IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

CHARLEY WIA,
aka Charlie Wia, aka Charles Wia, aka John Mirah,
aka Tom Tom, aka Jeremy Ludwig, aka John Doe, aka John Martin,
Defendant-Appellant.

OPINION

Cite as: 2020 Guam 17

Supreme Court Case No.: CRA18-005
Superior Court Case No.: CF0062-17

Appeal from the Superior Court of Guam
Argued and submitted on March 12, 2019
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 Charlie Wia appeals from a judgment of conviction finding him guilty of Aggravated Assault (As a Second Degree Felony) with a Special Allegation of Possession or Use of a Deadly Weapon in the Commission of a Felony, and Resisting Arrest (As a Misdemeanor). He argues that the trial judge's failure to disqualify herself from the case constituted plain error; that the evidence was insufficient to satisfy the Resisting Arrest charge; that the trial court should have applied the Justice Safety Valve Act of 2013 when sentencing him; and that sentencing him to pay both a fine and restitution was illegal. For the reasons below, we affirm in part, vacate in part, and remand with directions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Charges and Sentence

[2] A grand jury indicted Wia on the following charges: Aggravated Assault (As a Second Degree Felony), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; Aggravated Assault (As a Third Degree Felony), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; and Resisting Arrest (As a Misdemeanor).

[3] At the close of the People's case-in-chief, Wia moved for a judgment of acquittal on all charges. The trial court denied the motion. A jury convicted Wia of the charges of Aggravated Assault (as a Second Degree Felony), the Special Allegation accompanying that charge, and Resisting Arrest. A day before his sentencing hearing, Wia moved for application of the Justice

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

Safety Valve Act of 2013. The trial court denied the motion. The court sentenced Wia to: ten years' imprisonment for the aggravated assault charge;[2] five years' imprisonment for the special allegation, to run consecutively to the aggravated assault sentence; and one year of imprisonment for the resisting arrest charge, to run concurrently with the aggravated assault sentence. Wia was given credit for time served. Wia was effectively sentenced to fifteen years of imprisonment.

[4] Besides imprisonment, the court imposed against Wia a fine of $200.00, plus court costs, and restitution. The court did not specify an amount for restitution.

B. Judge Iriarte's Competency

[5] Judge Elyze M. Iriarte presided over the underlying case. On March 14, 2017, about a month after the case was assigned to her, Judge Iriarte filed a Notice Regarding Potential Disqualification, which disclosed that she was related within the third degree of consanguinity to "an Assistant Deputy Attorney General at the Prosecution Division of the Office of the Attorney General,"—namely, Attorney Joseph B. McDonald, who is Judge Iriarte's father's brother (i.e., Judge Iriarte's uncle)—but that it was her understanding that this relative was not directly involved in the prosecution of Wia's case. *See* Record on Appeal ("RA"), tab 19 at 1 (Notice Regarding Potential Disqualification, Mar. 14, 2017). Judge Iriarte stated she intended to continue to preside over the case, but that if any party objected to this, they may invoke the procedure under 7 GCA § 6107 and must file an objection within fourteen days of Judge Iriarte's notice. *Id.* Finally, Judge Iriarte noted that failure to timely object would "amount to a waiver of any objections." *Id.* at 2.

[2] There appears to be a typographical error in this part of the Judgment. As to the aggravated assault charge, the Judgment states that Wia "is sentenced to *five (10*) years of imprisonment." Record on Appeal ("RA"), tab 102 at 1 (Judgment of Conviction, June 14, 2018) (emphasis added). However, when the judgment is read as a whole, it is clear that Wia was sentenced to ten years (and not five) for the aggravated assault charge, because the trial court clearly stated Wia's total incarceration period to be fifteen years. *Id.* at 9; *see also* Tr. at 14 (Jury Trial – Sentencing, May 16, 2018) ("The court sentences the defendant to ten years for the crime of Aggravated Assault . . . .").

[6] Around the end of July 2017, Attorney McDonald was promoted to Chief Prosecutor.[3] In January 2018, the Public Defender Service Corporation—counsel for Wia—began seeking Judge Iriarte's disqualification in all criminal matters. *See People v. Santos*, 2018 Guam 12 ¶ 2. However, at no point did Wia or the People file a statement of objection or otherwise object to Judge Iriarte's continuing to preside over Wia's case. The case proceeded to trial by jury, and Wia was ultimately convicted of nearly all charges and sentenced by Judge Iriarte to a total of fifteen years of imprisonment.

II. JURISDICTION

[7] 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. 116-158 (2020)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[8] We address the standard of our review of Judge Iriarte's competency in Part IV.A. below.

[9] When a defendant raises the issue of sufficiency of the evidence by a motion for judgment of acquittal, we review the trial court's denial of the motion *de novo*. *People v. Song*, 2012 Guam 21 ¶ 26 (citing *People v. Anastacio*, 2010 Guam 18 ¶ 10).

[10] We review the trial court's imposition of a sentence for abuse of discretion, *People v. Joshua*, 2015 Guam 32 ¶ 20, and the legality of a sentence *de novo*, *People v. McKinney*, 2018 Guam 10 ¶ 9 (quoting *People v. San Nicolas*, 2001 Guam 4 ¶ 8).

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[3] The record does not clearly reveal the exact date of Attorney McDonald's promotion to Chief Prosecutor. Wia states Attorney McDonald assumed this position on approximately July 31, 2017. Appellant's Br. at 15 (Sept. 18, 2018). The People do not contest this date. While normally we look to the record itself and do not simply rely on the parties' statements of fact, for the purposes of this opinion, we assume this date to be an accurate approximation.

IV. ANALYSIS

A. Judge Iriarte's Competency

[11] A denial of a motion for a judge's disqualification is normally reviewed for abuse of discretion. *See Ada v. Gutierrez*, 2000 Guam 22 ¶ 10. Here, however, Wia raises the issue of Judge Iriarte's competency for the first time on appeal. Both parties agree that because Wia did not raise the issue below, the question of Judge Iriarte's competency to preside over this case should be reviewed for plain error. Appellant's Br. at 14 (Sept. 18, 2018); Appellee's Br. at 5 (Nov. 1, 2018). They differ on applying the four-prong plain-error test to the specific facts.

[12] Under plain error review, this court does 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." *People v. Bezon*, 2018 Guam 28 ¶ 12 (quoting *People v. Meseral*, 2014 Guam 13 ¶ 16); *see also* 8 GCA § 130.50 (2005) (plain error rule).

[13] Wia argues that our holding in *People v. Santos*, 2018 Guam 12, establishes that Judge Iriarte's continuing to preside over the case was clear error, satisfying the first two prongs of the plain error test. Wia relies on language in *Santos* which questions the propriety of Judge Iriarte's notice—specifically, her requirement that an objecting party file a statement of objection within fourteen days to preserve the objection, rather than the judge automatically disqualifying herself and then seeking affirmative waivers from all parties. Appellant's Br. at 15-16. According to Wia, under our holding in *Santos*, because Judge Iriarte was related within the third degree to the Chief Prosecutor, she was automatically disqualified from presiding over the case and could continue to preside only after obtaining affirmative agreements from all parties. *Id.* at 15-16.

[14] The People have a different take. They "concede there was error in a technical sense given this court took issue with Judge Iriarte's disqualification procedure in the *Santos* case." Appellee's Br. at 6-7. They do not agree, however, that it is clear or obvious that Judge Iriarte had to recuse herself under the particular facts of this case. *Id.* at 7. While the People recognize our concerns in *Santos* regarding the objection procedure in Judge Iriarte's notice, the People characterize this language as dicta, as the issue was not before the court in *Santos*. *Id.* at 10.

[15] The People argue that under current law—even post-*Santos*—Wia had an avenue to object if he believed Judge Iriarte did not properly disqualify herself. *Id.* (citing 7 GCA § 6107 (2005)). The People contend that Wia's failure to invoke this procedure after notice of Judge Iriarte's relationship to Attorney McDonald constituted a waiver of the judge's disqualification. *Id.* at 13. Besides Wia's failure to object within the deadline set in Judge Iriarte's notice, the People point to his failure to object throughout the duration of the case—specifically, that Wia did not object at any point between the judge's disclosure and trial, a period of over a year. *Id.* Even after the Public Defender Service Corporation changed course and sought disqualification of Judge Iriarte in all criminal cases, Wia never revisited Judge Iriarte's competency or sought her disqualification from his case. *Id.* at 13-14. The People argue that all these facts amount to a waiver of Judge Iriarte's disqualification. *Id.* at 14.

[16] In *Santos*, we were presented with five certified questions from Judge Iriarte regarding her competency to preside over criminal cases, absent waiver, given her relationship to the Chief Prosecutor. In a *per curiam* opinion, we held that "7 GCA § 6105(b)(5)(B) requires a Superior Court judge, related in the third degree to the Chief Prosecutor, to disqualify herself in any criminal proceeding brought by the Office of the Attorney General of Guam." *Santos*, 2018 Guam 12 ¶ 8. This disqualification, however, is not absolute. *Id.* ¶ 13. A judge may "continue to preside if, after

full disclosure, all parties agree to having the judge sit in the proceedings." *Id.* (citing 7 GCA § 6105(b)).

[17] At the end of our opinion, we expressed concern about Judge Iriarte's procedure for disqualification. *Id.* ¶ 15. We stated that Judge Iriarte's "notice appears to be improper because it places the onus on the parties to *object* to Judge Iriarte sitting in the proceedings." *Id.* ¶ 16. We noted that 7 GCA § 6105(b) is "explicit in its requirement that a judge disqualify himself or herself unless, 'following complete disclosure to all parties in the proceeding of the reasons for his or her disqualification, all parties *agree* to having the [j]udge continue to sit in the proceedings.'" *Id.* (quoting 7 GCA § 6105(b)). We continued, "Judge Iriarte's form disqualification notice appears to be improper as it requires parties to *object* to Judge Iriarte sitting rather than first recusing herself and then seeking the *agreement* of the parties." *Id.*

[18] *Santos* did not deal with the precise situation presented here—that is, what happens when the parties, after Judge Iriarte's full disclosure of her relationship to Attorney McDonald, fail to object not only within the deadline in the judge's notice, but at no other time before appeal? Do the parties thereby waive Judge Iriarte's disqualification? Or does the judge's failure to automatically disqualify herself and seek affirmative agreement of the parties give the parties the proverbial "second bite at the apple"? For several reasons, we decline to apply the plain error analysis and hold instead that Wia waived Judge Iriarte's disqualification by waiting to raise the issue for the first time on appeal. *See People v. Katzuta*, 2016 Guam 25 ¶ 21 ("[W]e have discretion to review or disregard an argument raised for the first time on appeal." (quoting *People v. Roten*, 2012 Guam 3 ¶ 37)).

[19] The facts of this case do not perfectly align with those in *Santos*. In that case, we analyzed the matter of Judge Iriarte's competency based upon her relationship to Attorney McDonald while

he served as Chief Prosecutor. Here, the parties gloss over the fact that when Judge Iriarte initially disclosed her relationship to Attorney McDonald, he was not yet the Chief Prosecutor, but rather was an "Assistant Deputy Attorney General at the Prosecution Division." RA, tab 19 at 1 (Notice Regarding Potential Disqualification). Approximately four months later, Attorney McDonald was promoted to Chief Prosecutor. Appellant's Br. at 15. While it does not appear that Judge Iriarte made a second disclosure based on Attorney McDonald's new position, this promotion was clearly known to Wia's counsel, the Public Defender Service Corporation, which moved for Judge Iriarte's disqualification in other cases based on her relationship to the Chief Prosecutor. *See Santos*, 2018 Guam 12 ¶ 2. Neither party argues that Judge Iriarte's omission in disclosing Attorney McDonald's promotion by itself amounted to error; instead, the parties frame their arguments concerning Judge Iriarte's disqualification procedure as if Attorney McDonald was Chief Prosecutor at the time of the judge's disclosure. In any event, regardless of Attorney McDonald's differing roles at the Attorney General's office, our holding that Wia waived Judge Iriarte's disqualification remains the same.

[20] Under a plain reading of 7 GCA § 6105(b), a judge disqualified under one of the several circumstances outlined in subsection (b) must recuse herself from the case unless, following complete disclosure to all parties of the reasons for her disqualification, all parties *expressly* agree to having the judge continue to preside over the case. This has been the practice outlined in the disqualification forms adopted by this court in 2013—specifically, "Form One – Disqualification: 7 GCA § 6106 Memorandum." Form One is to be used where a judge or justice knows of facts which, under 7 GCA § 6105, disqualify her from sitting on a case. The form allows the judge or justice to choose one of two options: continue to sit on the case if all parties file written agreements waiving the disqualification within fourteen days of filing Form One; or simply recuse herself

from the proceedings without seeking waiver of her disqualification. This form follows the reading of section 6105(b) outlined above.

[21] However, it does not appear Judge Iriarte's Notice Regarding Potential Disqualification was meant to be a substitute for Form One. Rather, it appears her notice was meant to be a substitute for "Form Three – Disqualification: Notice of Potentially Disqualifying Facts." That form is used when a judge or justice knows of facts which may be potentially disqualifying under 7 GCA § 6105, but which the judge or justice does not believe warrants her recusal. After fully disclosing these potentially disqualifying facts, the form provides an objection procedure nearly identical to that provided in Judge Iriarte's notice: "A party who wishes to pursue my disqualification based on these facts must file their objection to competency pursuant to 7 GCA § 6107 within fourteen (14) days of the filing of this notice for such objection to be considered timely." From the statements in her notice, it appears that at the time of filing of the notice, Judge Iriarte believed that her relationship to Attorney McDonald—who was not yet the Chief Prosecutor—was not necessarily disqualifying under section 6105 because she understood that her uncle was "not directly involved in the prosecution of this case"—that is, that a conflict wall removed the disqualifying nature of her relationship to Attorney McDonald. *See* RA, tab 19 at 1 (Notice Regarding Potential Disqualification).

[22] In her notice, Judge Iriarte also stated that "a judge shall disqualify herself where a person within the third degree of relationship to a judge is an officer of one of the parties." *Id.* Apparently, Judge Iriarte believed that, besides being potentially disqualifying under the appearance of impropriety standard under section 6105(a), her relationship to Attorney McDonald was potentially disqualifying because he was an "officer" of the Attorney General's ("AG") office. We declined to answer in *Santos* the specific question of whether Judge Iriarte was disqualified

because Attorney McDonald—as Chief Prosecutor—was an officer of one of the parties, instead resting our opinion on our finding that the Chief Prosecutor was "acting as a lawyer in the proceeding" because of his supervisory role over the attorneys in the Prosecution Division of the AG's office.

[23] However, even if Judge Iriarte believed her disqualification was warranted under 7 GCA § 6105(b)(5)(A) and therefore should have filed a Form One memorandum seeking waiver from the parties rather than a Form Three notice of potentially disqualifying facts, it still appears from her statements later in the notice that she believed her disqualification was not warranted because Attorney McDonald was "not directly involved in the prosecution of this case"—in other words, that his lack of direct involvement somehow cured the disqualification. RA, tab 19 at 1 (Notice Regarding Potential Disqualification). Under those circumstances, it was reasonable for her to use a notice akin to Form Three rather than a memorandum akin to Form One. The form disclosed the relevant facts that may call her impartiality into question under section 6105(a) and that may arguably fit one of the disqualifying relationships under 6105(b), and it set forth the procedure should any party wish to object to her competency based on those facts.

[24] The reasons for Judge Iriarte's choice of form aside, under *Santos*, Judge Iriarte's relationship to Attorney McDonald—at least from the time he became Chief Prosecutor—disqualified her from continuing to preside over Wia's case. When Attorney McDonald became Chief Prosecutor, Judge Iriarte did not declare herself disqualified from the case. And assuming Attorney McDonald's position as an Assistant Deputy Attorney General also presented grounds for Judge Iriarte's disqualification under 7 GCA § 6105(b), her notice to the parties was deficient

because she failed to declare herself disqualified and seek waivers from the parties, and instead merely notified the parties of her relationship and asked the parties to file objections.[4]

[25] Although we questioned the propriety of the disqualification procedure in Judge Iriarte's notice in *Santos*, we did not hold that remaining silent under this procedure would *not* constitute a waiver of the judge's disqualification. Title 7 GCA § 6107 provides parties an opportunity to object where a judge "neglects or fails to declare his or her disqualification." 7 GCA § 6107. That is precisely the scenario here. Notwithstanding any deficiencies in Judge Iriarte's disclosure statement and her failure to disclose Attorney McDonald's promotion to Chief Prosecutor, the parties had ample opportunity to object to Judge Iriarte's competency once they were put on notice of her disqualifying relationship. Even if they did not object within the deadline set in her notice, they still had an obligation to object within a reasonable time. *See* 7 GCA § 6107 ("The statement of a party objecting to the Justice or Judge on the ground of his or her disqualification shall be presented at the earliest practicable opportunity after his or her appearance and discovery of the facts constituting the ground of the Justice's or Judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such Justice or Judge.").

[26] In *Van Dox v. Superior Court of Guam*, this court held that "[w]ith respect to the statutory provision requiring that disqualification be urged at the 'earliest practicable opportunity,' the intention 'is clear that failure to comply with the provision constitutes a waiver.'" 2008 Guam 7 ¶ 45 (quoting *Caminetti v. Pac. Mut. Life Ins. Co. of Cal.*, 139 P.2d 930, 933 (Cal. 1943)). Normally, this means a party must object to a judge's competency "prior to any hearing before the

[4] We need not determine whether Attorney McDonald's position as an Assistant Deputy Attorney General of the Prosecution Division was in fact a disqualifying relationship under 7 GCA § 6105(b) warranting Judge Iriarte's automatic recusal unless waived by the parties. As we explain further, Wia ultimately waived any disqualification by failing to object within a reasonable time.

challenged judge in the matter," or, in some instances, before the matter is submitted for decision. *Id.* ¶ 46 (citations omitted). "[A] statement may be untimely if a party waits until the eve of trial to request disqualification based on information made known months earlier." *Id.* (citing *People v. Panah*, 107 P.3d 790, 824 (Cal. 2005)). This rule "rests on the principle that a party may not gamble on a favorable decision." *Id.* (quoting *Urias v. Harris Farms, Inc.*, 285 Cal. Rptr. 659, 664 (Ct. App. 1991)).

[27] Here—assuming Attorney McDonald's position as an Assistant Deputy Attorney General disqualified Judge Iriarte from presiding over Wia's case—the parties were notified of the grounds for Judge Iriarte's disqualification about a month after the indictment and her assignment to the case. Four months later, Attorney McDonald was promoted to Chief Prosecutor. Although Judge Iriarte did not make another disclosure about Attorney McDonald's new role, counsel on both sides of this case knew about Attorney McDonald's promotion. Trial was held over a year after Judge Iriarte disclosed her relationship to Attorney McDonald and months after Attorney McDonald's promotion. During this period before trial, Wia appeared before the judge numerous times for various motion and status hearings, but he never raised the issue of her competency. Also during that period, the Public Defender changed its policy and sought Judge Iriarte's disqualification in all criminal cases, rather than waive her disqualification as it had done in the past. *See Santos*, 2018 Guam 12 ¶ 2. Wia did not thereafter move for Judge Iriarte's disqualification in line with the Public Defender's new stance. Instead, the matter went through a full jury trial and sentencing, with Judge Iriarte presiding throughout. It does not matter that the grounds raised in Judge Iriarte's notice pertained to Attorney McDonald's position as an officer of a party rather than that he was acting as a lawyer in the proceeding, or that she believed the fact that Attorney McDonald was not directly involved in the prosecution of the case cured the

otherwise disqualifying relationship, or even that she failed to disclose Attorney McDonald's promotion to Chief Prosecutor. What matters is that Wia knew of Judge Iriarte's relationship to Attorney McDonald and Attorney McDonald's subsequent promotion yet chose to remain silent rather than voice his objections "at the earliest practicable opportunity." Under *Van Dox*, Wia's objection was untimely because he knew of the facts giving rise to Judge Iriarte's disqualification but waited to raise the issue on appeal.

[28] In a recent opinion, we held that parties can waive a judge's disqualification by remaining silent, at least under the context of 7 GCA § 6105(a) disqualifications. In *San Union, Inc. v. Arnold*, the trial court disclosed in open court that the President of San Union, Inc. was his former realtor and had helped him find his home ten years before. 2017 Guam 10 ¶ 6. The case proceeded with no objection from defendant Arnold; he raised the judge's competency for the first time on appeal. We ruled that Arnold "agreed to allow the trial judge to hear the case" by remaining silent. *Id.* ¶ 25. This holding was based on an adoption of the "silence-as-waiver" rule used by federal courts in the context of 28 U.S.C. § 455(a), the counterpart to 7 GCA § 6105(a) (requiring disqualification where a judge's impartiality might reasonably be questioned). *See id.* ¶¶ 25-27. We stated that "Guam law does not speak explicitly of waiver, but does require that 'all parties agree.'" *Id.* ¶ 27 (quoting 7 GCA § 6105(a), (b)). Rather than interpreting "agree" to mean that the parties must expressly agree to waive the judge's disqualification, we held that remaining silent constitutes waiver, at least in the context of 7 GCA § 6105(a), "[t]o avoid the possibility of parties 'l[ying] in wait, raising the recusal issue only after learning the court's ruling on the merits.'" *Id.* (quoting *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)).

[29] In a footnote, we noted that we were not addressing "the question whether even the most egregious conflicts are waivable through silence," quoting as an example section 6105(b)'s allowance of a judge to continue to sit—upon agreement of all parties—"[w]here he or she has a personal bias or prejudice concerning a party." *Id.* ¶ 27 n.2 (quoting 7 GCA § 6105(b)(1)). We noted that under federal law, subsection (b) disqualifications are not waivable—whether by silence or by express agreement. *Id.* By contrast, Guam law *does* allow waiver of subsection (b) conflicts. 7 GCA § 6105(b) ("[B]ut if, following complete disclosure . . . all parties agree to having the Judge continue to sit in the proceedings, [the judge] need not disqualify . . . .").

[30] Without deciding whether the most egregious conflicts are waivable through silence, we adopt the silence-as-waiver rule for section 6105(b) disqualifications on a case-by-case basis. While silence may not be enough to count as waiver in certain egregious cases, we determine that the conflict in this case was not egregious. Wia was aware of the grounds for Judge Iriarte's disqualification; the judge disclosed her relationship to Attorney McDonald when he was still an Assistant Deputy Attorney General, and Wia's counsel knew of Attorney McDonald's promotion to Chief Prosecutor and moved for the judge's disqualification on this ground in other criminal cases. Wia was informed of the procedure to object to Judge Iriarte's competency—something that the trial court in *San Union* did not appear to do when disclosing his potentially disqualifying relationship to San Union. Wia was provided ample opportunity to be heard; he could have objected within the fourteen days provided by the judge's notice and by statute, or within a reasonable time after the judge's deadline, or within a reasonable time after Attorney McDonald's promotion to Chief Prosecutor. Yet he chose to lie in wait for over a year, allowing Judge Iriarte to sit through the entire trial and sentencing process before finally raising her competency on

appeal. This is the type of scenario the silence-as-waiver rule tries to avoid. *See San Union*, 2017 Guam 10 ¶ 27 (quoting *Phillips*, 799 F.2d at 1472).

[31] For all these reasons, Wia waived Judge Iriarte's disqualification by failing to timely object.

B. Sufficiency of Evidence for Resisting Arrest Charge

[32] Wia appeals the trial court's denial of his motion for judgment of acquittal on the resisting arrest charge. Appellant's Br. at 18. He makes two primary arguments of insufficiency: first, that he was charged with resisting arrest "[o]n or about February 6, 2017," when the evidence shows he was arrested on February 7, 2017;[5] and second, that the evidence was insufficient to show that Wia would have reasonably understood that he was being arrested, or to show that his actions of squatting rather than lying down amounted to resisting arrest. *Id.* at 19-21.

[33] The People contend that the evidence sufficiently proved the charge of resisting arrest, namely: that Wia ran away when officers arrived at the scene; that he was instructed to stop running, but instead of stopping, he tripped and fell down; that rather than follow the officer's instruction to lie on the ground with his hands outstretched, Wia got into a squatting position; that he placed his hand inside his pocket; that he refused to comply with the officer's instruction to place his hands behind his back; and that because of his non-compliance, the officer tased him. Appellee's Br. at 21-22.

[34] As to the inconsistency about the date alleged in the indictment for resisting arrest and the date of arrest alleged by the evidence, the People argue that the one-day difference satisfies the

[5] The parties use inconsistent years in their brief. First, Wia says that he was charged for resisting arrest on February 6, 2017, and that the evidence shows he was actually arrested on February 7, 2018. Appellant's Br. at 19. He later uses February 6, 2018, as the date for resisting arrest alleged in the indictment, with the arrest taking place on February 7, 2018. *Id.* at 21. The People say the arrest occurred on February 7, 2018, and then later say it occurred on February 7, 2017. Appellee's Br. at 21-23. From the record, the accurate year is 2017: specifically, February 6, 2017, for the date alleged in the indictment, RA, tab 9 at 2-3 (Indictment, Feb. 17, 2017), and February 7, 2017, as the arrest date according to the testimony at trial, *see* Tr. at 18, 31-32 (Jury Trial Day 1, Apr. 23, 2018).

definition of "on or about" provided to the jury in Jury Instruction 3F, and this instruction is supported by Guam case law. Appellee's Br. at 23 (citing *People v. Diaz*, 2007 Guam 3 ¶ 40).

[35] In determining whether there is sufficient evidence to sustain a defendant's conviction, 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. *People v. Song*, 2012 Guam 21 ¶ 26 (citing *People v. Tennessen*, 2009 Guam 3 ¶ 14); *see also* 8 GCA § 90.21 (2005) ("No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."). "This is a 'highly deferential standard of review.'" *Song*, 2012 Guam 21 ¶ 26 (quoting *People v. Tenorio*, 2007 Guam 19 ¶ 9). "[T]he People 'must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.'" *Id.* ¶ 28 (quoting *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

[36] "It is not the province of the court, in determining [a motion for a judgment of acquittal], 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." *Id.* ¶ 29 (quoting *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)); *see also People v. Jesus*, 2009 Guam 2 ¶ 61 ("The appellate court cannot merely substitute its judgment for that of the jury."). The court is concerned with the existence or nonexistence of evidence, not its weight, *Song*, 2012 Guam 21 ¶ 29 (citing *State v. Weston*, 625 S.E.2d 641, 648 (S.C. 2006)), and this standard remains constant even when the People rely exclusively on circumstantial evidence, *id.* (citing *State v. Elmore*, 628 S.E.2d 271, 273 (S.C. Ct. App. 2006)).

[37] Wia was charged with resisting arrest in violation of 9 GCA § 55.35, which provides:

> A person is guilty of a misdemeanor when, with intent to prevent or delay the arrest of himself of [sic] another person by one whom he knows or reasonably should know to be a peace officer acting in an official capacity, he prevents or delays that arrest by the use or threat of force or by physical obstruction. For

> purposes of this Section, a peace officer shall include apprehending officers designated under Article 2 of 10 GCA Chapter 51, as well as peace officers as defined under 9 GCA § 1.70.

9 GCA § 55.35 (2005).

[38] At trial, Guam Police Department Officer Joshua Togawa testified that he responded to a call that the suspect to an aggravated assault that occurred the day before was seen walking on the Okkodo pipeline towards Route 28. Tr. at 98 (Jury Trial – Day 1, Apr. 23, 2018). When Officer Togawa "got towards that location," he overheard on the radio his supervisor say, "There he is, he's running, he's running." *Id.* Officer Togawa then observed a male matching the description of the suspect running away from another officer and towards Officer Togawa's patrol car. *Id.* Officer Togawa testified that he then got out of his car and instructed the male to stop running, at which point the male tripped and fell face forward toward the ground. *Id.* at 99. As he approached the suspect, Officer Togawa instructed the suspect to lie on the ground with his hands outstretched. *Id.* The suspect then got into a squatting position, and as Officer Togawa got closer, the suspect reached into his pocket. *Id.* Officer Togawa then used his Taser on the suspect and instructed him to put his hands behind his back, which he did. *Id.* Officer Togawa testified that he was trained to use the Taser when a suspect does not comply with his instructions and where he perceives the suspect to be a threat to the officer or others. *Id.* at 99-100. Officer Togawa said he used the device when the suspect reached into his pocket because the officer did not know whether the suspect had a weapon or other harmful item. *Id.* at 100. Officer Togawa also testified that he asked the suspect to put his hands behind his back, but the suspect did not do so "until after I had to drive stun him." *Id.*; *see also id.* at 104 ("I instructed him to place his hands behind his back, in which he refused to comply. And I stunned him after I saw him using his left hand trying to reach into his pocket.").

[39] On redirect examination, Officer Togawa further testified that when he arrived at the scene of the arrest, it looked like the suspect was trying to "sprint away" from Officer Certeza (the officer first to arrive). *Id.* at 115.

[40] Wia argues no evidence showed that the officers instructed him to stop or halt before he started to run, and "[h]ence, objectively, Wia reasonably might not have understood that he was being arrested." Appellant's Br. at 20. Wia further argues that "[f]leeing from, or even resisting a stop or pat/frisk does not constitute the crime of resisting arrest." *Id.* at 20-21 (citing *Commonwealth v. Grant*, 880 N.E.2d 820, 823 (Mass. App. Ct. 2008)).

[41] In *Commonwealth v. Grant*, the police were following the defendant's vehicle when he suddenly stopped the car and ran away. 880 N.E.2d at 822. Without telling the defendant to stop or that he was under arrest, the officers gave chase on foot. *Id.* After a lengthy chase, during which the defendant was observed concealing a gun in a backyard grill, the officers cornered the defendant, drew their guns, and ordered him to the ground, to which he submitted. *Id.* at 822-23.

[42] On the defendant's sufficiency challenge, the court noted that "the crime [of resisting arrest] is committed, if at all, at the time of the 'effecting' of an arrest." *Id.* at 823 (quoting *Commonwealth v. Grandison*, 741 N.E.2d 25, 35 (Mass. 2001)). "An arrest is effected when there is (1) 'an actual or constructive seizure or detention of the person, [2] performed with the intent to effect an arrest and [3] so understood by the person detained.'" *Id.* (quoting *Grandison*, 741 N.E.2d at 35). The court continued that an objective standard is used for determining whether a defendant understood he was being arrested: "whether a reasonable person in the defendant's circumstances would have so understood." *Id.* (citing *Commonwealth v. Cook*, 644 N.E.2d 203; *Commonwealth v. Obershaw*, 762 N.E.2d 276 (2002)).

[43] The *Grant* court held that under the facts of that case, the evidence was insufficient to meet the standard for resisting arrest. First, the court determined that when the defendant first fled, "he had not been actually or constructively seized or detained" because the officers did not tell him to stop or inform him he was under arrest, and no evidence showed that he knew of the arrest warrant when he fled his car. *Id.*

[44] The court also determined that proof of the third element was lacking because other than chasing the defendant, "the officers did not communicate with him in any way until right before he submitted." *Id.* at 824. Thus, the court found that a reasonable defendant under those circumstances would not have understood he was under arrest until the officers finally communicated to him to get on the ground. *Id.* Because the defendant immediately submitted after given this instruction, the evidence was insufficient to prove he resisted arrest. *Id.*

[45] We are persuaded by Massachusetts' approach and adopt the test in *Grant* about when an arrest is "effected." Applying the *Grant* test, the evidence is sufficient to prove Wia resisted arrest. Even if this court were to agree with Wia that his running did not count towards proving resisting arrest because there is no evidence he was told to stop before he ran, it is clear that once he was told to stop, tripped, and told to lie on the ground with his hands outstretched, the first factor—seizure or detention—was met.

[46] The second factor—that the seizure or detention was performed with the intent to effect an arrest—is met through Officer Togawa's testimony he reported to the scene in response to a call that the suspect to an earlier aggravated assault was in that area. Under these circumstances, it was clear Officer Togawa's instructions sought to effectuate an arrest, not merely a stop or a frisk.

[47] The final factor—whether a reasonable person in Wia's circumstances would have understood that he was being arrested—was met at the point Wia was on the ground and was

instructed to lie down, to stretch his arms, and ultimately to put his hands behind his back. A reasonable person in those circumstances would have understood these instructions were to arrest him, not merely to stop him or give him a pat-down. Once all three effecting-arrest factors were met—seizure, with intent to effect an arrest, and so understood by the defendant—Wia still did not submit to the officer's instructions to lie down, stretch his arms out, or put his hands behind his back, instead squatting and reaching his hand into his pocket. Such non-compliance constituted resisting arrest under *Grant*.

[48] Viewing the evidence in the light most favorable to the People, a rational trier of fact could have found the essential elements in Guam's resisting arrest statute beyond a reasonable doubt. Wia's intent to prevent or delay his arrest can be reasonably inferred by the circumstances—he did not comply with the officer's commands until he was finally tased. Circumstantial evidence also shows Wia knew or reasonably should have known that the person attempting the arrest was a police officer acting in his official capacity, as Officer Togawa testified that he arrived at the scene in his patrol car. Finally, a rational trier of fact could have found Wia delayed his arrest either by threat of force when he reached into his pocket, or by physical obstruction by positioning his body in such a way to make arrest more difficult. *See People v. Flores*, 1998 Guam 25 ¶ 15 (finding sufficient evidence of resisting arrest from defendant's use of his body to delay arrest, specifically, positioning himself on the floor against a wall and tensing his body so marshals were unable to handcuff him).

C. Denial of Motion to Apply Justice Safety Valve Act of 2013

[49] Wia next argues that the trial court abused its discretion by denying his motion to apply the Justice Safety Valve Act of 2013. This Act allows a judge to depart from the mandatory minimum sentence in certain situations:

> Notwithstanding any other provision of law, the court may depart from the applicable mandatory minimum sentence if the court finds substantial and compelling reasons on the record that, in giving due regard to the nature of the crime, the history and character of the defendant, and his or her chances of successful rehabilitation, that:
>
> (a) imposition of the mandatory minimum sentence would result in substantial injustice to the defendant; and
>
> (b) the mandatory minimum sentence is *not* necessary for the protection of the public.

9 GCA § 80.39.1 (added by Guam Pub. L. 33–022:2 (May 7, 2015)). Applying the Act is limited, however, by these exceptions:

> Section 80.39.1 of this Article *shall not* apply if the court finds that:
>
> (a) the individual has a conviction for the same offense during the ten (10)-year period prior to the commission of the offense;
>
> (b) the individual intentionally uses a firearm in a manner that causes physical injury during the commission of the offense; and
>
> (c) the individual was the leader, manager, or supervisor of others in a continuing criminal enterprise.

9 GCA § 80.39.2.

[50] Wia argues that the trial court abused its discretion in denying his motion for relief under the Act because he met the factors under section 80.39.1, and he did not fall under one of the exceptions provided in section 80.39.2. The People respond that Wia is essentially arguing that he is *entitled* to a departure under section 80.39.1 if he meets the conditions in that statute and does not fall under one of the exceptions in section 80.39.2. This is a fair assessment of Wia's argument.

[51] A trial court abuses its discretion when it "exercises its discretion 'to an end not justified by the evidence . . . .'" *People v. Perez*, 2004 Guam 4 ¶ 7 (quoting *People v. Tuncap*, 1998 Guam 13 ¶ 12). Under this standard, this court does not substitute its judgment for that of the trial court and instead reviews the decision to determine whether it was "based on an erroneous conclusion

of law or whether 'the record contains no evidence on which the [trial court] could have rationally based the decision.'" *Id.* (quoting *Lujan v. Lujan*, 2002 Guam 11 ¶ 7).

[52] Under this standard, we find no abuse of discretion. First, Wia ignores the operative word in the Act: "the court *may* depart from the applicable mandatory minimum sentence . . . ." 9 GCA § 80.39.1 (emphasis added). The plain meaning of section 80.39.1 is not that a trial court *must* depart from the mandatory minimum sentence if the defendant meets all of the factors allowing application of 80.39.1 and does not fall under one of the exceptions under 80.39.2. Such a reading would render the word "may" meaningless, stripping the trial judge of any discretion *not* to depart from the mandatory minimum.[6] Under the plain language of the statute, a trial court has the discretion not to depart from the mandatory minimum even where the defendant successfully shows he satisfies the standards under section 80.39.1.

[53] Furthermore, the court did not simply decline to apply the Act after finding Wia met the factors allowing such application. Rather, the court determined that Wia did not meet the standard under the Act and explicitly found no substantial and compelling reason that imposition of the mandatory minimum would result in substantial injustice to the defendant or that the mandatory minimum is unnecessary to protect the public. Tr. at 5-6 (Sentencing, May 16, 2018). After noting that the protection of the public was the court's primary concern, the court pointed to the evidence showing that Wia committed an unprovoked attack upon the victim in a place of business, striking the victim with a rock, and then ran away and tried to evade police. *Id.* at 5-6. The court found that under these circumstances, there is no substantial injustice to Wia to serve the mandatory

[6] By contrast, the safety-valve provision in the federal sentencing guidelines is not discretionary; it mandates federal judges to apply the safety valve once the court determines that the defendant meets the qualifications. 18 U.S.C.A. § 3553(f) ("[T]he court *shall* impose a sentence pursuant to the guidelines . . . *without regard* to any statutory minimum sentence . . . . " (emphases added)); *see also United States v. Hendricks*, 171 F.3d 1184, 1186 (8th Cir. 1999).

minimum, and insufficient showing that the protection of the public is not at risk if Wia received less than the mandatory minimum. *Id.* at 6. These findings have support in the evidence.

[54] For these reasons, we hold that the trial court did not abuse its discretion when it denied Wia's motion to depart from the mandatory minimum sentence under the Justice Safety Valve Act.

D. Sentence of a Fine and Restitution

[55] Wia's last point of contention is that his sentence to pay both a fine and restitution is illegal under 9 GCA § 80.50. That statute provides:

> A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding:
>
> (a) Ten Thousand Dollars ($10,000.00), when the conviction is of a felony of the first or second degree;
>
> . . . .
>
> (f) Any amount specifically authorized by statute. The restitution ordered paid to the victim shall not exceed his loss.

9 GCA § 80.50 (2005). Wia essentially argues that under the plain language of the statute—i.e., the disjunctive "or"—he can be sentenced to pay either a fine *or* restitution, but not both. Appellant's Br. at 24-25.

[56] The People agree that it was error to sentence Wia to the fine and restitution, but not because he was ordered to pay both—the People believe this is allowed under Guam law—but because there were no findings regarding his ability to pay either. Appellee's Br. at 30-31. The People argue that even if there was a sentencing error, the error should be deemed harmless because the order of restitution is effectively for the amount of $0.00, there having been no formal monetary amount for restitution requested by the People. Appellee's Br. at 33. Indeed, the Judgment does not specify an amount for restitution, just an amount for the fine ($200.00). For this reason, we decline to address whether a defendant may be sentenced to pay both a fine and

restitution under 9 GCA § 80.50 because here, the lack of a restitution amount effectively means that Wia does not owe restitution. On remand, the trial court shall vacate the part of the judgment sentencing Wia to pay restitution.

[57] We decline to address the issue—raised by the People in their brief—of the alleged lack of a finding of Wia's ability to pay either a fine or restitution. Wia did not raise the issue in his opening brief, and he does not engage the issue in his reply brief other than in passing. *See* Appellant's Reply Br. at 16 (Nov. 14, 2018). Thus, we determine the issue has been waived.

V. CONCLUSION

[58] Because Wia's sentence to pay restitution did not include a dollar amount, we **REMAND** to the trial court to **VACATE** the restitution portion of Wia's sentence. We **AFFIRM** the judgment in all other respects.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice