IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

PAUL CASTRO ALDAN,
Defendant-Appellant.

Supreme Court Case No.: CRA19-010
Superior Court Case No.: CF0776-15

OPINION

Cite as: 2020 Guam 29

Appeal from the Superior Court of Guam
Determined on the briefs submitted December 31, 2019
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Paul Castro Aldan appeals a final judgment of conviction for one count of Theft by Receiving a Motor Vehicle (as a 2nd Degree Felony) in violation of 9 GCA §§ 43.50(a) and 43.20(a). Aldan claims there was prosecutorial misconduct, pointing to four statements he characterizes as the prosecutor either misstating the law or arguing facts not in evidence. For the reasons discussed below, we affirm the conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Aldan was charged with and found guilty of one count of Theft by Receiving a Motor Vehicle (as a 2nd Degree Felony) in violation of 9 GCA §§ 43.50(a) and 43.20(a).

[3] Testimony at trial revealed that Aldan initially lied to the police about his name and Social Security number, was driving a stolen red truck with a fake temporary license plate, and could not produce the vehicle's registration. Additionally, there was a house key in the ignition, the tires, since being stolen, had been replaced by older tires, and the radio and speakers had been removed from the vehicle. There were also items found inside of the vehicle that did not belong to the vehicle's owner, such as a subwoofer, radio, gun with a blade taped to the tip, and bolt cutters.

[4] During closing arguments, the prosecution made these statements:

- Statement 1: "If you believe that Mr. Aldan actually stole the vehicle, you have a guilty verdict, because if he's retained it, that means that he got it for himself, and if he stole it, he's going to know if it's been stolen. All right. So, if you believe it actually -- that he actually is the one who stole it, you have that -- guilty, that's where you're at." Transcript ("Tr.") at 8 (Closing Args. & Verdict, Feb. 17, 2016).

- Statement 2: "He was the one that wanted to get it out of there, because, of course, it's stolen, and he was the one who knew it. He either knew, because he stole it himself . . . ." *Id.* at 41.

- Statement 3: "So if you started thinking, well, there's a lot of things in this truck that look like they're part of other illegal activities, does it make sense then, inference, that the truck itself is stolen? Using a stolen car to actually commit other crimes, is that an inference that makes sense. Possibly a stolen radio, possibly a stolen subwoofer, these parts don't belong to this car, there [sic] just strewn about in the cab." *Id.* at 13.

- Statement 4: "Here's the tools. Whatever this contraption is, some sort of bayonet, bolt cutters, sure, bolt cutters are everyday items that are purchased, but can they also be used to commit crimes?" *Id.*

Aldan objected only to Statement 2, and the trial court overruled the objection. *Id.* at 41.

[5] Aldan was sentenced to five years' imprisonment. He timely filed a notice of appeal.

II. JURISDICTION

[6] 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. 116-223 (2020)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[7] Prosecutorial comments objected to at trial are reviewed under a harmless error standard. *People v. Mendiola*, 2010 Guam 5 ¶ 13 (citing *People v. Moses*, 2007 Guam 5 ¶ 7). "In order for a petitioner to succeed on a claim of prosecutorial misconduct, he must show that the 'prosecutor's "comments" so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *People v. Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). "A harmless error inquiry typically involves analysis of numerous factors, including: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the

wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." *People v. Roten*, 2012 Guam 3 ¶ 41.

[8] When a defendant does not object to prosecutorial comments, we review for plain error. *Mendiola*, 2010 Guam 5 ¶ 11. "Plain error is highly prejudicial error." *Id.* ¶ 14 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11). Under this standard, the defendant must show that "(1) there was an error; (2) the error was clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is required to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.*

IV. ANALYSIS

[9] Aldan claims the four contested statements made during closing arguments constituted prosecutorial misconduct. Appellant's Br. at 10-11 (Nov. 17, 2019). Aldan argues the statements implying he may have stolen the vehicle and that if he did, then he is guilty, are a misstatement of law. *Id.* at 13. Aldan also argues that the references to the items found in the back of the truck and the characterization of those items as proceeds of or tools for illicit conduct amount to prosecutorial misconduct as these were facts not in evidence. *Id.* at 16-17.

A. Misstatements of Law

[10] Aldan argues that the following unobjected-to statement was prosecutorial misconduct:

> If you believe that Mr. Aldan actually stole the vehicle, you have a guilty verdict, because if he's retained it, that means that he got it for himself, and if he stole it, he's going to know if it's been stolen. All right. So, if you believe it actually -- that he actually is the one who stole it, you have that -- guilty, that's where you're at.

Tr. at 8 (Closing Args. & Verdict).

[11] Aldan also alleges it was misconduct for the prosecutor to state: "He was the one that wanted to get it out of there, because, of course, it's stolen, and he was the one who knew it. He

either knew, because he stole it himself, or knew because of all the other . . . ." *Id.* at 41. Aldan did not object to this statement.

[12] Aldan argues that one cannot be guilty of both theft and theft by receiving, and any argument that one may be guilty of both is a misstatement of the law. Appellant's Br. at 13. Aldan argues that because there was no evidence that he actually stole the vehicle, any remarks suggesting he stole the vehicle himself were improper. *Id.*

[13] The People argue that theft is included in theft by receiving, as theft by unlawful taking is a lesser-included offense of theft by receiving. Appellee's Br. at 10-11 (Dec. 17, 2019). The People contend that because of this relationship between the crimes, the prosecutor did not misstate the law when he argued Aldan committed the theft himself. *Id.* at 12. The People argue the statements merely related to the scienter element of the crime, as Aldan would know the vehicle is stolen if he stole the vehicle himself. *Id.* at 13. Thus, the People contend, the statements were sufficiently within the scope of acceptable arguments to make during a closing argument. *Id.*

[14] "[W]hen addressing claims of prosecutorial misconduct, we first determine whether the challenged statements were indeed improper." *People v. De Soto*, 2016 Guam 12 ¶ 63 (alteration in original) (quoting *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000)). If the statement is improper, then we must determine if the statement rises to the level of constitutional violation. *See id.* We assess if the "prosecutor's 'comments' so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Darden*, 477 U.S. at 181).

[15] Title 9 GCA § 43.50(a) defines "theft by receiving stolen property" as when one "intentionally receives, retains or disposes of movable property of another knowing that it has been stolen or believing that it has probably been stolen."[1] 9 GCA § 43.50(a) (2005).

[16] This court has dealt with the compatibility of the "theft" and "theft by receiving stolen property" statutes in *People v. Palisoc*, 2002 Guam 9. In *Palisoc*, we held that dual convictions for theft and theft by receiving are incompatible. *Id.* ¶ 42. "[A] defendant cannot be convicted of both theft and theft by receiving because one who is a thief *cannot* be [sic] also be a receiver."[2] *Id.* (emphasis added). To imply one could be guilty of both "would be in error, not because the same offense is being punished twice under two separate statutes in violation of double jeopardy, but because the two statutes are intended to reach two distinct groups of wrongdoers and thus the dual convictions are inconsistent." *Id.*

[17] One cannot be convicted of both theft and theft by receiving because the statutes are intended to cover two distinct types of thieves: one who takes the property originally, and one who knowingly retains the property. *Id.* By enacting a theft by receiving statute, "[t]he legislative intent was not to expand the offense of theft, but to create a separate crime." *Id.* ¶ 41 (quoting *People v. Jackson*, 627 P.2d 741, 746 (Colo. 1981) (en banc)). One may not be the

[1] This statute was derived from Model Penal Code section 223.6. *See* 9 GCA § 43.50, SOURCE.

[2] This approach is followed by several other jurisdictions. However, there is a split among jurisdictions regarding the nature of theft by receiving statutes. In some jurisdictions, theft by receiving and theft are incompatible only in that one cannot be convicted of both, even though one may be guilty of both. *See, e.g.*, *Altom v. United States*, 454 F.2d 289, 295 (7th Cir. 1971); *United States v. Sharpe*, 452 F.2d 1117, 1119 (1st Cir. 1971) ("[T]here is nothing inconsistent in being involved in the theft and being guilty of possession of stolen goods."); *State v. Underwood*, 668 A.2d 447, 449 (N.J. Super. Ct. App. Div. 1995). Under this alternative approach, and the one the People ask us to adopt, while one may not be convicted of both theft and theft by receiving, the prosecution, when discussing the scienter element of the receiving crime, may imply a defendant committed the initial theft. This court considered and rejected this approach in *People v. Palisoc*, 2002 Guam 9.

original taker of property and also the receiver of that property, at least not for the same act at the same time.[3]

[18] Aldan relies on *Palisoc* in his appeal, citing the case's clear analysis that one may not be convicted of both theft and theft by receiving. Appellant's Br. at 14, 16. We have rejected the assertion that one may have stolen property and also received the same stolen goods. Furthermore, under our receiving statute, a receiver is not the actual thief. *See Palisoc*, 2002 Guam 9 ¶¶ 41-42 (adopting reasoning of other jurisdictions). When the prosecution stated, "So, if you believe it actually -- that he actually is the one who stole it, you have that -- guilty, that's where you're at," Tr. at 8 (Closing Args. & Verdict), the prosecution misstated the law established by *Palisoc*.

[19] As the two statements were improper misstatements of law, we must now assess if these statements have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *De Soto*, 2016 Guam 12 ¶ 63 (quoting *Evaristo*, 1999 Guam 22 ¶ 20). As Aldan objected to the statement implying he himself may have stolen the vehicle, we analyze the effect on the trial under a harmless error analysis. We look to several factors such as "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." *Roten*, 2012 Guam 3 ¶ 41.

[3] It is possible to conceive of situations such as "when there is evidence of complete divorcement between the theft and a subsequent receiving, such as when the thief has disposed of the property and subsequently receives it back in a transaction separate from the original theft"; in such a scenario, one may be convicted of being both the original taker of the property and the receiver of that property. *People v. Jaramillo*, 548 P.2d 706, 759 n.8 (Cal. 1976) (in bank).

[20] While the prosecution did misstate the law, this misstatement did not affect the verdict or imbue the trial with unfairness. After misstating the law, the prosecution stated:

> If you're not sure about that, you can still find him guilty, because it's theft by receiving. Right? You don't have to show that he was actually the one that took this out of Mr. Tom's driveway on the night of the 14th. All you have to do is show that he had it, and that he either knew or probably believed it was stolen.

Tr. at 8 (Closing Args. & Verdict). The prosecution did not seem to rely on or even expect the jury to believe Aldan himself stole the vehicle. There was no direct evidence that it was Aldan himself who took the vehicle from the victim's driveway, but there is circumstantial evidence that Aldan likely knew he possessed a stolen vehicle. These misstatements of law did not deprive Aldan of due process. While there was prosecutorial misconduct, it was a harmless error.

B. Statements Arguing Facts Not in Evidence

[21] Aldan contends certain statements made during closing arguments constituted prosecutorial misconduct because they argued facts not in evidence. During closing arguments, the prosecutor stated:

> So if you started thinking, well, there's a lot of things in this truck that look like they're part of other illegal activities, does it make sense then, inference, that the truck itself is stolen? Using a stolen car to actually commit other crimes, is that an inference that makes sense. Possibly a stolen radio, possibly a stolen subwoofer, these parts don't belong to this car, there [sic] just strewn about in the cab.

Tr. at 13 (Closing Args. & Verdict). The prosecutor continued, "Here's the tools. Whatever this contraption is, some sort of bayonet, bolt cutters, sure, bolt cutters are everyday items that are purchased, but can they also be used to commit crimes?" *Id.*

[22] Aldan argues there was no evidence proving the items in the truck were stolen or used for illegal activities. Appellant's Br. at 16. The People respond that the statements merely asked the

jurors to make reasonable inferences about this evidence, which is permissible in a closing argument. Appellee's Br. at 15-16.

[23] Arguments to a jury must remain within "proper bounds." *United States v. Young*, 470 U.S. 1, 8 (1985). Prosecutors, however, have reasonable latitude in summarizing the evidence and proposing inferences to the jury. *Roten*, 2012 Guam 3 ¶ 38. While a prosecutor may not imply illogical conclusions, a prosecutor may argue reasonable inferences to the jury. *Mendiola*, 2010 Guam 5 ¶ 15; *see also People v. Guerrero*, 2017 Guam 4 ¶ 54.

[24] Prosecutorial misconduct by arguing facts not in evidence may also occur when a prosecutor implies knowledge and access to evidence not presented to a jury or otherwise inadmissible. *See Young*, 470 U.S. at 18-19. Prosecutorial misconduct may occur when a prosecutor insinuates personal knowledge of the defendant's guilt. *See United States v. Bradley*, 917 F.3d 493, 505-06 (6th Cir. 2019).

[25] It is well established in our jurisprudence that arguing facts not in evidence is attorney misconduct. *See, e.g.*, *HRC Guam Co. v. Bayview II L.L.C.*, 2017 Guam 25 ¶ 103. A counsel may "indulge in all fair arguments" but "may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences." *Id.* (quoting *Malkasian v. Irwin*, 394 P.2d 822, 828 (Cal. 1964) (in bank)). In *People v. Mendiola*, for example, we found prosecutorial misconduct when the prosecutor opined about children's truthfulness and ability to make things up. 2010 Guam 5 ¶¶ 21-22. As there had been no admitted testimony on the truthfulness of children, we held the prosecutor's statements to be an improper comment on facts not in evidence. *Id.* ¶ 22.

[26] Aldan relies on *State v. Ly*, 85 P.3d 1200 (Kan. 2004), for his argument condemning the introduction of evidence not in the record. In *Ly*, the prosecutor argued multiple armed intruders entered the victim's room, whereas the testimony indicated only one man had a gun. *Id.* at 1206.

The Kansas Supreme Court found that the prosecutor argued facts never introduced during the trial. *Id.* While this constituted prosecutorial misconduct, the court found the error was not significant enough to impact the verdict. *Id.* at 1206-07.

[27] In *United States v. Young*, 470 U.S. 1 (1985), the prosecutor argued that the evidence suggested the defendant had intended to commit fraud. *Id.* at 19. The Court found the prosecutor's statement permissible, as it was a reasonable inference based on summarized evidence presented to the jury and properly admitted. *Id.*

[28] During Aldan's trial, the prosecutor asked the jury to consider the possibility that a radio and subwoofer in the back seat of the truck—items that did not belong to the vehicle's owner—may have been stolen. The prosecutor also asked the jury to consider the possibility that bolt cutters and a gun with a sharpened tool attached may be used to commit crimes. These statements are logical inferences based on the testimony elicited. Unlike the prosecutor in *Ly* or *Mendiola*, the prosecutor here did not present new material evidence when making these statements. These statements are more akin to those in *Young*, where the prosecutor presented an inference about the evidence based on evidence already properly admitted. It was well established during trial that a subwoofer, radio, bayonet-like gun, and bolt cutters were in the stolen vehicle. The prosecutor, during closing argument, presented the theory these items may have been stolen or potentially used to commit other crimes. The prosecution is permitted wide latitude to present reasonable inferences to the jury, and the prosecution did just that.

[29] During the opening statements and testimony, the prosecution discussed and presented photographic evidence of the items and received testimony from multiple witnesses regarding the evidence. The defense had numerous opportunities to present an alternative explanation as to the nature of these items.

[30] As these statements did not offer new material facts, infer the prosecutor knew information not properly admitted, or present a new theory of the evidence to which the defendant had no opportunity to respond, these statements do not rise to the level of prosecutorial misconduct.

V. CONCLUSION

[31] The first two statements were misstatements of law constituting prosecutorial misconduct, but the error was harmless and did not deprive Aldan of due process. The remaining two statements merely asked the jurors to make reasonable inferences based on the evidence and did not amount to prosecutorial misconduct. For these reasons, we **AFFIRM** the judgment of conviction.

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
F. PHILIP CARBULLIDO
Chief Justice