



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RICKY SANTOS CRUZ,
Defendant-Appellant.

Supreme Court Case No. CRA24-006
Superior Court Case No. CF0120-21

OPINION

Cite as: 2026 Guam 13

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2025
Hagåtña, Guam

Appearing for Defendant-Appellant:
Braddock J. Huesman, *Esq.*
Razzano Walsh & Torres, P.C.
139 Murray Blvd., Ste. 100
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
Christine Santos Tenorio, *Esq.*
Assistant Attorney General
Office of the Attorney General
General Crimes Division
134 W. Soledad Ave., Ste. 301
Hagåtña, GU 96910

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

MARAMAN, J.:

[1] On March 9, 2021, the People charged Ricky Santos Cruz with four counts of Second Degree Criminal Sexual Conduct (“CSC II”). The charges alleged three instances of Cruz touching I.M.’s vagina and one instance of Cruz forcing I.M. to touch his penis on or about the period between January 1, 2015, and May 30, 2016. The indictment added the Special Allegation of Vulnerable Victim to each count, seeking sentencing enhancements under the Vulnerable Victims Act of 2014.

[2] The trial testimony included evidence of an additional, uncharged incident of alleged criminal sexual conduct by Cruz against I.M. The evidence also showed that the five alleged incidents occurred between 2012 and 2016. The jury convicted Cruz on all four counts of CSC II. On appeal, Cruz contends that the discrepancy between the dates alleged in the indictment and those presented at trial—and the introduction of an additional, uncharged incident of alleged criminal sexual conduct—caused confusion in the charges against him. He claims this discrepancy negatively affected his substantial rights by depriving him of proper notice and exposing him to the risk of double jeopardy.

[3] There was no violation of Cruz’s due process rights to notice of the charges against him or his constitutional protection against double jeopardy. We affirm.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Magistrate's Complaint and Indictment

[4] The People filed a magistrate's complaint alleging three counts of CSC II for three instances of Cruz touching I.M.'s vagina in 2015. The declaration of probable cause attached to the magistrate's complaint represented that the allegations were based on I.M.'s report to police that the incidents occurred about six years before, when I.M. was in the fourth grade. The three incidents alleged in the complaint were that (1) Cruz touched I.M.'s vagina when she was in the fourth grade, (2) Cruz touched I.M.'s vagina again the following night while playing a video of an adult male massaging the exposed vagina of a female minor, and (3) Cruz touched I.M.'s vagina again the next night while playing a video of two women having sex with a man.

[5] A grand jury returned an indictment charging Cruz with four counts of CSC II. Three of the four counts alleged that Cruz intentionally touched the primary genital area of I.M., a minor under fourteen years of age, on or about the period between January 1, 2015, and May 30, 2016, in Guam, in violation of 9 GCA § 25.20(a)(1) and (b). The first three counts were identical, except Count Two and its Special Allegation each stated that the underlying incident occurred "*at a time different from Count One above, inclusive,*" Record on Appeal ("RA"), tab 10 at 2 (Indictment, Mar. 9, 2021), and Count Three and its Special Allegation each clarified that the underlying incident occurred "*at a time different from Count One and Count Two above, inclusive,*" *id.* at 3. The fourth count alleged that Cruz "intentionally . . . caus[ed] the hand of [I.M.], a minor under fourteen (14) years of age, to touch his primary genital area, in violation of 9 GCA § 25.20(a)(1) and (b)." *Id.* at 3-4. The indictment added a Special Allegation of Vulnerable Victim to each count and expanded the timeframe alleged in the magistrate's complaint by five months, from

January 1, 2015, through December 31, 2015, to January 1, 2015, through May 30, 2016. *Id.* at 1-4.

B. Cruz’s Motion *In Limine* to Exclude “Prior Bad Acts”

[6] Before trial, Cruz moved *in limine* to exclude any evidence of sex acts involving I.M. that pre-dated the timeframe charged in the indictment, on the grounds that such incidents were “prior bad acts” that would be inadmissible under Guam Rule of Evidence (“GRE”) 404(b). RA, tab 61 at 1-3 (Mot. *In Limine* Exclude 404(b) Evid., Sep. 20, 2023). The People opposed the motion, arguing the incidents that Cruz characterized as “prior bad acts” were in fact the same acts underlying the counts of the indictment. RA, tab 65 at 1-6 (Ppl.’s Resp. Mot. *In Limine* to Exclude 404(b) Evid., Sep. 20, 2023). The prosecution also asserted that Cruz had long been aware of the basis for the charges because he had authored a written statement admitting to the conduct, which was given to defense counsel in initial discovery on July 28, 2021.² *Id.* at 2; RA, tab 73 at 1-3 (Min. Entry, Sep. 22, 2023). In that statement, Cruz wrote: “I sexually touched [I.M.] on her vagina over her clothing and had her touch me on my privet [sic]. . . . This happened around 2011 or 2012.” *See* RA, tab 107 (Def.’s Sent’g Mem., Feb. 9, 2024), Ex. B at 1 (Def.’s Statement, Feb. 26, 2021). Cruz has not contested that he received this statement in discovery.

[7] The People also argued that evidence of any uncharged acts by Cruz against I.M. would be admissible under GRE 413, which permits evidence of similar uncharged sexual conduct in CSC cases, subject to notice and other applicable evidentiary safeguards. *See* RA, tab 65 at 3-4 (Ppl.’s Resp.); Guam R. Evid. 413. The trial court issued an oral decision before jury selection, denying Cruz’s motion. Transcript (“Tr.”) at 2 (Jury Trial, Day 1, Sep. 25, 2023). In explaining its

² While the police reports are not part of the record on appeal, Cruz’s statement is attached to his sentencing memorandum. *See* Record on Appeal (“RA”), tab 107 (Def.’s Sent’g Mem., Feb. 9, 2024), Ex. B at 1 (Def.’s Statement, Feb. 26, 2021).

decision, the trial court accepted the People’s arguments that (1) the acts in dispute were the same acts for which Cruz was charged and therefore were not “prior bad acts” under GRE 404(b), and (2) there was no material variance because time is not an element of CSC crimes. *Id.* (“When I questioned [the prosecutor], she said those are the same acts. They’re not extra acts.”). The trial court issued a written decision and order memorializing its rejection of Cruz’s motion to exclude.

C. Trial Testimony

[8] At trial, I.M. was 17 years old. I.M. testified that, while she was living at her grandmother’s house in Dededo, Cruz—her father’s relative—lived with them on and off, sharing a room with her “nina” and her auntie. Tr. at 33-34 (Jury Trial, Day 1). Cruz’s cousin testified that Cruz moved into her home in Pâgat, Mangilao, in 2013, where he lived until 2015. Tr. at 35-41, 49, 51-52 (Jury Trial, Day 2, Sep. 26, 2023). Cruz’s cousin added that in 2016, Cruz moved in with her nephew, who lived next door. *Id.* at 41-42, 51. I.M. indicated that even after Cruz moved out, he sometimes still stayed at her grandmother’s house. *See* Tr. at 119-22 (Jury Trial, Day 1). Cruz’s cousin also acknowledged that it was possible Cruz occasionally stayed at I.M.’s grandmother’s house, even while living with her. *See* Tr. at 45, 52-53 (Jury Trial, Day 2).

[9] I.M. testified to four incidents in which Cruz touched her vagina and one incident in which Cruz forced her to touch his penis, all occurring in her grandmother’s house. Tr. at 33, 36, 84-85 (Jury Trial, Day 1).

[10] I.M.’s testimony about the first incident described how Cruz touched her vagina inside her nina’s room after closing the door and asking to see her private parts. *Id.* at 44-55. According to I.M., the first incident occurred in 2012 or 2013, when she was six or seven years old. *Id.* at 36, 38-43, 108, 123. I.M. also testified that the first incident happened around the time her sister was born. *Id.* at 36-40, 108, 123, 174-76. Her mother confirmed this sister was born in 2012. *Id.* at

143, 185. Her mother added that I.M. would have been in the first or second grade when she was six or seven years old. *Id.* at 185-86.

[11] I.M. then described the second incident, during which Cruz touched her vagina in the same manner in the same room at night about a year or two later while playing a pornographic video of two women in lingerie “deepthroating” a sex toy. *Id.* at 55-67.

[12] I.M. then explained the third incident, during which Cruz touched her vagina in the same manner in the same room at night about a year or two after the second incident while playing a pornographic video of an adult man touching the vagina of what looked like a six- or seven-year-old girl. *Id.* at 66-74. I.M. testified that she had gone to Cruz’s room that night to watch a Thomas the Train DVD on the family laptop while her parents were out of the house, but Cruz played the child pornography instead. *Id.* at 69, 75.

[13] I.M. then described the fourth incident, during which Cruz touched her vagina in the same manner in the same room about a year after the third incident while playing an animated zombie movie that featured a shower scene with naked women. *Id.* at 78-80, 111, 127. I.M. testified that the fourth incident occurred when she was nine years old and in the fourth grade. *Id.* at 79, 95.

[14] I.M. then explained a fifth incident,³ during which Cruz forced her to touch his penis over his pants at night in the room I.M. shared with her siblings. *Id.* at 81-87. I.M. testified that this incident also occurred when she was nine years old and in the fourth grade. *Id.* at 78-79, 95-96.

[15] I.M. and her mother testified that due to storm damage, the family had to tear down the walls of the room in which the first four incidents allegedly occurred. *Id.* at 103-04, 150-51. I.M. testified that this construction occurred when she was in the fifth grade. *Id.* at 112-13.

³ On appeal, Cruz does not contest the fifth incident, reflected in Charge One, Count Four of the indictment. See Appellant’s Br. at 2 n.1 (Aug. 30, 2024).

[16] I.M. testified that she eventually told her mother about the first incident years later when she saw Cruz make her little sister “scratch his arm,” which made her angry and concerned. *See id.* at 87-88. Her mother testified that, at first, I.M. told her only about the first incident, which I.M. said happened when she was six or seven years old and in the first or second grade. *Id.* at 174-76, 186.

[17] I.M.’s mother told I.M.’s father about the allegation, and I.M.’s father confronted Cruz. I.M. and her mother testified that Cruz tried to apologize to them following that confrontation. Later that night, I.M.’s mother took her to the police station to report the incident, and they returned the next day to file a statement. I.M. testified that she told the police that Cruz touched her four times when she was six or seven years old. *Id.* at 36-39, 107-10. I.M. further testified that she told the police that Cruz had shown her videos during two of the incidents, one “with the two ladies and then the other one dealing with a child.” *Id.* at 110.

D. Objections and Motion for Acquittal

[18] At trial, defense counsel repeatedly objected—and eventually made a continuous objection—to the introduction of evidence of CSC that allegedly occurred before the timeline in the indictment. Tr. at 3-4, 15, 36-37, 40-41 (Jury Trial, Day 1) (noting counsel’s “continuous objection” to evidence falling outside indictment’s timeline). Following the prosecution’s case-in-chief, Cruz moved for a judgment of acquittal on all four counts, claiming that insufficient evidence was presented that any sexual contact occurred in the timeframe between January 1, 2015, and May 30, 2016, alleged in the indictment. The trial court denied his motion.

E. Closing Arguments

[19] During their closing argument, the People noted that there was testimony of five incidents of CSC but only four charges. Tr. at 19 (Jury Trial, Day 3, Sep. 27, 2023). However, the People

did not specify which of the four incidents of Cruz allegedly touching I.M.’s vagina were associated with Counts One, Two, and Three in the indictment. Even when reciting the charges to the jury, the People did not clarify which incidents were being prosecuted. *Id.* at 27-29.⁴ Instead, the People stated that the first three counts had the same elements, “[t]he only difference being that [each] occurred at a time different” from the other counts. *Id.* at 28-29. Moreover, the People referred to the four or five incidents collectively when discussing the weight of the evidence and I.M.’s credibility. *Id.* at 20-21, 25, 29. The People assert on appeal that the uncharged act was the fourth incident involving the animated zombie video. *See* Appellee’s Br. at 27 (Oct. 17, 2024).⁵

[20] During closing arguments, defense counsel emphasized the variance between the dates in the indictment and the dates elicited at trial, attacked the credibility of the witnesses, and argued that there was a lack of evidence genuinely corroborating I.M.’s testimony. Defense counsel asserted that the CSC could not have occurred during the 2015-2016 time alleged because (1) Cruz had moved out of I.M.’s grandmother’s house by 2013, and (2) the room in which the first four incidents allegedly occurred no longer existed by 2015. Defense counsel also attacked I.M.’s

⁴ Regarding Count One: “In order to prove Ricky Cruz guilty of Count One of Second Degree Criminal Sexual Conduct, in order to prove . . . Ricky [is] guilty of this Charge, the People must prove . . . : ‘On or about the period between January 1st, 2025 [sic] and May 30th, 2016, inclusive . . . in Guam, that Ricky intentionally engaged in sexual contact with another, to wit, by touching the primary genital area of [I.M.], a minor under fourteen years of age.’ So based on everything you’ve heard, what do you know? You know that these events occurred in Guam, and that Ricky Cruz made sexual contact with [I.M.] by touching her vagina, which is a primary genital area, and that [I.M.] was under -- for well under fourteen years of age at the time.” Transcript (“Tr.”) at 27-28 (Jury Trial, Day 3, Sep. 27, 2023).

Regarding Count Two: “Count Two of Second Degree Criminal Sexual Conduct are the same elements. *The only difference here is that Count Two relates to an incident that occurred at a time different from Count One. Okay?*” *Id.* at 28-29 (emphasis added).

Regarding Count Three: “[T]hese are the elements for Count Three for Second Degree Criminal Sexual Conduct. Once again, the same elements. *The only difference being that it occurred at a time different from Count One and Count Two.* Now, remember that . . . [I.M.] testified that about four incidents in which Ricky Cruz sexually assaulted her by massaging her vagina, *but only three of those incidents have been charged, and those three incidents are Counts One, Two, and Three.*” *Id.* at 29 (emphases added).

⁵ While the People contend on appeal that the uncharged act was the fourth incident involving the animated zombie video, *see* Appellee’s Br. at 27 (Oct. 17, 2024), their closing argument devoted more attention to that uncharged incident than to the first charged incident, *see* Tr. at 20-21 (Jury Trial, Day 3).

assertions that Cruz showed her child pornography, questioning why the police did not engage in their standard search for this pornography. Defense counsel also pointed out that the police did not refer I.M. to the Healing Hearts Crisis Center at the Guam Behavioral Health and Wellness Center (“GBHWC”) for sexual abuse. Defense counsel also noted that when I.M. did eventually go to the crisis center for suicidal ideation, she did not say that the alleged CSC caused her trauma. Defense counsel suggested that her trauma could have instead stemmed from the issues with her father that were evident from both I.M. and her mother’s testimony.

F. Jury Instructions and Verdict Forms

[21] The jury instructions included an unanimity instruction requiring the jury to come to a “substantial agreement as to the principal factual elements underlying a specified offense.” RA, tab 85 at Instr. 8B (Jury Instrs., Sep. 28, 2023).

[22] The verdict forms did not provide any indication of which of the first four incidents to which I.M. testified correspond with Counts One, Two, and Three.

G. Verdict and Sentencing

[23] On September 28, 2023, the jury found Cruz guilty of all four counts of CSC II and Special Allegations. At the sentencing hearing, the People moved to dismiss the Vulnerable Victim sentencing enhancements because the incidents occurred around 2012 or 2013, and the Vulnerable Victim sentencing enhancement was enacted in 2014. The trial court agreed that the Vulnerable Victim sentencing enhancements would not be used. The trial court sentenced Cruz to ten years of incarceration. Cruz timely appealed.

II. JURISDICTION

[24] This court has jurisdiction over appeals from final judgments of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 119-127 (2026)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[25] Generally, this court reviews *de novo* material-variance claims that implicate Fifth Amendment considerations regarding fair notice and double jeopardy. *See People v. Taitano*, 2015 Guam 33 ¶ 9. A variance is material and constitutes a reversible error when it affects the substantial rights of the accused by either: (1) causing unfair surprise that impairs their ability to present a defense or (2) creating a risk of a subsequent prosecution for the same offense. *See People v. Campbell*, 2006 Guam 14 ¶ 12 (quoting *Berger v. United States*, 295 U.S. 78, 82 (1935)); *Taitano*, 2015 Guam 33 ¶¶ 11, 18. But “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” 8 GCA § 130.50(a) (2005).

[26] When a defendant fails to object to defects in the indictment before trial, this court reviews for plain error. *See People v. Felder*, 2012 Guam 8 ¶ 8. Under plain-error review, this court “will 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. Martin*, 2018 Guam 7 ¶ 9 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11).

[27] The parties dispute the standard of review that applies to Cruz’s material-variance claim. The People argue that Cruz did not object to the language of the indictment before trial, and therefore, this court should invoke the plain-error standard of review. Appellee’s Br. at 10 (citing *Felder*, 2012 Guam 8 ¶ 31). Title 8 GCA § 65.15, which is based on Federal Rule of Criminal Procedure 12(b), requires a defendant to object to an indictment before trial, unless the objection is that it fails to show jurisdiction or to charge an offense. 8 GCA § 65.15(b) (2005) (“The following shall be raised prior to trial: . . . (b) Defenses and objections based on defects in the indictment”); Fed. R. Crim. P. 12(b)(3)(B)(iii) (“The following . . . objections . . . must be raised by pretrial motion . . . : (B) a defect in the indictment . . . including: . . . lack of

specificity.”); *see also Martin*, 2018 Guam 7 ¶ 11. Failure to raise such an objection in a pretrial motion constitutes waiver absent a showing of good cause. 8 GCA § 65.45 (2005); *Martin*, 2018 Guam 7 ¶ 11.

[28] However, in his pretrial motion to exclude GRE 404(b) evidence, Cruz sought to exclude the introduction of evidence of bad acts committed before the timeframe alleged in the indictment. RA, tab 61 at 1-3 (Mot. *In Limine* Exclude 404(b) Evid.). Cruz argued that such prior bad acts were “not relevant to the allegations contained in the indictment and appear to be whole new allegations.” *Id.* at 1. Furthermore, at trial, defense counsel repeatedly objected—and ultimately lodged a continuous objection—to the introduction of evidence predating the 2015-2016 timeframe alleged in the indictment. *See* Tr. at 3-4, 15, 36-37, 40-41 (Jury Trial, Day 1). Defense counsel again raised this concern when moving for acquittal. *See* Tr. at 21-25 (Jury Trial, Day 2). Because his pretrial motion to exclude, trial objections, and motion for acquittal were all premised on the alleged variance between the indictment and the evidence the People sought to introduce, we conclude that the issue was preserved. *See United States v. Lokey*, 945 F.2d 825, 833 n.2 (5th Cir. 1991) (concluding variance issue preserved by defendant’s motion *in limine* and objections at trial). We therefore review Cruz’s material-variance claim *de novo*.

IV. ANALYSIS

A. The Variance Was Immaterial and Does Not Warrant Reversal

[29] Cruz’s sole claim on appeal is that a variance between the indictment and the trial evidence deprived him of adequate notice of the charges and exposed him to a risk of double jeopardy. *See* Appellant’s Br. at 7 (Aug. 30, 2024). He maintains that the dates alleged in the indictment did not align with the proof at trial and that testimony describing more incidents than charged further obscured which underlying acts formed the basis of the convictions. We therefore examine

whether a variance existed, and if so, whether it materially affected Cruz’s substantial rights to notice of the charges or protection against subsequent prosecution.

[30] Generally, allegations in an indictment must correspond with the proof offered at trial. *Campbell*, 2006 Guam 14 ¶ 12 (quoting *Berger*, 295 U.S. at 82). The purpose of this rule is to protect the accused’s substantial rights enshrined in the Fifth Amendment. *See id.* (citing *Berger*, 295 U.S. at 82); *Taitano*, 2015 Guam 33 ¶ 18. The Due Process Clause of the Fifth Amendment protects an accused’s substantial rights to notice of charges and to protection from double jeopardy. *People v. Riosen*, 2023 Guam 23 ¶ 38; *Taitano*, 2015 Guam 33 ¶ 18.

[31] A variance occurs when there is a discrepancy between the wording of the indictment and the evidence provided at trial. *Taitano*, 2015 Guam 33 ¶ 19. As Cruz notes, “proof at trial need not be a precise replica of the charges contained in an indictment.” Appellant’s Br. at 14 (citing *Taitano*, 2015 Guam 33 ¶ 35). However, a variance is material—and constitutes reversible error—when it affects the defendant’s substantial rights by either: (1) taking them by surprise and hindering their ability to present a defense or (2) exposing them to the risk of another prosecution for the same offense. *See Campbell*, 2006 Guam 14 ¶ 12 (quoting *Berger*, 295 U.S. at 82); *Taitano*, 2015 Guam 33 ¶ 18.

1. There was a variance between the timeline in the indictment and the proof at trial for two of the counts

[32] The indictment alleged that the four counts of CSC each occurred between January 1, 2015, and May 30, 2016. The People assert that “the only charge that is not covered by the time period in the indictment is Charge One, Count One; the testimony indicated that the incident would have occurred between 2012 and 2013, approximately two to three years before the time period set out in the Indictment.” Appellee’s Br. at 18. We disagree, as a review of the evidence suggests that both the first and second incidents occurred outside the timeframe alleged in the indictment.

[33] The evidence at trial indicated that the first incident occurred around 2012 or 2013, when I.M. was six or seven years old and in the first or second grade. Tr. at 36-43, 108, 123, 174-76, 184-86 (Jury Trial, Day 1). This means that there was a variance between the timeline established for the first incident by the proof at trial and the 2015-2016 timeline alleged in the indictment.

[34] While there is ambiguity regarding the timing of the second and third incidents, I.M. consistently testified that the fourth and fifth incidents occurred when she was in the fourth grade, noting that she was nine years old throughout the entire school year. *Id.* at 78-79, 95-96. When the prosecution asked her in what year she was nine years old, I.M. said she was unsure. *Id.* at 95-96. The prosecution then tried to do the calculation for her, saying she was born in 2006, and that 2006 plus nine was 2014. *Id.* at 95-97. I.M. seemed to defer to the attorney's calculation when she responded: "I believe so." *See id.* However, the prosecutor's calculation was mistaken.⁶ Given I.M.'s June 2006 birthdate, it follows that she would have been nine years old from June 2015 until June 2016, and therefore in the fourth grade from fall 2015 to spring 2016. This accurate calculation places the fourth incident squarely within the timeframe of the indictment. But defense counsel continued to rely on the incorrect 2014 date during cross-examination, which—if accepted—would have placed the incident outside the charged timeframe, despite the record supporting that it occurred within it. *See* Tr. at 109 (Jury Trial, Day 1).

[35] I.M. testified that the third incident occurred about a year before the fourth incident and about a year after the second incident. *Id.* at 67, 79, 110. Because the fourth incident occurred between fall 2015 and spring 2016, the evidence places the third incident roughly between 2014 and 2015. The possible timeframe of the third incident overlaps with the 2015-2016 timeline

⁶ When trying to calculate dates, the prosecutor noted: "[M]ath is not my strength either." Tr. at 29 (Jury Trial, Day 1, Sep. 25, 2023).

alleged in the indictment, and the evidence does not establish that this incident occurred outside the charged period. Thus, there is no variance for this count.

[36] I.M. further testified that the second incident took place about a year before the third incident and about a year or two after the first incident. *Id.* at 66-67. Because the first incident occurred in 2012 or 2013 and the third incident occurred around 2014-2015, the evidence suggests that the second incident occurred between 2013 and 2014—outside the 2015-2016 period alleged in the indictment, resulting in a variance for that count.

[37] In summary, the proof at trial established that the first incident occurred between 2012 and 2013, the second between 2013 and 2014, the third between 2014 and 2015, and the fourth between 2015 and 2016. Thus, the first and second incidents fell outside the January 1, 2015, to May 30, 2016, timeframe alleged in the indictment, while the fourth incident fell within it and the third incident’s possible timeframe overlapped it.⁷ Accordingly, the record reflects a variance between the indictment’s alleged timeline and the proof presented at trial as to two of the counts.

2. The variance was not material

[38] When presented with a variance claim, this court analyzes it with “two separate but related inquiries.” *People v. Wesen*, 2022 Guam 18 ¶ 38 (quoting *Taitano*, 2015 Guam 33 ¶ 11). Under the first inquiry, if the variance claim alleges a lack of proof at trial regarding the essential elements of the charges in the indictment, the court assesses the sufficiency of the evidence supporting the conviction *de novo*. *Taitano*, 2015 Guam 33 ¶¶ 9, 11. Under the second inquiry, the court determines whether the variance affected the substantial rights of the defendant, including the rights to proper notice of charges and to protection against double jeopardy. *Id.* ¶ 11; *Wesen*, 2022

⁷ For purposes of this timeline analysis, we refer to the incidents in the sequence in which I.M. described them at trial; as discussed below in our notice analysis, however, the declaration attached to the magistrate’s complaint appears to describe the second and third incidents in a different order.

Guam 18 ¶¶ 39-40. These claims are also reviewed *de novo*. *Taitano*, 2015 Guam 33 ¶ 9. Sufficiency-of-the-evidence analysis is unnecessary where the defendant does not contend that the People did not prove the charged offenses and instead argues that the introduction of extraneous acts impaired his substantial rights. *See Wesen*, 2022 Guam 18 ¶ 38.

[39] Here, Cruz concedes that “the sufficiency of the evidence is not at issue.” Appellant’s Br. at 3. Cruz instead argues that the variance between the allegations in the indictment and the evidence presented at trial was material because extraneous proof of other facts affected his substantial rights. *See id.* at 15; Appellant’s Reply Br. at 4 (Dec. 4, 2024). Thus, we need not engage in analysis under the first inquiry, and our analysis focuses only on the second material-variance inquiry. *See Wesen*, 2022 Guam 18 ¶¶ 38, 39.

[40] A variance constitutes reversible error if it affects the substantial rights of a defendant by denying proper notice of charges against him or exposing him to significant risk of double jeopardy. *Taitano*, 2015 Guam 33 ¶ 11. Cruz argues that there was a variance between the dates alleged in the indictment and the dates presented at trial that created a lack of clarity in the charges against him and resulted in a lack of proper notice. Appellant’s Br. at 8-15; Reply Br. at 4. Cruz asserts that, although the People charged him with crimes in 2015 and 2016, “when it presented its evidence, most of the crimes it sought a conviction for occurred several years before” the indictment’s timeframe. Appellant’s Br. at 10. Cruz characterizes the first three counts in the indictment as “three identical boilerplate charges for the wrong timeframe” that made it “impossible to tell which allegations go to which crime.” *Id.* at 8-11.

[41] To determine whether an indictment provided adequate notice, the court may first consider whether its charges were sufficiently specific. “[A] charge is sufficiently specific when it contains the elements of the crime, permits the accused to plead and prepare a defense, and allows the

disposition to be used as a bar in a subsequent prosecution.” *Fawcett v. Bablitch*, 962 F.2d 617, 618 (7th Cir. 1992) (citations omitted). Here, the charges in the indictment included the essential elements within each count. *See generally* RA, tab 10 (Indictment).

[42] “While ‘prosecutors should be as specific as possible in delineating the dates and times of abuse offenses,’ ‘[f]airly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements’ because of the inherent difficulties in investigating and prosecuting child abuse.” *United States v. Beasley*, 688 F.3d 523, 533 (8th Cir. 2012) (alteration in original) (quoting *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005)). “Courts have recognized that it is difficult for child witnesses to identify exact times, dates, and locations, and thus they have consistently given prosecutors and grand juries leeway in terms of the particularity required in this kind of case” 157 Am. Jur. *Trials* 187 § 24 (Aug. 2026 Update). “This is particularly true where the crimes involve a repeated course of conduct over an extended period of time and the accused and the victim are related or reside in the same household, which facilitates the extended period of abuse.” *Id.*

[43] The People argue that “[d]iscrepancies between the dates of the crimes charged and the dates elicited at trial do not constitute a material variance because time is not an element of criminal sexual conduct.” Appellee’s Br. at 15. It is true that time is not an element of criminal sexual conduct, *People v. Kusterbeck*, 2024 Guam 3 ¶ 16 (collecting cases), and “[a]s long as a defendant is neither surprised nor hampered in preparing his defense, there can be a variance between the dates proved at trial and those alleged in an indictment or information,” *Campbell*, 2006 Guam 14 ¶ 17 (quoting *Tingley v. State*, 549 So. 2d 649, 650 (Fla. 1989)).

[44] At the same time, due process requires a prosecutor who seeks multiple charges against a defendant to “link those multiple charges to multiple identifiable offenses.” *Valentine*, 395 F.3d

at 636. While “differentiation will often require reference to date ranges or time ranges or certain locations or certain actions . . . , differentiation does not require overly-burdensome precision.” *Id.* at 637. This court has concluded that adding language like “at a time different than that alleged in Count One” in otherwise identical charges sufficiently establishes that the counts of an indictment allege offenses for distinguishable acts. *See Martin*, 2018 Guam 7 ¶ 20 (citation modified).

[45] After determining whether the charges were sufficiently specific, the reviewing court may then consider whether the evidence at trial delineates the factual bases for each separate incident alleged in the indictment. *See Valentine*, 395 F.3d at 634 (“The due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the forty separate incidents either before or during the trial.”). In cases of repeat sexual abuse of a child, a “separate incident” of criminal sexual conduct “can be shown by tying each count to a salient fact in the victim’s life.” *See Riosen*, 2023 Guam 23 ¶ 27 (citing *People v. Callahan*, 2022 Guam 13 ¶ 26; *Campbell*, 2006 Guam 14 ¶ 27).

a. Cruz had adequate notice of the charges against him⁸

[46] To determine whether a defendant received adequate notice of the charges against him, a court may consider sources other than the indictment, including a complaint, an arrest warrant, a bill of particulars, information provided during pretrial discovery, and information provided during the course of pretrial hearings. *Taitano*, 2015 Guam 33 ¶ 19; *Wesen*, 2022 Guam 18 ¶¶ 40-49; *Valentine*, 395 F.3d at 633, 636. In *People v. Wesen*, this court held that the defendant’s substantial rights were not violated when the trial court admitted evidence of uncharged acts of CSC. 2022

⁸ This analysis concerns a defendant’s constitutional right under the Fifth Amendment to receive adequate notice of the charges against him. We note that this right is distinct from the evidentiary notice requirements of GRE 404(b) and GRE 413, which operate under separate legal frameworks, serve different procedural and constitutional purposes, and generally protect different interests in criminal proceedings.

Guam 18 ¶¶ 40, 49 (citing Guam R. Evid. 413(b)). We reasoned that a declaration attached to the magistrate’s complaint, along with police reports provided during pretrial discovery, gave the defendant sufficient notice of the expected testimony against him. *Id.*

[47] In evaluating whether a variance affected a defendant’s right to notice of the charges, this court may find that any variance between the indictment and the trial evidence is immaterial and is not a constitutional violation where the defendant received adequate notice. *See People v. Taisacan*, 2018 Guam 23 ¶ 32 (determining that defendant had adequate notice and therefore “any variance between the facts alleged in the indictment and those presented at trial were immaterial and did not rise to the level of a constitutional violation”); *see also* 8 GCA § 130.50(a) (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”); *cf. Indictments*, 41 Geo. L.J. Ann. Rev. Crim. Proc. 280, 315-17 & n.962 (2012) (“Unless the defendant can demonstrate substantial prejudice, courts will rarely reverse a conviction on the basis of a variance.”).

[48] Cruz argues that there was insufficient notice of the charges against him because the indictment alleged four counts of CSC that occurred during January 1, 2015, and May 30, 2016, “but the testimony at trial suggested that the indicted crimes and the prior bad act happened years earlier.” Reply Br. at 9; Appellant’s Br. at 7, 9-15. Cruz further contends that, for his convictions on the first three counts, there was evidence of four crimes presented at trial, and the lack of specificity in the indictment and jury verdict forms makes it “impossible to link the evidence to the count as convicted.” Appellant’s Br. at 14. Cruz maintains this lack of clarity violated his right to proper notice. Reply Br. at 5. Cruz also asserts that the dates in this case are important for two reasons: (1) they are relevant to his alibi, and (2) they determine whether the Special

Allegations in the indictment qualify under the Vulnerable Victims Act of 2014, triggering sentencing enhancements. *Id.* at 10.

[49] The People maintain that Cruz had “actual notice of the charges against him because the Magistrate’s Complaint and the Indictment sufficiently differentiated between each count of criminal sexual conduct” and “put him on actual notice of the specific acts that he was charged with.” Appellee’s Br. at 9-10, 13. The People also argued at trial that the testimony regarding the alleged incidents was consistent with the information in the police reports provided to Cruz before trial. Tr. at 26-27 (Jury Trial, Day 2); *accord* Appellee’s Br. at 13 (“There was no material variance between allegations and proof because I.M. testified to the same sex acts that were charged in the Indictment.”). The People further asserted that Cruz’s actual notice of the basis for the charges is evidenced by his pretrial motion seeking to exclude evidence of sex acts predating the timeframe alleged in the indictment. *See* Appellee’s Br. at 18; *see also* RA, tab 61 at 1-3 (Mot. *In Limine* Exclude 404(b) Evid.). Before trial, the prosecution argued that the incidents that Cruz characterized as “prior bad acts” were in fact the same acts underlying the counts of the indictment. *See* RA, tab 65 at 1-6 (Ppl.’s Resp.); RA, tab 73 at 1-3 (Min. Entry).

[50] The prosecution also asserted that Cruz had long been aware of the basis for the charges because he had authored a written statement admitting to the conduct, which was provided to defense counsel in initial discovery on July 28, 2021. RA, tab 65 at 2 (Ppl.’s Resp.). While the police reports are not part of the record on appeal, Cruz’s confession is attached to his sentencing memorandum. *See* RA, tab 107 (Def.’s Sent’g Mem.), Ex. B (Def.’s Statement). In that statement, Cruz admitted: “I sexually touched [I.M.] on her vagina over her clothing and had her touch me on my privet [sic]. . . . This happened around 2011 or 2012.” *Id.* Cruz has not contested that he received this statement in discovery.

[51] The People further contend that the only charge that is not covered by the period in the indictment is Charge One, Count One, and that Cruz’s actual notice of this variance is evidenced by his motion *in limine* to exclude the incident for being outside the timeframe. Appellee’s Br. at 18. However, the evidence suggests that the second incident was also outside the timeline alleged in the indictment. In any event, the trial court maintained that it “put everyone on notice” regarding the timeline that would be discussed at trial when it denied Cruz’s pretrial motion to exclude. Tr. at 27-28 (Jury Trial, Day 2).

[52] We conclude that Cruz had sufficient notice of the charges against him before trial based on the indictment, the magistrate’s complaint, discovery, pretrial hearings, and pretrial filings.

i. Taken together, the magistrate’s complaint, discovery, pretrial hearings, and pretrial filings provided adequate notice of the conduct underlying the charges

[53] The magistrate’s complaint presents three counts of CSC II that each allegedly occurred between January 1, 2015, and December 31, 2015, and includes a declaration in which the Assistant Attorney General describes three incidents of CSC allegedly committed by Cruz against I.M. RA, tab 1 at 1-3 (Magis.’s Compl., Feb. 28, 2021). The first incident described in the declaration alleges that when I.M. was in the fourth grade, “unknown dates about 6 years prior,” Cruz touched her vagina. *Id.* The second incident described in the declaration alleges that “[t]he following night,” Cruz “play[ed] a sexual video” and touched her vagina again. *Id.* The third incident described in the declaration alleges that “[t]he next night,” Cruz touched her vagina again “then played an adult video with two women having sex with a man.” *Id.*

[54] While the magistrate’s complaint alleged that the three incidents all occurred on consecutive days in 2015, or when I.M. was in the fourth grade, the evidence at trial indicates that the first three incidents occurred roughly a year apart between 2012 and 2014. *Compare* RA, tab

1 at 3 (Magis.'s Compl.), *with* Tr. at 36-113 (Jury Trial, Day 1). Thus, the *timeframe* in the magistrate's complaint alone did not provide Cruz with proper notice of the charges against him. Nevertheless, as explained below, the detailed descriptions of each incident in the declaration attached to the magistrate's complaint, combined with the information disclosed through discovery, pretrial hearings, and pretrial filings, provided Cruz with adequate notice of the charges against him.

[55] The first incident described in the declaration aligns with the first incident I.M. recounted at trial: both involve Cruz touching I.M.'s vagina in her nina's bedroom after closing the door and asking to see her "private parts." *Compare* RA, tab 1 at 3 (Magis.'s Compl.), *with* Tr. at 46-47 (Jury Trial, Day 1). Of the five incidents I.M. described at trial, only one involved Cruz making that specific request to see her "private parts." *See* Tr. at 36-113 (Jury Trial, Day 1). Although the declaration places the first incident in I.M.'s fourth-grade year—described vaguely as "unknown dates about 6 years prior"—I.M. testified that it occurred in 2012 or 2013, when she was six or seven years old. *See* Tr. at 36, 38-43, 108, 123 (Jury Trial, Day 1). This timeline aligns with Cruz's written confession, in which he admitted to touching I.M.'s vagina around 2011 or 2012. *See* RA, tab 107 (Def.'s Sent'g Mem.), Ex. B (Def.'s Statement). Despite the discrepancy in dates, Cruz had adequate notice that the charge encompassed this specific incident. Cruz's confession was included in the initial discovery materials provided to defense counsel on July 28, 2021, well before trial and before the plea-negotiation period. *See* RA, tab 65 at 2 (Ppl.'s Resp.). The prosecution also confirmed in its opposition to Cruz's pretrial motion to exclude that the indictment covered the acts described in that confession. *See id.*; RA, tab 73 at 1-3 (Min. Entry).

[56] The second incident in the declaration aligns with the third incident I.M. described at trial and provided adequate notice because (1) the former placed I.M. in the room watching a movie

while the latter placed I.M. in the room to watch a Thomas the Train DVD and (2) both allege that Cruz touched I.M.'s vagina at night while playing a sexual video of an adult man touching the vagina of a female minor while I.M.'s parents were not home. *Compare* RA, tab 1 at 3 (Magis.'s Compl.), *with* Tr. at 67, 69-73, 75, 126 (Jury Trial, Day 1).

[57] The third incident in the declaration aligns with the second incident I.M. described at trial and provided adequate notice because both involve allegations of Cruz touching I.M.'s vagina in her nina's bedroom at night while Cruz played a pornographic video involving two women. *Compare* RA, tab 1 at 3 (Magis.'s Compl.) (alleging Cruz played "an adult video with two women having sex with a man"), *with* Tr. at 55-57, 60, 126 (Jury Trial, Day 1) (alleging Cruz played a video with two women "deepthroating" a sex toy). Thus, although the declaration describes the incidents in a different sequence than I.M.'s trial testimony, the substance of the allegations demonstrates that the declaration's second incident corresponds to the third incident described in I.M.'s testimony, while the declaration's third incident corresponds to the second incident described in her testimony.⁹

[58] While the indictment did not clearly link the first three counts to the underlying incidents, the magistrate's complaint suggests that Counts One, Two, and Three in the indictment were associated with the first three incidents to which I.M. testified due to the similarities between the incidents alleged in the declaration and those I.M. described in her testimony. The People claim that the fourth incident I.M. described involving an animated zombie movie was the uncharged act. Appellee's Br. at 27. The magistrate's complaint does not mention the zombie animation or anything similar. The evidence supports that the incidents described in the declaration are the same as the first three incidents described at trial. Taken together with the information disclosed

⁹ The fact that the declaration described the second and third incidents in a different sequence than I.M.'s testimony does not undermine the conclusion that Cruz had notice of the underlying conduct at issue.

through discovery (including his confession), pretrial hearings, and pretrial filings, the record shows that Cruz had adequate notice of the charges against him, despite any variances. His actual notice is underscored by his pretrial motion to exclude acts before the timeframe of the indictment, which the trial court denied—confirming that the acts reflected in the magistrate’s complaint and discovery materials that occurred before the indictment’s timeline were in fact the same incidents underlying the charges against him.

b. Cruz’s ability to prepare his defense was not materially affected by any variance

[59] When evaluating whether a variance affected a defendant’s substantial right to notice of charges, the court may consider whether the variance impaired his ability to prepare an adequate defense. *See Campbell*, 2006 Guam 14 ¶ 12 (citing *Berger*, 295 U.S. at 82); *United States v. Soto-Beníquez*, 356 F.3d 1, 27 (1st Cir. 2003) (“Convictions may be reversed based on variance only upon a showing of prejudice to the defendant’s substantial rights—that is, when lack of notice regarding the charges deprives the defendant of his ability to prepare an effective defense and to avoid surprise at trial.” (citing *United States v. Fisher*, 3 F.3d 456, 462 (1st Cir. 1993))). The court may assess whether the defendant has shown that curing the alleged variance would have altered his defense. *See Felder*, 2012 Guam 8 ¶ 40; *Wesen*, 2022 Guam 18 ¶ 41 (noting that defendant “d[id] not explain what that strategy would have been or provide evidence that Wesen’s trial counsel would have used this strategy but for the alleged surprise”); *Taitano*, 2015 Guam 33 ¶ 22 (“Taitano provides concrete examples of how his defense would have differed”). In *People v. Felder*, this court examined the defense’s arguments at both trial and appellate levels and determined that amending the indictment to cure the variance would not have altered the defense, which focused on witness credibility. 2012 Guam 8 ¶ 40. We noted that Felder “never argued that he could or would have provided an alternative defense had he been charged with second

degree CSC.” *Id.* In *People v. Taisacan*, this court similarly rejected the defendant’s variance claims, noting that the defendant had not “provide[d] concrete examples of how his defense would have differed to refute [the] allegations.” 2018 Guam 23 ¶ 32 (first alteration in original) (quoting *Taitano*, 2015 Guam 33 ¶ 22). After noting that Taisacan’s defense at trial “was that he was simply not involved in the alleged burglaries and thefts,” this court explained that “[i]t [was] difficult to see how this defense would have changed.” *Id.* In *United States v. Beasley*, the Eighth Circuit held that the defendant was neither subject to unfair surprise at trial nor prejudiced in his ability to put on an alibi defense because the prosecution provided him, in advance of trial, with the images and video files forming the basis of the production of child pornography charges against him. 688 F.3d 523, 533 (8th Cir. 2012). The Eighth Circuit also noted that the defendant failed to explain what alibi he would have presented in the absence of a variance. *Id.*

i. Cruz has not provided concrete examples of how his defense strategy would have differed without the variance

[60] The People argue that “[t]he variance as to the date did not hamper Cruz’s defense, as he was able to present his defense, which was ultimately rejected by the jury.” Appellee’s Br. at 22. This included his defense of “factual impossibility” that “he did not have access to I.M. during the years in question because he no longer lived at the Dededo residence where the incidents occurred” along with “his defense that the allegations were fabricated.” *Id.* at 18-19, 22.

[61] During closing arguments, defense counsel emphasized the variance between the dates in the indictment and the dates elicited at trial, attacked the credibility of the witnesses, and argued that there was a lack of evidence genuinely corroborating I.M.’s testimony. *See* Tr. at 37-48 (Jury Trial, Day 3). On appeal, Cruz argues that the variance affected his alibi because defense counsel asserted at trial that (1) Cruz had moved out of I.M.’s grandmother’s house in 2013 and (2) the room in which the first four incidents allegedly occurred no longer existed by the 2015-2016

timeframe in the indictment. *See* Reply Br. at 10. However, the People presented evidence that Cruz continued to visit I.M.’s grandmother’s house after moving out. *See* Tr. at 119-22 (Jury Trial, Day 1); Tr. at 45, 52-53 (Jury Trial, Day 2). Moreover, Cruz has not provided “concrete examples” of how his alibi defense would have been different had the indictment’s timeframe precisely matched the dates established at trial. *See Taitano*, 2015 Guam 33 ¶ 22; *Felder*, 2012 Guam 8 ¶ 40; *Wesen*, 2022 Guam 18 ¶ 41; *Taisacan*, 2018 Guam 23 ¶ 32.

[62] During closing argument, defense counsel also attacked I.M.’s assertions that Cruz showed her child pornography, questioning why the police did not engage in their standard search for this pornography. Defense counsel also pointed out that the police did not refer I.M. to GBHWC’s Healing Hearts Crisis Center for sexual abuse. Defense counsel also noted that when I.M. did eventually go to the crisis center for suicidal ideation, she did not attribute her trauma to the alleged CSC. Defense counsel suggested that her trauma could have instead stemmed from the issues with her father that I.M. and her mother had described at trial.

[63] Cruz has not provided “concrete examples” of how his attacks on the witness’s credibility or his argument about the lack of corroborating evidence would have differed if the indictment’s timeframe had precisely aligned with the dates presented at trial. *See Taitano*, 2015 Guam 33 ¶ 22; *Wesen*, 2022 Guam 18 ¶ 41; *Taisacan*, 2018 Guam 23 ¶ 32. This lack of concrete examples is particularly salient because Cruz had adequate notice of the expected testimony against him from the magistrate’s complaint, discovery, pretrial hearings, and pretrial filings. By the time of trial, Cruz had been expressly advised—through both discovery and the trial court’s pretrial rulings—that the charged conduct included the touching he admitted in his written confession, which he dated to 2011 or 2012. Thus, any decision to anchor his alibi defense to events occurring only from 2013 onward reflected a strategic choice made with awareness that the prosecution’s

theory—consistent with his own confession—encompassed conduct predating the indictment’s alleged timeframe.

[64] As discussed above, the declaration attached to the magistrate’s complaint described three incidents consistent with the first three incidents to which I.M. testified at trial: one incident involved Cruz touching I.M.’s vagina in her nina’s bedroom after closing the door and asking to see her “private part(s)”; one incident involved I.M. initially coming to her nina’s bedroom to watch a movie, followed by Cruz touching her vagina while playing a sexual video of an adult man touching the vagina of a female minor, while I.M.’s parents were not home; and one incident involved Cruz touching I.M.’s vagina in her nina’s bedroom at night while Cruz played pornography involving two women. *Compare* RA, tab 1 at 3 (Magis.’s Compl.), *with* Tr. at 36-113 (Jury Trial, Day 1). Moreover, during the pretrial filings and proceedings on Cruz’s motion to exclude, the People confirmed that Cruz was being prosecuted for the acts described in his confession, in which he admitted to touching I.M.’s vagina in 2011 or 2012—dates corresponding with the first incident I.M. described at trial in which he asked to see her “private parts.” *See* RA, tab 61 at 1-3 (Mot. *In Limine* Exclude 404(b) Evid.); RA, tab 73 at 1-3 (Min. Entry). Cruz’s confession, along with related police reports, was included in the initial discovery materials provided to defense counsel on July 28, 2021—well before trial and prior to the plea-negotiation period. *See* RA, tab 65 at 2 (Ppl.’s Resp.).

[65] Cruz’s actual notice is further demonstrated by his pretrial motion to exclude evidence of alleged bad acts committed before the timeframe charged in the indictment. *See* RA, tab 61 at 1-3 (Mot. *In Limine* Exclude 404(b) Evid.). In response, the People confirmed that the incidents that Cruz characterized as “prior bad acts” were in fact the same acts forming the basis of the charged offenses. *See* RA, tab 65 at 1-6 (Ppl.’s Resp.); RA, tab 73 at 1-3 (Min. Entry). Taken together,

we conclude that Cruz had notice of the acts underlying the charges against him based on the magistrate's complaint, discovery (including his confession), pretrial filings, and pretrial hearings.

[66] Despite receiving adequate pretrial notice that he was being prosecuted for these incidents, Cruz still centered his defense on three main themes: (1) asserting that he had moved out of I.M.'s grandmother's house in 2013; (2) arguing that the room where the first four incidents allegedly occurred no longer existed during the 2015-2016 period charged in the indictment; and (3) challenging I.M.'s credibility. By the time of trial, however, Cruz had received notice that the charged conduct corresponded both to (1) the incidents described in discovery—including I.M.'s reports of acts predating the indictment's timeframe, which formed the basis of his own motion to exclude—and (2) the touching he admitted in his written confession, which he dated to 2011 or 2012. The trial court's denial of his pretrial motion to exclude evidence of acts predating the indictment's alleged timeframe further reinforced that the prosecution's theory would encompass conduct earlier than the indictment's dates. Yet he elected not to mount a defense directly addressing that earlier conduct and instead proceeded with an alibi theory tied to events beginning in 2013 and a factual-impossibility argument tied to the room's alteration in 2015. The record therefore reflects an informed strategic choice rather than a defense undermined by unfair surprise at trial. Cruz has identified no concrete way in which his defense strategy would have differed had the indictment's dates precisely matched the proof at trial. This court has repeatedly rejected variance claims based on inadequate notice where the defendant did not provide specific, "concrete examples of how his defense would have differed to refute [the] allegations" without the alleged variance. *Taisacan*, 2018 Guam 23 ¶ 32 (quoting *Taitano*, 2015 Guam 33 ¶ 22); *Wesen*, 2022 Guam 18 ¶ 41. We therefore find that Cruz had adequate notice of the charges against him and that his defense was not materially affected.

ii. Special Allegations under the Vulnerable Victims Act and plea negotiations

[67] Cruz further argues that, although time is not an element of CSC, it was nonetheless “a critical piece of information” that impacted how the defense prepared its case and his ability to enter an honest and accurate plea agreement. *See* Reply Br. at 3, 10, 16. Specifically, he contends that the dates alleged in the indictment were significant because they determined whether the Special Allegations qualified under the Vulnerable Victims Act, potentially triggering sentencing enhancements. *See id.* at 10-12. However, even if the charging timeframe complicated plea discussions, we do not conclude that it materially affected Cruz’s substantial rights or otherwise rendered the variance material.

[68] At the sentencing hearing, defense counsel explained that Cruz admitted to touching I.M. in 2012 but denied committing any acts in 2015-2016 as alleged in the indictment, which complicated plea negotiations:

Cruz never denied the incident. He actually admitted that it happened, but it happened back in 2012. And so he was given the opportunity to plead guilty; however, the indictment alleged incidents in 2015 and 2016, and he denied any incidents during those times. So we did have a plea. We tried to negotiate changing the actual date of the time of the alleged incident, and the Government wouldn’t agree to it, and so it was hard for him to take the stand, to plead guilty and say he did something in 2016, when he, in fact, did not do anything in 2016, and so he had no choice but to go to trial.

Tr. at 5 (Sent’g Hr’g Cont’d, Feb. 16, 2024). The plea offer placed on the record contemplated an eight-year sentence with five years suspended. *Id.* at 7; *see also* RA, tab 107 (Def.’s Sent’g Mem.), Ex. A (Plea Agreement). After Cruz proceeded to trial and was convicted, the People moved at the sentencing hearing to dismiss the Vulnerable Victim sentencing enhancements, conceding that the incidents occurred before the enactment of the Vulnerable Victims Act in 2014. Tr. at 2 (Sent’g Hr’g Cont’d). The trial court accordingly did not apply the Vulnerable Victim sentencing

enhancements when sentencing Cruz. Thus, while Cruz ultimately received a higher sentence than the pretrial offer, his final sentence was not affected by the Vulnerable Victims Act sentencing enhancements.

[69] On appeal, Cruz argues that a defendant who lacks accurate information about the dates of an alleged offense—or is given “blatantly incorrect ones”—cannot properly evaluate the government’s case or truthfully admit guilt for conduct that did not occur in the years charged. *See Reply Br.* at 16. He emphasizes that this concern is heightened when “the Government is attempting to force a plea under the Vulnerable Victims Act of 2014 for crimes that predate the law.” *See id.*

[70] As discussed above, the record suggests that the discrepancy between the dates alleged in the indictment and those established at trial complicated Cruz’s plea negotiations.¹⁰ As defense counsel explained at sentencing, Cruz acknowledged conduct occurring in 2012 but maintained that he could not truthfully admit to committing offenses during the 2015–2016 timeframe alleged in the indictment. *See Tr.* at 5 (Sent’g Hr’g Cont’d). Although the discrepancy complicated Cruz’s

¹⁰ Here, defense counsel confirmed at oral argument that the defense “is not alleging bad faith” in the government’s choice of dates in the indictment. Digital Recording at 10:58:56-10:59:02 (Oral Arg., Feb. 20, 2025). The People assert that the charging timeframe was based on the victim’s recollection during her police interview. *See Appellee’s Br.* at 14, 16-17. Prosecutors are afforded broad discretion in determining what charges to file. “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute,” the decision to prosecute—and which charges to pursue—“generally rests entirely in his discretion.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also* 63C Am. Jur. 2d *Prosecuting Attorneys* § 39 n.9, Westlaw (database updated Aug. 2026) (collecting cases). Cruz does not dispute that probable cause supported the indictment. Moreover, because Cruz does not allege that the People acted in bad faith, we accept their representations that they selected and maintained the charging timeframe based on the victim’s statements in both the indictment and plea negotiations.

Although defense counsel expressly disclaimed any allegation of bad faith, the prosecution’s selection of a charging period that coincided with the effective date of the Vulnerable Victims Act raises concern. The integrity of criminal proceedings requires that charging decisions reflect the evidentiary record rather than potential sentencing consequences. And because Guam imposes no statute of limitations for (1) any sex crime committed against a victim under the age of majority at the time of the offense, *see* 8 GCA § 10.16 (added by Guam Pub. L. 31-006:2 (Mar. 9, 2011)), and (2) any first- or second-degree criminal sexual conduct offense, regardless of the victim’s age, *see* 8 GCA § 10.17 (added by P.L. 31-069:1 (May 24, 2011)), prosecutors must take particular care to ensure that charging timeframes do not result in retroactive application of newly enacted criminal statutes or sentencing enhancements.

efforts to negotiate a plea agreement acceptable to him, this difficulty, standing alone, does not establish that the variance materially affected his substantial rights. Cruz had no legal entitlement to a plea agreement. It is well established that defendants have no constitutional or statutory right to be offered a plea bargain. *See White v. Klitzkie*, 1998 Guam 31 ¶ 18 (“[A] defendant has no right to receive such a plea agreement.”); *Lafler v. Cooper*, 566 U.S. 156, 168 (2012); *Missouri v. Frye*, 566 U.S. 134, 148-49 (2012); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971). Likewise, Guam’s plea-bargaining statute imposes no duty on the government to extend or amend a plea offer. *See* 8 GCA § 60.80 (2005). Nor is the prosecution generally required to offer the particular terms a defendant seeks. *See United States v. Williams*, 827 F.3d 1134, 1165 (D.C. Cir. 2016) (per curiam) (“[H]e had ‘no right to be offered a plea’ at all, much less the particular plea agreement of his choosing.” (citation omitted)). Although constitutional protections apply when the government engages in plea negotiations, *see Lafler*, 566 U.S. at 168, Cruz’s inability to obtain a plea agreement on terms acceptable to him does not, standing alone, establish that the variance prejudiced his substantial rights. We therefore assess his claim under the governing material-variance framework.

[71] Under the material-variance framework, the relevant inquiry is whether the discrepancy caused unfair surprise that impaired Cruz’s ability to prepare or present a defense or exposed him to the risk of subsequent prosecution for the same offense. *See Taitano*, 2015 Guam 33 ¶ 18; *Wesen*, 2022 Guam 18 ¶¶ 39–42. As discussed above, Cruz received notice before trial that the prosecution intended to rely on conduct predating the indictment’s timeframe. *See* RA, tab 65 at 1–2 (Ppl.’s Resp); RA, tab 73 at 1–3 (Min. Entry). Although Cruz identifies the difficulties that the incorrect dates created during plea negotiations, he has not shown that the variance caused unfair surprise at trial or impaired his ability to prepare or present a defense to the underlying

charges. *See Taitano*, 2015 Guam 33 ¶ 22; *Wesen*, 2022 Guam 18 ¶ 41. Accordingly, although the inaccurate charging dates complicated plea negotiations, Cruz has not established that the variance materially prejudiced his substantial rights on this basis.

[72] We conclude that the magistrate’s complaint, discovery, pretrial hearings, and pretrial filings provided Cruz with adequate notice of the charges against him. Before trial, Cruz was advised that the prosecution’s theory encompassed the acts described in both the declaration attached to the magistrate’s complaint and the discovery materials. Those materials—including his written confession and the police reports containing I.M.’s allegations—formed the basis of his pretrial motion to exclude acts predating the indictment’s alleged timeframe, demonstrating his actual notice of the conduct. In opposing that motion, the prosecution confirmed these incidents fell within the scope of the charged offenses. The trial court’s denial of the motion further reinforced that the prosecution’s theory would include conduct predating the indictment’s timeframe. Although the dates in those materials and the dates elicited at trial did not consistently align with the indictment’s timeframe, we do not find that any variance deprived him of adequate notice. We now turn to whether any variance impaired his right to protection against double jeopardy.

3. Cruz’s double jeopardy rights are not at risk, as the People are barred from re-prosecuting the underlying conduct

[73] Cruz argues that the variance between the indictment and the trial evidence created confusion about which specific acts supported each conviction, thus violating his constitutional right against double jeopardy. Appellant’s Br. at 15. He explains that “it is unclear which convictions go to which allegations because the allegations of discrete incidents outnumber the convictions.” *Id.* At sentencing, Cruz expressed his continued uncertainty:

THE COURT: Mr. Cruz, do you have anything to say on your behalf? I know you didn't give a statement to the Probation office, and I know whatever concerns you may have. I'm not going to force you to, but if you want to say something, I -- Go ahead.

THE DEFENDANT: I'm still -- Am I charged in 2015, or 2012?

THE COURT: Well, the charges are from 2015 to 2016.

THE DEFENDANT: I mean, I'm really confused about that. I explained it to people. They're -- It's confusing to people too, where I'm at. I mean, it's a big time-frame difference.

Tr. at 7 (Sent'g Hr'g Cont'd).

[74] The Double Jeopardy Clause of the Fifth Amendment prohibits successive criminal prosecutions or punishments for the same offense. *Riosen*, 2023 Guam 23 ¶ 38. A defendant is protected from being charged again for the same underlying conduct if the conduct alleged in a subsequent prosecution falls within the same factual scope or timeframe as the first prosecution. *See Wesen*, 2022 Guam 18 ¶ 42; 9 GCA § 1.26(a) (2005); *see also Valentine*, 395 F.3d at 628-29, 635-36 (holding that indictment charging numerous undifferentiated sexual-assault counts violated due process because it failed to provide adequate notice and protection against double jeopardy, and concluding that defendant could not later be prosecuted for same offenses against victim during charged period). Under Guam law, double jeopardy bars a subsequent prosecution where “[t]he former prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is for . . . the *same conduct*,” unless (A) each offense “requires proof of a fact not required by the other” and the offenses are “intended to prevent a substantially different harm or evil,” or (B) “the second offense was not consummated when the former trial began.” 9 GCA § 1.26(a)(3) (emphasis added).

[75] Importantly, courts are not limited to the language of the indictment when determining the scope of double jeopardy protection. *See, e.g., United States v. Jaswal*, 47 F.3d 539, 542-43 (2d

Cir. 1995) (per curiam); *United States v. Votrobek*, 847 F.3d 1335, 1340 (11th Cir. 2017); *United States v. Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972); *United States v. Ekanem*, 555 F.3d 172, 174 (5th Cir. 2009). Rather, courts may consider the entire record to assess whether subsequent prosecution would be barred. See 157 Am. Jur. *Trials* 187 § 5, Westlaw (database updated Aug. 2026) (“[F]or purposes of barring a future prosecution, it is the judgment and not the indictment alone which acts as a bar, and the *entire record* may be considered in evaluating a subsequent claim of double jeopardy.” (emphasis added)); *United States v. Kramer*, 711 F.2d 789, 796 (7th Cir. 1983) (collecting cases); *United States v. George*, 752 F.2d 749, 754 (1st Cir. 1985). Accordingly, the reviewing court may consider the record as a whole to determine the precise conduct to which double jeopardy attaches.

[76] Although time is not an essential element of CSC, discrepancies in dates may still carry constitutional significance when the indictment is broad and the evidence complex enough to raise a risk that jurors convicted the defendant based on different factual incidents. See *United States v. Lapier*, 796 F.3d 1090, 1097 (9th Cir. 2015). Where the government introduces evidence of multiple acts that could support a single count, either the prosecution must specify which act forms the basis of the charge, or the trial court must instruct the jury to unanimously agree on the particular act supporting conviction. See *State v. Chuprinov*, 556 P.3d 1127, 1135 n.6 (Wash. Ct. App. 2024); see also *Lapier*, 796 F.3d at 1096-97 (“[A] specific unanimity instruction is required if there is a ‘genuine possibility of jury confusion’ or a possibility ‘that a conviction may occur as the result of different jurors concluding that the defendant committed different acts.’” (quoting *United States v. Payseno*, 782 F.2d 832, 836 (9th Cir. 1986))). Here, although the indictment, prosecution’s closing arguments, and jury verdict forms did not clearly link each count to specific factual incidents, the trial court gave an unanimity instruction, requiring the jury to reach a

“substantial agreement as to the principal factual elements underlying a specified offense.” RA, tab 85 at Instr. 8B (Jury Instrs.); Tr. at 74-77 (Jury Trial, Day 3) (reading jury instructions); *see also United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (“When it appears . . . that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, . . . the trial judge must . . . ensure the jury understands its duty to unanimously agree to a particular set of facts.”).¹¹

[77] In *Valentine v. Konteh*, the Sixth Circuit held that the defendant’s due process and double jeopardy rights were violated where the indictment and jury instructions did not tie any specific factual incidents to the charges. 395 F.3d at 636. There, evidence was presented on ten separate incidents, but the jury was asked to decide only six charges without guidance on which facts applied to which counts, creating a risk that the defendant could be convicted twice for the same conduct or without jury unanimity. *Id.* By contrast, in *Wesen*, this court found no violation of double jeopardy where the victim testified to multiple incidents of CSC occurring within the broad time periods charged in the indictment. 2022 Guam 18 ¶¶ 37-42. Although the defendant argued he was “left to guess” which act matched each charge, amounting to unfair surprise at trial, we concluded the government would be barred from re-prosecuting any conduct that occurred within the charged timeframe. *Id.* ¶¶ 37, 42. We held that any variance was not plainly erroneous and did not warrant reversal. *Id.* ¶ 42. As we explained in *Wesen*, where the government charges a defendant with conduct against a particular victim during a specified time range, double jeopardy

¹¹ Notably, Cruz does not specifically challenge the unanimity of the jury’s verdict on appeal. *See generally* Appellant’s Br. Although the Sixth Amendment guarantees the right to an unanimous jury verdict in criminal cases, *see United States v. Lapiere*, 796 F.3d 1090, 1098 (9th Cir. 2015) (“[A] conviction notwithstanding a genuine possibility of jury confusion and risk of a nonunanimous verdict seriously affects the fairness and integrity of judicial proceedings because it jeopardizes [the defendant’s] constitutional rights.”), Cruz expressly disclaims raising any Sixth Amendment issues, *see* Appellant’s Reply Br. at 6 (Dec. 4, 2024) (“[T]he Government raises the Sixth Amendment, which was not argued in Mr. Cruz’s Opening Brief.”). Accordingly, we do not review the propriety of the trial court’s unanimity instruction or otherwise evaluate the unanimity of the verdict. Our inquiry is limited to whether the asserted variance exposed Cruz to subsequent prosecution in violation of the Fifth Amendment.

principles preclude further prosecution for other acts involving the same victim within the same time range. *Id.* ¶ 42.

[78] The People argue that Cruz’s double jeopardy rights remain protected because they are barred from prosecuting him for any criminal sexual conduct involving I.M. during the time period alleged in the indictment, regardless of differing dates elicited at trial. Appellee’s Br. at 23-25. They also contend that the uncharged incident was the fourth incident I.M. described at trial, which fell within the timeframe of the indictment. *Id.* at 27. We agree that any criminal sexual conduct by Cruz against I.M. occurring within the indictment’s timeframe is generally protected from subsequent prosecution. *See Wesen*, 2022 Guam 18 ¶ 42 (holding that double jeopardy bars further prosecution for other acts involving the same victim within the same timeframe). However, double jeopardy protection also extends to the underlying conduct supporting any of the convictions themselves, even if the evidence at trial established a different timeframe than that alleged in the indictment. *See* 9 GCA § 1.26(a)(3) (generally prohibiting subsequent prosecution for the same offense based on the same facts as a prior conviction or acquittal).

[79] Cruz maintains that his double jeopardy concerns remain unresolved. *See* Reply Br. at 15-16. He attempts to distinguish *Wesen*, asserting that, unlike in *Wesen*, the timeline here was “completely wrong” and included allegations tied to the Vulnerable Victims Act, which he claims could never have applied to the earlier incidents. *See id.* (citing *Wesen*, 2022 Guam 18). He further argues that, with respect to his convictions on the first three counts, there was evidence of four distinct incidents, but the lack of specificity in the indictment and verdict forms makes it “impossible to link the evidence to the count as convicted.” Appellant’s Br. at 14. We conclude, however, that double jeopardy principles bar subsequent prosecution for all the incidents—charged or uncharged—described at trial. *See* 9 GCA § 1.26(a)(3); *Wesen*, 2022 Guam 18 ¶ 42.

[80] Although the indictment, prosecution’s closing statement, and jury verdict forms did not precisely identify the specific incidents linked to Counts One, Two, and Three, the magistrate’s complaint and trial evidence suggest that those counts aligned with the first three incidents described in I.M.’s testimony. *Compare* RA, tab 1 at 3 (Magis.’s Compl.), *with* Tr. at 36-113 (Jury Trial, Day 1). The People likewise confirm that the first three counts of conviction correspond to those incidents. *See* Appellee’s Br. at 14, 17-18. Accordingly, the People are barred from subsequently prosecuting Cruz for those same incidents. *See* 9 GCA § 1.26(a)(3). The evidence further establishes that the fourth incident—the uncharged act—occurred between fall 2015 and spring 2016, falling squarely within the period alleged in the indictment. Thus, the People are also barred from subsequently prosecuting Cruz for the uncharged fourth incident. *See Wesen*, 2022 Guam 18 ¶ 42.

[81] The proper scope of double jeopardy protection is determined by examining the record as a whole. Relevant portions of the record include: (1) the timeframe alleged in the indictment, (2) Cruz’s written confession admitting to touching I.M.’s vagina around 2011 or 2012; (3) the prosecution’s opposition to Cruz’s motion to exclude, confirming that the acts described in Cruz’s confession were the same acts underlying the indictment; (4) the incidents detailed in the declaration attached to the magistrate’s complaint; and (5) I.M.’s trial testimony describing the timing and nature of each incident. Taken together, this record establishes that the People are precluded from bringing further charges against Cruz based on any of the incidents described at trial—including those outside the indictment’s timeframe and the one not explicitly charged. *See* 9 GCA § 1.26(a); *Wesen*, 2022 Guam 18 ¶ 42. Accordingly, we conclude that any variance did not amount to a violation of Cruz’s double jeopardy rights.

a. Cruz’s reliance on Guam Rule of Evidence 413 does not demonstrate a material variance or double jeopardy risk

[82] Cruz argues that, despite his objections to the admission of GRE 404(b) evidence, the trial court “refused to exclude the evidence based on GRE 413,” thus creating “the possibility of double jeopardy.”¹² Appellant’s Br. at 15. We conclude, however, that Cruz’s double jeopardy rights are not at risk.

[83] Under GRE 413, “[i]n a criminal case in which the defendant is accused of an offense of criminal sexual conduct, evidence of the defendant’s commission of another offense or offenses of criminal sexual conduct is admissible, and may be considered for its bearing on any matter to which it is relevant.” Guam R. Evid. 413(a). Thus, “the rule endorses the ‘propensity inference’ normally forbidden by [Rule] 404(b).” 4 Clifford S. Fishman & Anne Toomey McKenna, *Jones on Evidence* § 20:4 (7th ed.), Westlaw (database updated Nov. 2025) (analyzing Fed. R. Evid. 404(b), upon which Guam R. Evid. 404(b) was modeled)). In *Wesen*, we clarified that GRE 413

¹² A review of the record indicates that Cruz’s characterization on appeal of the evidentiary rulings is inaccurate. In his opening brief, Cruz suggests that defense counsel objected under GRE 404(b) because the “allegations of discrete incidents outnumber[ed] the convictions.” See Appellant’s Br. at 15. But both his motion to exclude and objections at trial were directed at excluding evidence of conduct predating the 2015-2016 timeframe alleged in the indictment—not at excluding an additional, uncharged incident. See RA, tab 61 at 1-3 (Mot. In Limine Exclude 404(b) Evid., Sep. 20, 2023) (characterizing challenged incidents as “uncharged offenses” because they allegedly occurred “much earlier” than indictment’s timeframe, not because number of alleged incidents exceeded number of counts); Tr. at 3-4, 15, 36-37, 40-41 (Jury Trial, Day 1); see also Tr. at 21-25 (Jury Trial, Day 2).

Cruz also claims that the trial court “refused to exclude the evidence *based on GRE 413*” Appellant’s Br. at 15 (emphasis added). The record reflects otherwise. In denying the motion to exclude, the trial court accepted the People’s argument that (1) the acts at issue were the same acts underlying the indictment and therefore were not “prior bad acts” under GRE 404(b), and (2) there was no material variance because time is not an element of criminal sexual conduct crimes. Tr. at 2 (Jury Trial, Day 1) (“When I questioned [the prosecutor], she said those are the same acts. They’re not extra acts.”); see also RA, tab 95 at 1-4 (Dec. & Order, Oct. 11, 2023). The trial court then added that—“[e]ven if the court treated [the evidence] as prior bad act testimony” under GRE 404(b)—the evidence would still satisfy the GRE 413 balancing test in *People v. Chinell*, 2013 Guam 24, because the incidents occurred only a few years before the dates alleged in the indictment, and Cruz had received notice of the evidence months earlier. RA, tab 95 at 4 (Dec. & Order) (citing *People v. Campbell*, 2006 Guam 14; *People v. Sablan*, 2023 Guam 4). The trial court expressly stated that GRE 413 was not necessary. *Id.* Thus, the trial court did not deny the motion “*based on GRE 413*”; its discussion of GRE 413 was offered solely in the alternative and played no role in the actual basis for the ruling. See Appellant’s Br. at 15 (emphasis added).

Ultimately, even accepting Cruz’s assertions at face value, we conclude that his double jeopardy rights are not at risk.

encompasses not only prior acts of sexual misconduct, but also “similar events happening contemporaneously with the charged conduct.” *See Wesen*, 2022 Guam 18 ¶¶ 44-46.

i. Judicial caution and evidentiary safeguards when uncharged acts are introduced

[84] In general, trial courts must exercise caution when admitting evidence of uncharged acts. Whenever the evidence suggests more incidents than those charged, concerns may arise regarding a defendant’s rights and the unanimity of the jury’s verdict. *See, e.g., Valentine*, 395 F.3d at 636. But where the record contains evidence of each charged act plus an additional uncharged act, the introduction of that additional uncharged act does not, by itself, create a material variance. *See Wesen*, 2022 Guam 18 ¶¶ 39, 49-50 (“Wesen cites no case law supporting his premise that surplus evidence of uncharged misconduct creates a material variance between indictment and the proof at trial.”). In such circumstances, the more appropriate avenue of challenge often relates to jury unanimity. *See, e.g., Valentine*, 395 F.3d at 636. Here, however, Cruz does not dispute the unanimity of the verdict and expressly disclaims raising any Sixth Amendment issue. *See generally* Appellant’s Br.; *see also* Reply Br. at 6.

[85] In criminal sexual conduct cases, GRE 413 prescribes specific procedures for admitting evidence of similar uncharged acts, and trial courts must be vigilant in ensuring those procedures are followed. *See* Guam R. Evid. 413. This includes ensuring that the rule’s fifteen-day written notice requirement has been satisfied:

In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

Guam R. Evid. 413(b). However, Cruz does not argue on appeal that the prosecution failed to comply with Rule 413’s notice requirements or that the trial court erred in admitting the evidence

on that basis; rather, his reliance on GRE 413 and 404(b) is advanced in support of his material variance claim. *See generally* Appellant’s Br.; Reply Br. at 17. Although we conclude that Cruz received adequate constitutional notice of the charges against him, we do not reach whether the notice requirements of GRE 413—or 404(b)—were satisfied in this case. Furthermore, we emphasize that the evidentiary notice requirements of GRE 413—and GRE 404(b)—are distinct from the constitutional notice principles governing material variance under the Fifth Amendment.

[86] Any “evidence admitted under GRE 413 should also be balanced under GRE 403.” *See People v. Santos*, 2021 Guam 12 ¶ 47 (citing *Chinel*, 2013 Guam 24 ¶ 30); Guam R. Evid. 413(c); *Chinel*, 2013 Guam 24 ¶ 30 (noting that evidence otherwise admissible under GRE 413 “may still be deemed inadmissible for violating GRE 403”); *Wesen*, 2022 Guam 18 ¶ 47. When evidence of uncharged acts of criminal sexual conduct is otherwise admissible, trial courts must ensure that its probative value is not substantially outweighed by Rule 403 concerns—including unfair prejudice, confusion of the issues, or misleading the jury—particularly where the uncharged act occurred in close temporal proximity to the charged acts. *See* Guam R. Evid. 403; 23 *Fed. Prac. & Proc. Evid.* § 5387 (2d ed.), Westlaw (database updated Apr. 2026). In such situations, a clarifying jury instruction distinguishing the charged acts from any uncharged act may be appropriate.

[87] Cruz references Rules 403 and 413 in arguing that the introduction of testimony concerning an additional uncharged act contributed to the alleged material variance and resulting double jeopardy concerns. *See* Appellant’s Br. at 15-20. But Cruz does not separately develop a standalone evidentiary claim that reversal is warranted because the trial court improperly admitted the evidence under Rules 403 or 413.¹³ *See generally id.* As discussed above, when there is

¹³ While Cruz notes that the trial court did not consider any “curative instructions,” he raises this point only in support of his material variance argument, not as an independent claim of error on appeal. *See* Appellant’s Br. at 17-19.

evidence of all charged crimes established in the record, the introduction of an additional uncharged act does not necessarily amount to a material variance. *See Wesen*, 2022 Guam 18 ¶¶ 39, 49-50.

ii. No material variance was created by alleged Rule 413 evidence

[88] The sole issue Cruz raises on appeal is whether “the variance between the evidence presented and the indictment interfere[d] with [his] substantial right to notice and to avoid double jeopardy.” *See* Appellant’s Br. at 3. Although Cruz discusses GRE 404(b), GRE 413, and related evidentiary concerns, he raises those arguments in support of his broader material variance claim—particularly his contention that the additional-act testimony created uncertainty regarding which conduct formed the basis of the convictions and thereby implicated double jeopardy concerns. *See generally id.* We therefore consider those arguments only insofar as they bear on whether a material variance occurred.

[89] Cruz argues that, even if testimony concerning an additional act was technically admissible under GRE 413, “the lack of clarity as to what testimony helped support what count implicates serious double jeopardy concerns given there are four crimes of touching a minor described with only three convictions for Mr. Cruz touching the Individual—all outside of the Timeframe.” *See* Reply Br. at 17-19. He asserts that this alleged lack of clarity presents the same type of double jeopardy concern addressed in *People v. Taitano*, 2015 Guam 33. Appellant’s Br. at 15-17.

[90] In *Taitano*, we reversed a CSC conviction after concluding that a material variance between the charging allegations and the proof at trial violated the defendant’s Fifth Amendment rights to notice and protection against double jeopardy. 2015 Guam 33 ¶¶ 21-23, 26. There, although the indictment charged a specific incident occurring in Mangilao during 2010, the evidence at trial suggested that the conduct occurred in Yigo and in a different year. *Id.* ¶¶ 3-6, 14 (“The victim in

this case identified Yigo as the location where sexual contact had occurred and denied that any contact had taken place while in the family's Mangilao residence.”). Compounding the problem, the record failed to clearly identify which factual incident formed the basis of the jury's verdict. *Id.* ¶¶ 5, 23. This ambiguity created a substantial risk that Taitano could be subjected to a subsequent prosecution for conduct already tried. *Id.* ¶ 23 (“[T]he People could potentially bring an identical indictment against Taitano for the incident in Mangilao, claiming that the present conviction covered the incident in Yigo. Alternately, it is unclear if the existing conviction would preclude the People from bringing Taitano to trial under the theory that the Yigo incident had occurred in 2009, using their own trial memorandum to claim that the present case dealt with the 2010 incident in Mangilao.” (internal citations omitted)). Because the variance both undermined notice and left the verdict insufficiently tethered to a particular act, we vacated the conviction and remanded for a new trial. *Id.* ¶ 40.

[91] This case is distinguishable. Unlike in *Taitano*, where the trial record did not adequately tether the conviction to a specific act, the record here provides a basis for identifying the conduct underlying the first three charges. As explained above, the similarities between the three incidents described in the declaration attached to the magistrate's complaint and the first three incidents to which I.M. testified support the conclusion that those incidents formed the basis of the first three charges. Compare RA, tab 1 at 3 (Magis.'s Compl.), with Tr. at 36-113 (Jury Trial, Day 1). The uncharged act was the fourth incident involving the zombie animation which occurred within the indictment's timeframe. Moreover, the broader record—including Cruz's written confession, the prosecution's pretrial filings, and I.M.'s trial testimony—provides a basis for identifying the conduct prosecuted and assessing any subsequent double-jeopardy claim involving those incidents. As further discussed above, Cruz is not at risk of subsequent prosecution for any of the

incidents described at trial—including those that predated the indictment’s timeframe and the one not charged. *See* 9 GCA § 1.26(a); *Wesen*, 2022 Guam 18 ¶ 42. Accordingly, Cruz’s double jeopardy rights are not implicated.

[92] Because Cruz’s substantial rights to notice and to avoid double jeopardy were not violated, we conclude that the variance was immaterial and does not warrant reversal.

V. CONCLUSION

[93] Although there was a variance between the indictment’s alleged timeline and the proof at trial for two of the four counts, Cruz had adequate notice of the charges through the magistrate’s complaint, discovery, pretrial filings, and pretrial hearings. Further, because Cruz has not provided any concrete examples of how his alibi defense would have differed had the indictment’s timeframe precisely matched the dates established at trial, we conclude that the variance did not materially affect his ability to prepare his defense.

[94] While I.M. testified to four incidents of Cruz touching her vagina, the indictment, the prosecution’s closing argument, and the jury verdict forms did not clearly identify which of these four incidents described at trial corresponded with the first three counts in the indictment. But the magistrate’s complaint, along with trial testimony, supports that the uncharged incident was the fourth incident involving the animated zombie video. Because the record shows that this fourth incident occurred within the timeframe alleged in the indictment, the People are barred from prosecuting Cruz for that act. Likewise, double jeopardy protects Cruz from any future prosecution for all incidents described at trial—including those predating the indictment’s timeframe and the one not charged.

[95] Accordingly, there was no violation of Cruz’s due process rights to notice of the charges against him or his constitutional protection against double jeopardy. We therefore hold that the variance was immaterial and does not warrant reversal.

[96] We **AFFIRM**.

_____/s/
F. PHILIP CARBULLIDO
Associate Justice

_____/s/
KATHERINE A. MARAMAN
Associate Justice

_____/s/
ROBERT J. TORRES
Chief Justice