IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JONOVAN MICHAEL LAITAN CRUZ,
Defendant-Appellant.

Supreme Court Case No.: CRA19-002
Superior Court Case No.: CF0240-17

OPINION

Cite as: 2020 Guam 11

Appeal from the Superior Court of Guam
Argued and submitted on August 23, 2019
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Jonovan Michael Laitan Cruz appeals from a final judgment convicting him of one count of Second Degree Robbery (as a Second Degree Felony) in violation of 9 GCA § 40.20(a)(3), in addition to the special allegation of Possession or Use of a Deadly Weapon in Commission of a Felony, in violation of 9 GCA § 80.37. For the reasons below, we vacate the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In March 2017, the R U Game Room in Dededo was robbed by two men, one of whom was shown from surveillance footage to be armed with a knife and the other with a police-style baton. A witness working at a nearby minimart heard someone call out that the R U Game Room was being robbed. The witness saw two individuals flee the scene in a maroon or red car. At some point after officers from the Guam Police Department ("GPD") arrived on scene, the manager of R U Game Room determined that $6,244 was taken during the robbery.

[3] The cashier at the R U Game Room, Phil Ogo, did not testify at trial but was interviewed after the incident by GPD Officer Angel Santos. During the interview, Santos and Ogo reviewed surveillance footage of the incident with the assistance of another R U Game Room employee, Jason Rivera. From the video and interviews conducted by GPD, a description of the two suspects emerged. One man was described as weighing approximately 150 pounds, with a muscular build and armed with a police billy-club. The second man was described as thin, with a distinct crescent-

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

shaped scar on the right side of his head, and armed with a knife. R U Game Room employee Rivera recognized the suspect with the scar as a regular customer, whom he later identified as Cruz.

[4] Two days after the robbery, Rivera noticed Cruz enter the R U Game Room and called GPD. GPD then arrived at R U Game Room and took Cruz into custody after advising him of his rights. GPD Officer Edgar Tiamzon interviewed Cruz, who admitted to being at the gameroom with his brother Joshua Cruz ("Joshua") in the afternoon of the same day as the robbery, but he did not admit to being at the gameroom that night.

[5] About a month after the R U Game Room robbery, while GPD Officer Eric Asanoma was investigating a string of different robberies that took place between March and April 2017, GPD executed two search warrants covering multiple locations. The first search warrant covered Cruz's vehicle, a Toyota 4Runner, and the adjoining homes of Cruz and his brother Joshua. The second search warrant covered the homes and vehicles of suspects in allegedly unrelated robberies. During execution of the second warrant, at the home of a certain A.J. Toves (a target of the second warrant), Officer Asanoma's colleague Officer Jan Dizon discovered a police-style baton matching the description of the device used in the R U Game Room robbery. Officer Asanoma knew that Cruz was a suspect in the R U Game Room robbery, and after discovery of the police-style baton, he apprehended Cruz and took him into custody.

[6] After his arrest, Cruz was indicted on charges of robbery and theft, with special allegations for use of a deadly weapon in the form of a knife in each case. The case went to trial. At the beginning of trial, the People explained that they intended to introduce evidence of the other robberies because they felt it was necessary to show how the police discovered the police-style baton while executing the second search warrant related to those robberies. Cruz objected to the

admission of this evidence, arguing it was prejudicial and that the jury might conclude he was guilty on an improper basis; the trial court denied his objection. Cruz renewed his objection when the evidence was introduced at trial, but the GPD investigation into the unrelated robberies was introduced along with evidence related to how the police-style baton was discovered by GPD.

Before the jury was instructed, defense counsel proposed Jury Instruction 3G, which reads:

> The Defendant is under no obligation to present any evidence. The Government is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.
>
> If weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the government, the evidence offered should be viewed with distrust.

Record on Appeal ("RA"), tab 81 at 7 (Def.'s Proposed Jury Instrs., June 14, 2018); *see also* Transcript ("Tr.") at 5 (Jury Trial, June 14, 2018). After discussion with the parties—and over Cruz's objection—the Superior Court decided on using different language for the second paragraph of the instruction:

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

Tr. at 10-15 (Jury Trial, June 14, 2018); RA, tab 88 (Jury Instrs., June 19, 2018). This was the instruction read to the jury.

[7] After jury deliberations, Cruz was found guilty of the charges in the amended indictment, including the special allegations attached to each charge. At Cruz's sentencing, the People moved to dismiss the charge of theft and the special allegation attached thereto, because of this court's opinion in *People v. Afaisen*, 2016 Guam 31 ¶¶ 52-53. The Superior Court granted the motion. Cruz thereafter filed a timely appeal.

II. JURISDICTION

[8] 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. 116-142 (2020)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] We review a trial court's evidentiary decisions for abuse of discretion. *People v. Perez*, 2015 Guam 10 ¶ 19; *People v. Roten*, 2012 Guam 3 ¶ 13. Similarly, "[w]here a defendant objected to a particular jury instruction at trial, courts view the instruction in the context of the delivered jury instructions as a whole and reverse only for an abuse of discretion." *People v. Songeni*, 2010 Guam 20 ¶ 9. "An abuse of discretion results where the sentence 'is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision.'" *People v. Manibusan*, 2016 Guam 40 ¶ 12 (quoting *People v. Joshua*, 2015 Guam 32 ¶ 33).

[10] When no objections to jury instructions are made at trial, we review for plain error. *People v. Aldan*, 2018 Guam 19 ¶ 11 (citing *People v. Gargarita*, 2015 Guam 28 ¶ 11). "Reversal under a plain error standard is granted only when: '(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Id.* ¶ 13 (quoting *Gargarita*, 2015 Guam 28 ¶ 11); *see also People v. Lessard*, 2019 Guam 10 ¶ 7. Absent plain error, we will not reverse a conviction. *People v. Diego*, 2013 Guam 15 ¶ 23.

IV. ANALYSIS

[11] On appeal, Cruz raises two issues: (1) an error relating to an instruction on "weaker and less satisfactory evidence" and (2) the admission of evidence pertaining to alleged crimes

committed by other individuals. *See* Appellant's Br. at 6, 13-14 (May 20, 2019). Following the issuance of our opinion in *People v. Lessard*, 2019 Guam 10, which considered a similar instruction on "weaker and less satisfactory evidence," Cruz's appellate counsel withdrew briefed arguments regarding the instruction.[2] In the interest of justice, we must exercise our discretion to revive consideration of the jury instruction utilizing plain error review.[3] *See* 8 GCA § 130.50(b) (2005) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *see also People v. Martin*, 2018 Guam 7 ¶ 11 ("This court has discretion to review plain errors or defects affecting substantial rights, even when not raised at trial."). Though such discretion is to be used sparingly, we exercise it here given the substantial rights at issue and because a miscarriage of justice would occur if the court leaves the instructional error unaddressed.

[12] As both parties have correctly identified, the crux of the instructional error issue is its similarity or dissimilarity to the error we found in *People v. Aldan*, 2018 Guam 19—a case where we addressed the constitutionality of a similar "weaker and less satisfactory evidence" instruction. *See* Appellant's Br. at 13-14; Appellee's Br. at 22-23 (July 3, 2019). The trial court here instructed the jury:

> The Defendant is under no obligation to present any evidence. The Government is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

[2] We do not find *Lessard* to be particularly instructive because that opinion considered a "weaker and less satisfactory evidence" instruction that limited the burden of producing evidence to "the People." 2019 Guam 10 ¶¶ 8-10. Rather, we find *People v. Aldan* to be controlling because there we considered a "weaker and less satisfactory evidence" instruction that, like here, applied equally to both the prosecution and defense. 2018 Guam 19 ¶ 7.

[3] Appellate counsel's apparent misreading of *Lessard* and subsequent withdrawal of the instructional error issue would have deprived Cruz of a meritorious argument on appeal. While we address the instructional error in this opinion, attorneys should carefully review our precedent to provide effective counsel to their clients.

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

RA, tab 88 (Jury Instrs.); Tr. at 21 (Jury Trial, June 15, 2018). By comparison, the jury instruction we considered in *Aldan* read:

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence, or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.
>
> If weaker and less satisfactory evidence is offered by a party, when it appears that stronger and more satisfactory evidence was within the power of a party, the evidence offered should be viewed with distrust.

2018 Guam 19 ¶ 7.

[13] In *Aldan*, we disapproved of including the "weaker and less satisfactory evidence" instruction when charging the jury in a criminal case, except in rare circumstances. *Id.* ¶ 15. We cited with approval *People v. Cuff*, 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*." 55 P. 407, 408 (Cal. 1898) (emphasis added); *Aldan*, 2018 Guam 19 ¶ 18. The *Cuff* court cited only one proper occasion for giving the instruction, and that is when the testimony of an accomplice is given. *See Aldan*, 2018 Guam 19 ¶ 18; *Cuff*, 55 P. at 408. Likewise, we relied upon *State v. Mains* for the proposition "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)).

[14] 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," although we did not unpack the entire universe of all such

potential circumstances. *Id.* ¶ 20.[4] We specifically left open whether a "weaker and less satisfactory evidence" instruction is 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. While it may be better practice to avoid the instruction altogether in criminal cases, our focus in this opinion is on the constitutionality of the instruction in this case." *Id.* In refraining from resolving this question, we identified a handful of times when courts have permitted giving such an instruction. *See id.* ¶ 20. We cited several prior cases where such an instruction was deemed permissible because the instruction was "a modified version applying *only* to the government." *Id.* ¶ 20 (emphasis added) (citing *State v. Willits*, 393 P.2d 274, 276 (Ariz. 1964) (in banc); *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). These cases stand for the proposition that the instruction may be permissible in these circumstances: (1) where the government spoiled or destroyed evidence; (2) where the defendant asserts an affirmative defense for which he or she bears the burden of proof; or (3) where a modified version applying only to the government is given.

[15] Here—similar to *Aldan*—none of these exceptions apply. *See id.* ¶ 21. "Since none of the potential exceptions to the general prohibition against this instruction apply, the error in providing the instruction is even more evident." *Id.* The paragraph that incorporated the "weaker and less satisfactory" language applied to *both* Cruz and the government; Cruz asserted no affirmative defenses, and the instruction was not limited to accomplice testimony or the government's destruction of evidence.

[4] "While we need not determine whether these other exceptions are the law in Guam, they are helpful to demonstrating how rarely the 'weaker and less satisfactory evidence' instruction should be given in criminal cases." *Aldan*, 2018 Guam 19 ¶ 15.

[16] The People argue that Jury Instruction 3G differed significantly from the instruction in *Aldan* in two ways: (1) the defendant asked for the instruction; and (2) the first paragraph stated that the defendant had no obligation to present evidence. Appellee's Br. at 22-23. The People's first assertion is incorrect, because Cruz did *not* ask for the *second* paragraph of Jury Instruction 3G—instead, as noted above, he requested the following language in the latter half of Jury Instruction 3G, which expressly applies *only to the government*:

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

RA, tab 81 at 7 (Def.'s Proposed Jury Instrs.) (emphasis added); *see also* Tr. at 5-15 (Jury Trial, June 14, 2018). The People's second assertion attempts to frame Jury Instruction 3G as if the first paragraph's statement that "[t]he Defendant is under no obligation to present any evidence" cures the second paragraph in Jury Instruction 3G. However, the first paragraph of Jury Instruction 3G is not so different from the *other* instructions given in *Aldan*, which—although not addressed in our opinion—stated that the defendant had neither an obligation to testify nor an obligation to produce any evidence. *See Aldan*, 2018 Guam 19 ¶¶ 28-29. And in *Aldan*, we did not find this language cured the "weaker and less satisfactory evidence" error. *See id.* ¶¶ 13-32. Accordingly, it was an error for the trial court to give the "weaker and less satisfactory evidence" instruction, and for the same reasons we stated in *Aldan*, the error was clear and obvious under current law.[5]

[17] Because the error was both clear and obvious, we next consider whether the instruction affected Cruz's substantial rights and if reversal is necessary to prevent a miscarriage of justice. In *Aldan*, we strongly stated:

[5] In their supplemental brief, the People admitted that the trial court erred under *Aldan* in providing the instruction. *See* Appellee's Suppl. Br. at 2 (Feb. 17, 2020).

> The right to remain silent, the presumption of innocence, and the right to a fair trial are all substantial protections enshrined in the Constitution and the Organic Act of Guam. A criminal defendant has a right to "sit on his hands." In other words, a fundamental tenet of our criminal justice system is that a defendant may put the government to proof of its case and need not put on any evidence.

2018 Guam 19 ¶ 26 (internal citations omitted). These fundamental protections are undermined when an instruction on "weaker and less satisfactory evidence," that applies to both the prosecution and defense, invites members of the jury to distrust and question a defendant's choice not to present evidence.

[18] Like the defendant in *Aldan*, Cruz did not take the stand in his defense, nor did he call any witnesses to testify or present any affirmative defenses. Rather, his trial counsel presented arguments based only on the testimony and evidence solicited during the prosecution's case-in-chief. While the government did not emphasize the erroneous instruction in its closing summation, it left members of the jury to question whether Cruz should have put on stronger or more satisfactory evidence despite his right and choice to "sit on his hands" and not present any evidence. This includes potential testimony that could have been solicited from other individuals alleged to be involved in the robbery. Given these circumstances, the instruction affected the verdict because it improperly drew attention to Cruz's decision not to put forth evidence and invited the jury to distrust his decision not to testify. Moreover, simply instructing the jury that the defendant is under no obligation to present evidence does not, on its own, cure language that "directs jurors to doubt the credibility of a criminal defendant simply based on his exercise of his right not to present evidence." *Id.* ¶ 32.

[19] While reversal for plain error is not mandatory, *see id.* ¶ 31 (citing *People v. Felder*, 2012 Guam 8 ¶ 36), we believe it is proper here to maintain the integrity of the judicial process,

especially in those circumstances "when the trial court fails to properly instruct the jury on fundamental aspects of a crime and evidence." *Id.*

[20] We caution the trial courts and litigants that using a "weaker and less satisfactory evidence" instruction is strongly disfavored, particularly when such an instruction is not limited to the government's case and applies to both the prosecution and defense. *See Lessard*, 2019 Guam 10 ¶ 11 (stating that a "weaker and less satisfactory evidence" instruction will "often confuse rather than clarify the burdens in a criminal prosecution"). Because we reverse the conviction on instructional error, we need not reach the issue of whether evidence regarding other alleged crimes was impermissibly admitted during trial.[6] *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33; *People v. Flores*, 2009 Guam 22 ¶ 85.

V. CONCLUSION

[21] For the reasons set forth above, we **VACATE** the judgment of conviction and **REMAND** for proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice

[6] Our decision not to address the remaining issue on appeal should not be interpreted to signal approval of the trial court's evidentiary ruling. We make no pronouncements as to this issue other than to state that the trial court may consider the admissibility of such evidence upon retrial under the circumstances then presented.