 19, 2016). When asked why K.M. "initiated" the sexual contact, Santos theorized that "maybe she feels that if she starts touching me . . . she can get away with it." *Id.* at 69. He also told the agents that K.M. was "already assuming she's going to be arrested" and that's why she started crying "because she felt she's under arrest or something." *Id.* at 76. Santos stated that K.M. had performed oral sex on him, that they had engaged in sexual intercourse, and that he had touched her breast.

[6] Santos was charged with: (1) three counts of First Degree Criminal Sexual Conduct ("CSC") (as a First Degree Felony) involving personal injury to the victim and the use of force or coercion; (2) three counts of First Degree CSC (as a First Degree Felony) under circumstances involving the commission of another felony; (3) two counts of Second Degree CSC (as a First Degree Felony) involving personal injury to the victim and the use of force or coercion; (4) two counts of Second Degree CSC (as a First Degree Felony) under circumstances involving the commission of another felony; (5) Bribery (as a Third Degree Felony); (6) two counts of Official Misconduct (as a Misdemeanor); and (7) Abetting Prostitution (as a Misdemeanor). After the Government closed its case, Santos moved to acquit on both counts of the Third Charge, both counts of the Fourth Charge, the second count of the Sixth Charge, and the Seventh Charge. The trial court granted the motion as to both counts of the Third Charge, but denied the motion as to the other charges. The jury found Santos guilty of: one count of Third Degree CSC, as an included offense of First Degree CSC (Charge One – Count One); three counts of First Degree CSC (Charge One – Count Two, Charge Two – Counts One and Two); one count of Second Degree CSC (Charge Four – Count One); Bribery (Charge Five); two counts of Official

Misconduct (Charge Six – Counts One and Two); and Abetting Prostitution (Charge Seven). The jury acquitted Santos of the remaining charges. After the verdict, Santos filed a Motion for Judgment of Acquittal, which the court denied.

[7] The trial court sentenced Santos to twenty-one years' incarceration. Santos timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-135 (2020)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] In reviewing a trial court's denial of a motion to suppress, we review the court's findings of fact for clear error and its conclusions of law *de novo*. *See People v. Cundiff*, 2006 Guam 12 ¶ 14. We review the voluntariness of a waiver of *Miranda* rights *de novo*. *People v. Hualde*, 1999 Guam 3 ¶ 19.

[10] We *sua sponte* raise whether Santos waived his objections to the indictment by failing to raise this issue in a pre-trial motion. *See People v. White*, 2005 Guam 20 ¶ 14 (raising waiver issue *sua sponte*). Under 8 GCA § 65.15, "objections based on defects in the indictment" must be raised before trial. 8 GCA § 65.15(b) (2005); *see also White*, 2005 Guam 20 ¶ 14. Failure to comply with the timeliness requirements of section 65.15 results in a waiver of those objections, unless the defendant can show good cause. 8 GCA § 65.45 (2005); *see also White*, 2005 Guam 20 ¶ 14.

[11] "Issues of statutory interpretation, such as defining a continuing course of conduct and merger of offenses, are reviewed *de novo*." *People v. Diaz*, 2007 Guam 3 ¶ 10.

IV. ANALYSIS

A. The Trial Court Did Not Err in Denying Santos's Motion to Suppress

[12] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V; *see also* 48 U.S.C.A. § 1421b(d), (u) (Westlaw through Pub. L. 116-130 (2020)). "The Fifth Amendment privilege against self-incrimination prohibits the prosecution from using statements stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards to secure that privilege." *People v. Rasauo*, 2011 Guam 1 ¶ 24. Such safeguards include the practice of giving a *Miranda* warning, *see* 384 U.S. at 444, or a *Garrity* warning, *see* 385 U.S. at 496-97. In *Garrity*, the U.S. Supreme Court prevented entities from "us[ing] the threat of discharge to secure incriminatory evidence against an employee." 385 U.S. at 499. The Court ruled that when an employee faces the choice "between self-incrimination or job forfeiture," his statements are deemed categorically coerced, involuntary, and inadmissible in subsequent criminal proceedings. *Id.* at 496-97.

[13] "[A] suspect may waive his Fifth Amendment privilege [against self-incrimination], 'provided the waiver is made voluntarily, knowingly and intelligently.'" *Hualde*, 1999 Guam 3 ¶ 20 (quoting *Miranda*, 384 U.S. at 444). "[T]he voluntary, knowing and intelligent nature of a *Miranda* waiver is to be gleaned from the totality of the circumstances, which includes 'the background, experience and conduct of the defendant.'" *People v. Angoco*, 2007 Guam 1 ¶ 37 (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 13). The prosecution bears the burden of proving by a preponderance of the evidence that a defendant made a voluntary, knowing, and intelligent waiver of his right against self-incrimination. *Miranda*, 384 U.S. at 475; *United States v. Smith*, 821 F.3d 1293, 1304 (11th Cir. 2016); *Sangalang*, 2001 Guam 18 ¶ 13. Before a court determines whether a defendant's testimony was coerced within the meaning of *Garrity*,

the defendant "must show that he subjectively believed that he would lose his job if he refused to answer questions and that his belief was objectively reasonable. A subjective belief is not objectively reasonable unless it derived from actions of the governmental unit." *United States v. Waldon*, 363 F.3d 1103, 1112 (11th Cir. 2004) (citations omitted); *see also United States v. Cook*, 526 F. Supp. 2d 1, 7 (D.D.C. 2007); *United States v. Stein*, 440 F. Supp. 2d 315, 328 (S.D.N.Y. 2006).

[14] FBI agents questioned Santos after giving both *Miranda* and *Garrity* warnings. Santos argues that the trial court erred in denying his motion to suppress the statements he made to the agents because the statements were not given freely and voluntarily; rather, they were made under threat of his silence being used against him in administrative proceedings. Santos contends this threat was included in the FBI's *Garrity* warning, in direct violation of *Garrity*.

[15] If Santos subjectively believed he was compelled to respond to the FBI agents' questions or else face termination, this belief was not objectively reasonable. There are several variations of *Garrity* warnings that governmental entities have used. *See United States v. Goodpaster*, 65 F. Supp. 3d 1016, 1030-31 (D. Or. 2014) (collecting model warnings). Santos argues that the *Garrity* warning at issue was itself in direct violation of *Garrity* because of the inclusion of the phrase: "your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case." Record on Appeal ("RA"), tab 28 at Ex. 1 (Mot. Suppress, Mar. 16, 2015). Warnings including this identical phrase are sufficient and not coercive. *See, e.g.*, *United States v. Palmquist*, 712 F.3d 640, 644-45 (1st Cir. 2013); *United States v. Perelman*, 737 F. Supp. 2d 1221, 1225, 1228 (D. Nev. 2010); *Abdallah v. Napolitano*, 909 F. Supp. 2d 196, 199 n.3, 199-200 (W.D.N.Y. 2012); *Criswell v. State*, 45 N.E.3d 46, 52-53 (Ind. Ct. App. 2015). Moreover, Santos has not argued or shown that a GPD officer's silence

would support an adverse action by GPD.[2] The warning itself states, "you cannot be discharged from your employment solely for remaining silent." RA, tab 28 at Ex. 1 (Mot. Suppress). The U.S. Supreme Court ruled in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), that similar facts did not evidence "an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege [against self-incrimination]." 425 U.S. at 317-18. Accordingly, the *Garrity* warning here was sufficient and not coercive, and it was not objectively reasonable for Santos to have the subjective belief he would lose his job if he did not cooperate.

[16] Santos also argues that the People have not met their burden of establishing waiver. We disagree. In their opposition to Santos's motion to suppress, the People attached as exhibits both the signed *Garrity* form and *Miranda* waiver form. In their filing, the People included a recording of the FBI's questioning of Santos and highlighted that when the agents were reading Santos the *Garrity* form, Santos stated, "I understand, I understand, I read people their rights every day." RA, tab 33 at 2 (People's Opp'n to Mot. Suppress, Apr. 29, 2015). These factual findings do not rise to the level of clear error. Therefore, the trial court did not err in denying Santos's motion to suppress, as Santos voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege against self-incrimination.

B. The Trial Court Erred in Convicting Santos of Both First Degree CSC under the Second Charge and Bribery

[17] Santos argues that he cannot be convicted of two counts of First Degree CSC under the Second Charge because the acts of sexual penetration occurred during the course of committing

[2] This fact distinguishes this case from those cited by Santos in support of his contention that he was coerced. *See, e.g.*, *McKinley v. City of Mansfield*, 404 F.3d 418, 423 (6th Cir. 2005) (employee's silence would constitute violation of employer's rules and regulations); *United States v. Friedrick*, 842 F.2d 382, 396 (D.C. Cir. 1988) (refusal to answer could result in disciplinary action, including dismissal); *United States v. Camacho*, 739 F. Supp. 1504, 1509 (S.D. Fla. 1990) (provision of city code provided "that a civil servant who invokes the Fifth Amendment and refuses to answer or provide information which may bear on his/her fitness to hold a job, would be fired"); *Goodpaster*, 65 F. Supp. 3d at 1029 (regulation would have justified firing of employee if employee remained silent); *State v. Mzhickteno*, 658 P.2d 1052, 1053-54 (Kan. Ct. App. 1983) (refusal to answer would subject employee to departmental discipline).

Bribery, thereby constituting a continuing course of conduct. "Issues of statutory interpretation, such as . . . merger of offenses, are reviewed *de novo*." *Diaz*, 2007 Guam 3 ¶ 10.

[18] Although Santos contends that a continuing course of conduct analysis is appropriate here, we disagree. Under 9 GCA § 1.22(e), a defendant cannot be convicted of more than one offense if "the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses." 9 GCA § 1.22(e) (2005). The wording of 9 GCA § 1.22(e) is identical to Model Penal Code § 1.07(1)(e). *Compare* 9 GCA § 1.22(e), *with* Model Penal Code § 1.07(1)(e) (2018). The Comment to section 1.07 of the Model Penal Code explains the reason for this section: "Subsection (1)(e) deals with a continuing course of conduct prohibited *by a single statute*. It provides that only one conviction is proper based upon a single uninterrupted course of such behavior, unless the statute prescribes that specific periods constitute separate offenses." Model Penal Code § 1.07 cmt. 2(e) (1985) (emphasis added). Here, the alleged continuing course of conduct is prohibited by two statutes, and neither offense is defined as a continuing course of conduct; consequently, section 1.22(e) does not apply.

[19] The applicable section is 9 GCA § 1.22(a), under which a defendant cannot be convicted of more than one offense if "one offense is included in the other as defined in § 105.58 of the Criminal Procedure Code." 9 GCA § 1.22(a). Under 8 GCA § 105.58(b)(1), an offense is an included offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." 8 GCA § 105.58(b)(1) (2005).[3]

[20] As charged, First Degree CSC has the elements of: (1) intentionally (2) engaging in sexual penetration where (3) the penetration occurred under circumstances involving the

[3] The other two subsections of 8 GCA § 105.58(b) are inapplicable here, as 8 GCA § 105.58(b)(2) relates to inchoate offenses and 8 GCA § 105.58(b)(3) relates to offenses that differ only as to the seriousness of injury or culpability. *See* 8 GCA § 105.58(b).

commission of another felony, namely, Bribery. *See* 9 GCA § 25.15(a)(3) (as amended by Guam Pub. L. 32-012:2 (Apr. 11, 2013)); RA, tab 91 at 2-3 (2d Superseding Indictment, Oct. 6, 2016). As charged, Bribery has the elements of: (1) intentionally (2) soliciting a benefit from another person (3) as consideration for performance of an official function. *See* 9 GCA § 49.30 (2005); RA, tab 91 at 4 (2d Superseding Indictment). First Degree CSC possesses a distinct element from Bribery because it requires the prosecution prove that a defendant "engage[d] in sexual penetration." 9 GCA § 25.15(a)(3). Bribery, as charged, contains no such requirement. The question that must be answered is whether Bribery contains a separate factual element from First Degree CSC.

[21] In *People v. Camacho*, 2015 Guam 37, we defined when an underlying felony is an included offense. We noted that in *People v. Aguirre*, 2004 Guam 21, we had held that an underlying felony in an aggravated murder charge was an included offense. *Camacho*, 2015 Guam 37 ¶ 21. We elaborated this holding was supported by Guam's aggravated murder statute requiring proof that the underlying felony was committed or that its commission was attempted. *Id.* ¶ 22 (highlighting the following language from 9 GCA § 16.30(a)(2): "*during the commission* or attempt to commit any felony" (quoting *Angoco v. Bitanga*, 2001 Guam 17 ¶ 13)). By contrast, we found that an underlying felony in a kidnapping charge was not an included offense because Guam's kidnapping statute did not require that the essential elements of the underlying felony be proven. *Id.* ¶¶ 22-23 (highlighting the following language from 9 GCA § 22.20(a)(2): "*facilitat[ing] commission* of any felony or flight thereafter" (alteration in original) (emphasis added) (quoting 9 GCA § 22.20(a)(2) (2005))).

[22] Under 9 GCA § 25.15(a)(3), a person is guilty of First Degree CSC if he engages in sexual penetration with the victim and the "sexual penetration occurs under circumstances

involving the commission of any other felony." 9 GCA § 25.15(a)(3). The indictment followed this language and charged Santos with First Degree CSC for engaging in sexual penetration with another where the sexual penetration "occurred under circumstances involving the commission of another felony, namely, bribery." RA, tab 91 at 2-3 (2d Superseding Indictment). The statute requires proof that the underlying felony was committed or, in other words, that the essential elements of the underlying felony be proven. *See, e.g.*, *People v. Manila*, 2015 Guam 40 ¶¶ 46-47 (ruling there was insufficient evidence of an underlying felony to support a First Degree CSC conviction for a sexual penetration that occurred "under circumstances involving the commission of any other felony"); *see also People v. Lockett*, 814 N.W.2d 295, 304 (Mich. Ct. App. 2012) (per curiam). Therefore, under *Camacho*, Bribery, as charged here, is an included offense of First Degree CSC. The trial court erred in convicting Santos of both Bribery and First Degree CSC under the Second Charge.[4]

C. The Trial Court Erred in Convicting Santos of Both First Degree CSC under Count Two of the First Charge and First Degree CSC under Count Two of the Second Charge for the Same Act of Penetration

[23] Although not raised by Santos, the People concede that the trial court erred in convicting and sentencing Santos of First Degree CSC under both Count Two of the First Charge and Count Two of the Second Charge because the charges relate to the same penetration. We agree.

[24] "Where an indictment charges two violations of the same statute for seemingly related conduct, our multiplicity analysis is twofold. We must first determine 'what act the legislature intended as the "unit of prosecution" under the statute.'" *People v. Martin*, 2018 Guam 7 ¶ 15 (quoting *People v. San Nicolas*, 2001 Guam 4 ¶ 13). We must then "determine whether 'the conduct underlying each violation involves a separate and distinct act.'" *Id.* ¶ 16 (quoting *United*

[4] Because we vacate Santos's conviction for Bribery, we need not address the issues, raised by Santos, concerning the sufficiency of the evidence and jury instructions on the Bribery charge. *See* Appellant's Br. at 15-21 (Sept. 15, 2017).

States v. Technic Servs., Inc., 314 F.3d 1031, 1046 (9th Cir. 2002), *overruled in part on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010)). Title 9 GCA § 25.15 reads, in part: "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and if any of the following circumstances exists." 9 GCA § 25.15(a). The legislature intended each sexual penetration, "however slight," as the "unit of prosecution." *Martin*, 2018 Guam 7 ¶ 18; *see also People v. Johnson*, 279 N.W.2d 534, 537-38 (Mich. 1979) (holding that one sexual penetration accomplished through multiple aggravating circumstances constitutes one offense of First Degree CSC).

[25] "In determining whether the conduct underlying the separate counts involved separate and distinct acts, we look to the indictment." *Martin*, 2018 Guam 7 ¶ 19. Looking to the indictment, Santos was charged with First Degree CSC for *the same act* of sexual penetration—intercourse—under two separate legal theories: "force or coercion" in the First Charge and "involving the commission of another felony" in the Second Charge. RA, tab 91 at 2-3 (2d Superseding Indictment). Therefore, the conduct underlying the separate counts did not involve separate and distinct acts, and the trial court violated the Double Jeopardy Clause of the Fifth Amendment in convicting and sentencing Santos under both Count Two of the First Charge and Count Two of the Second Charge for the same act of sexual penetration.

[26] When we find that a defendant's protection against double jeopardy has been violated, we reverse and dismiss the conviction of the lesser offense. *See People v. Afaisen*, 2016 Guam 31 ¶¶ 52-53. Here, the offenses are of equal weight. We therefore exercise our discretion in vacating the First Degree CSC conviction under Count Two of the Second Charge. *See Johnson*, 279 N.W.2d at 538.

D. The Trial Court Erred in Convicting Santos of Both First Degree CSC and Third Degree CSC for the Same Act of Fellatio

[27] Santos was convicted of Third Degree CSC as an included offense of First Degree CSC under Count One of the First Charge for fellatio by force or coercion. He also was convicted of First Degree CSC under Count One of the Second Charge for the same act of fellatio but "under circumstances involving the commission of another felony." *See* RA, tab 91 at 2 (2d Superseding Indictment); RA, tab 124 (Verdict Form 4, Dec. 29, 2016); *see also* 9 GCA § 25.15. We hold that Santos could not be convicted or sentenced for both Third Degree CSC and First Degree CSC for the same act of sexual penetration for two reasons. First, assuming—without deciding—that Third Degree CSC is an included offense of First Degree CSC, Santos cannot be convicted or punished for both the greater and the lesser offense for the same act of sexual penetration.[5] *See Aguirre*, 2004 Guam 21 ¶ 18 ("[A] defendant may be prosecuted for multiple offenses arising from the same conduct if the conduct establishes the commission of more than one offense. However, if the offenses are included offenses, the defendant cannot be convicted of more than one offense."); 9 GCA § 1.22(a).

[28] Second, if Third Degree CSC is not an included offense of First Degree CSC, then Santos cannot be convicted or sentenced for Third Degree CSC because the indictment did not charge Santos with Third Degree CSC. In effect, the conviction for Third Degree CSC would have constituted a constructive amendment to the indictment, which we have held to be reversible error. *See People v. Songeni*, 2010 Guam 20 ¶ 25 ("Convictions on crimes not charged in the indictment constitute 'constructive amendments' to indictments, which have been found by

[5] This comports with our holding in Part IV.C. above, because if the jury had instead found Santos guilty of both fellatio-related charges of First Degree CSC (rather than found him guilty of First Degree CSC for one charge and Third Degree CSC on the other charge), we would have determined that only one First Degree CSC conviction can stand under the unit-of-prosecution analysis because the charges stemmed from the same act of fellatio.

federal courts to be reversible error as they violate both the Fifth and Sixth Amendments to the Constitution of the United States."); *id.* ¶ 26.

[29] For these reasons, we vacate Santos's conviction and sentence for Third Degree CSC under Count One of the First Charge.

V. CONCLUSION

[30] Based on the foregoing, we: (1) **AFFIRM** the trial court's denial of Santos's motion to suppress because his Fifth Amendment privilege against self-incrimination was not violated; (2) **VACATE** Santos's conviction for bribery because bribery, as charged, was an included offense of First Degree CSC; (3) **VACATE** Santos's conviction for First Degree CSC under Count Two of the Second Charge because the trial court violated double jeopardy in convicting and sentencing Santos of First Degree CSC under both Count Two of the First Charge and Count Two of the Second Charge for the same act of sexual penetration; and (4) **VACATE** Santos's conviction for Third Degree CSC under Count One of the First Charge for the same act of fellatio as his conviction for First Degree CSC under Count One of the Second Charge because it was either an included offense of his First Degree CSC conviction, or if not an included offense, the conviction for Third Degree CSC constituted a constructive amendment to the indictment. We **REMAND** for entry of a new judgment not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice