IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

FRANKIE GARRIDO BLAS,
Defendant-Appellant.

Supreme Court Case No.: CRA14-010
Superior Court Case No.: CM0534-09

OPINION

Cite as: 2015 Guam 30

Appeal from the Superior Court of Guam
Argued and submitted on May 14, 2015
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Frank Garrido Blas appeals from a final judgment convicting him of two counts of Invasion of Privacy (As a Misdemeanor) in violation of 9 GCA § 70.35(a)(2) (2005), for allegedly capturing videos and images of women using the restroom at the Bank of Guam ("Bank"). On appeal, Blas first argues that the evidence was insufficient to support a conviction for Invasion of Privacy because Plaintiff-Appellee People of Guam ("the People") did not present evidence that the images or videos were taken within the applicable statute of limitations period. Within Blas's sufficiency of the evidence challenge appears to be a unit of prosecution objection to Blas's conviction for two counts of Invasion of Privacy; one for each of the two victims identified in the Complaint. This argument, however, was not sufficiently developed for purposes of appellate review. Next, Blas contends the People made improper comments regarding the applicable burden of proof during closing argument that the trial court did not cure. Finally, Blas believes the trial court's Judgment improperly required him to register as a Level One Sex Offender.

[2] We hold that sufficient evidence on the record supported Blas's Invasion of Privacy conviction. Second, we hold that any improper statement by the prosecutor resulted in harmless error. Finally, we conclude that the trial court did not abuse its discretion in notifying Blas of his sex offender registration requirements in the Judgment. Accordingly, the trial court's Judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On May 13, 2009, a Bank employee discovered a camera in a men's restroom stall on the seventh floor of the Bank. Within the camera, the employee found an SD card containing explicit photographs of women using the restroom. The employee removed the SD card, but left the camera in the stall. After sharing the contents of the SD card with a co-worker, the pair agreed to turn the card in to their supervisor.

[4] The two employees were unable to locate a hole in the seventh floor women's restroom, but examined the sixth floor restroom after determining some women in the photos worked on the sixth floor. The employees discovered a hole in the toilet paper dispenser of the sixth floor women's restroom. They opened the outer utility room adjacent to the women's restroom to further investigate the mechanical utility room, but their keys were unable to open the door to the interior electrical utility room. The employees submitted the SD card with an anonymous letter to the human resources manager ("HR Manager"). The HR Manager shared the letter with her supervisor and the Bank's General Counsel upon receipt, resulting in an investigation.

[5] The investigating team discovered that the master key did not open the interior utility room. The master key opened the inner and outer utility rooms on all floors except the sixth floor. The head of security also was unable to access the room. In the months prior to the discovery of the SD card, Blas was identified as the only person with keys to the interior utility room. The maintenance department was in charge of maintenance keys controlling the Bank's utility rooms, and Blas was the Bank's head of maintenance.

[6] Blas was located and directed to use his key to open the room. Inside the room, a laptop was discovered, as well as a hole in the wall adjacent to the women's restroom, an X-rated CD or

DVD, and two adult "toys." The hole in the utility room provided a view to the women's restroom. Blas admitted to other employees that the computer found in the room was his personal laptop, and that he liked to do personal work there because it was "peaceful and quiet."

[7] The General Counsel asked Blas to start the computer, and the first user profile to boot up was entitled "Valued Customer." Blas immediately changed the username to "Frank" and appeared nervous. There did not appear to be any inappropriate images under the "Frank" username." Blas claimed "Valued Customer" was the previous owner of the computer, which he purchased at a flea market. The HR Manager confiscated the laptop to ensure private Bank information was not compromised, and found additional images similar to those on the SD card. Two female bank employees were identified within the images from their recognizable hair and jewelry.

[8] Blas's office on the seventh floor was searched, and a camera box, charger, and a charging battery were discovered. When further questioned by Bank personnel, Blas stated he knew about the hole in the utility room since 2008, but chose not to cover it up. Blas also said he looked through the hole to see women use the toilet, but claimed that he did not photograph them.

[9] Blas was charged with two counts of Invasion of Privacy (As a Misdemeanor) for allegedly capturing videos and images of women using the restroom at the Bank:

> On or about the period between April 1, 2009, through May 31, 2009, inclusive, in Guam, **FRANKIE GARRIDO BLAS** did commit the offense of ***Invasion of Privacy***, in that he did install in a private place, that is, a women's restroom located at the Bank of Guam, Hagåtña Branch Building, without the consent of the person or persons entitled to privacy there, to wit: [victims], a device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place, in violation of 9 GCA § 70.35(a)(2).

Record on Appeal ("RA"), tab 1 at 1-2 (Compl., July 8, 2009).

[10] A jury trial commenced on December 17, 2013. At trial, Officer Jesse P. Rodriguez (the "Examiner") testified as a Certified Computer Forensics Examiner on behalf of the People. He identified a total of five user profiles on the laptop, including the "Valued Customer" profile. The "Valued Customer" profile was created on February 10, 2009, was the only active profile, and had been used on May 12, 2009. The profile contained 5.89 gigabytes of data with several folders designated by dates containing pictures of women using the restroom. The "jpg" and "mov" files on the SD card were consistent with those found on the "Valued Customer" profile. The Examiner accessed the files using a program that did not alter the date stamps, and burned CDs of the content in a way that did not change the date or alter the contents of the files.

[11] Blas elicited testimony from the Examiner that the date and time of creation of a file is based on the internal clock of the computer, which can be manipulated by the user:

> Q So then you can't say that the files, themselves, were created February 10, 2009. You can only say that the folder of the user was created; right?
>
> A No. The files should be in the burned disk. It should be there. But I don't recall what the dates were on the burned disk. . . .

Transcript ("Tr.") at 26-27, 30-32 (Jury Trial, Day 3, Dec. 19, 2013). The Examiner only recalled the creation date for one image:

> Q . . . Didn't you indicate that according to an image that you found on the computer, it had a creation date of June 2, 2008?
>
> A Yes, sir.
>
> Q Thank you. And that was a picture similar to those that you downloaded to the two CDs you made while imaging; correct?
>
> A Yes.
>
> (Brief Pause)

Q And in order for it to have that date, it meant that the image had to have been created prior to that date. Correct?

A Well, that's the date that was assigned to that image; correct.

Q So it had to have been created on that date.

A Yes, sir.

Id. at 43. On redirect, the Examiner clarified the difficulty in determining a date based on the time designation of the operating system from his CD files:

> [T]he software, when it boots up, is not using the operating system. So, as far as timeframe is concerned, I'm not going to know that. It's designed in such a way that you don't interrupt the data within . . . the hard drive. So, because of that, it's not going to show me a time and date on the bottom. You're running off the CD.

Id. at 54.

[12] Following the Examiner's testimony, the two victims identified in the Complaint took the stand. The victims were able to identify themselves in videos shown at trial. The first victim recognized her wedding ring and watch, but could not identify a time frame that the videos were taken. The second identified herself by her accessories and wedding ring, but was also unable to specify a date that the images might have been taken. In addition to identifying herself, the second victim testified she had once observed Blas photographing her and she informed him to stop. She further testified he frequented her office and was "creepy." Finally, she mentioned that she observed Blas exiting the men's bathroom on the sixth floor at the same time she exited the ladies room even though he worked on the seventh floor. This peculiar coincidence occurred more than three times, and she began suspecting he was a "peeping Tom." *Id.* at 85.

[13] During closing argument, Blas's counsel objected to several statements made by the People including the following: "Now, Mr. Van de Veld is probably going to get up here later and talk about reasonable doubt, and he's going to tell you some reasons why he thinks that the

evidence fails." Reporter's Transcript of Partial Proceedings ("RT") at 3 (Dec. 20, 2013). After a side bar conference that was inaudible and unable to be transcribed, the People continued:

> MS. YU: Members of the jury, as I was saying about reasonable doubt, the reasonable doubt that may be created later or he might try to create later, are not going to come up together to make a reasonable alternative as to what happened. It will not be reasonable doubt.

Id. at 3. Following Blas's closing argument, the People offered the following in rebuttal:

> MS. YU: Ladies and gentlemen, as I told you, Mr. Van de Veld got up here and told you about reasonable doubt. He pointed out several pieces of evidence that he thought was the reason why the evidence failed. But, pointing out all the holes, he doesn't give you a reasonable alternative as to what could have happened. He still hasn't come up with anyone who has a motive or an opportunity to frame the Defendant.

Id. at 11. Blas again objected, but the content of the sidebar conference was indiscernible. *Id.* at 11-12. After the sidebar conference, the Prosecution clarified with the following statements:

> MS. YU: Now, while it's true that Defendant doesn't have a burden to prove to you anything, he's asserting that there's another reasonable alternative explanation as to what happened. But he never tells you what that is. All he points out are little things that confuse you as to what the real issue here is.

Id. at 12. Blas objected, but the sidebar conference was again indiscernible.

[14] It is not clear from the record if the trial court instructed the jury to disregard the People's statements. However, a jury instruction given by the trial court at the beginning of the trial clarified the burden of proof:

> The defendant has pled not guilty to the charges, and is presumed innocent until such time the Government proves the defendant guilty beyond a reasonable doubt.
>
> In addition, the defendant also continues to have the right to remain silent, and is never having to prove innocence, or to present any evidence.

Tr. at 26 (Jury Trial, Day 1, Dec. 17, 2013). Following the trial, the court provided another burden of proof instruction before the jurors began deliberation:

> The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. The burden never shifts to a defendant for the law never imposes upon a defendant in any criminal case the burden or duty of calling any witnesses or producing any evidence.

Tr. at 30-31 (Jury Trial, Day 4, Dec. 20, 2013).

[15] After the People presented their case, Blas moved for an acquittal. First, he argued the Complaint argued an identical crime twice. Second, he moved for an acquittal on statute of limitations grounds, arguing that the People "failed to prove . . . the date of installation of the device in the wall." Tr. at 106, 108 (Jury Trial, Day 3). Blas argued all that was proven was the date the images were discovered, but not when the crime occurred—namely, the date the images were taken. The trial court allowed the charge to go forward as a single charge with two counts for the two victims. Furthermore, the trial court denied the motion for acquittal despite the lack of providing a specific date for commission of the crime, reasoning that "a reasonable jury may still find beyond a reasonable doubt that, in fact, Mr. Blas did engage in the conducts alleged" in the Complaint based on the evidence presented. *Id.* at 118.

[16] Blas was convicted of two counts of Invasion of Privacy (As a Misdemeanor), and sentenced to one year incarceration for each count to be served consecutively, as well as fines, restitution to the victims, and two years of parole following confinement. The Judgment also indicated Blas was required to "register as [a] Level One Sex Offender with the Guam Sex Offender Registry." RA, tab 95 at 2 (Judgment, May 16, 2014). Blas timely appealed.

II. JURISDICTION

[17] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-49 (2015)); 7 GCA §§ 3105, 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[18] The relevant inquiry when reviewing whether the evidence was sufficient "to support a criminal conviction is 'whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt.'" *People v. Campbell*, 2006 Guam 14 ¶ 10 (quoting *People v. Maysho*, 2005 Guam 4 ¶ 8). The evidence is reviewed "in the light most favorable to the People," and is sufficient to support a conviction if "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged." *Id.* (citing *Maysho*, 2005 Guam 4 ¶ 8). This standard of review is "'highly deferential.'" *Id.* (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 20).[1]

[19] A claim for prosecutorial misconduct requires a showing 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)). Even if the People's comments to the jury are "'undesirable or even universally condemned,'" the remarks are not necessarily "tantamount to a constitutional violation." *Id.* (quoting *Wainwright*, 477 U.S. at 181). Objectionable comments by the People are reviewed under a harmless error standard and will only be reversed if "it is more likely than

[1] We note that during oral argument, Blas offered a less stringent standard of review for sufficiency of the evidence issues. These arguments will be disregarded because "arguments not raised in a party's initial brief and instead raised for the first time at oral argument are considered waived." *United States v. Pizarro-Berrios*, 448 F.3d 1, 5 (1st Cir. 2006); *see also Szczesny v. Ashcroft*, 358 F.3d 464, 465 (7th Cir. 2004).

not that the comment affected the jury's verdict" in a way that "taint[s] the underlying fairness of the proceedings." *People v. Moses*, 2007 Guam 5 ¶ 7 (quoting *Evaristo*, 1999 Guam 22 ¶ 18).

[20] "Issues of statutory interpretation are reviewed *de novo*." *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10 (citing *People v. Quichocho*, 1997 Guam 13 ¶ 3).

IV. ANALYSIS

A. Whether Sufficient Evidence was Presented to Show that Blas Captured Images and Video within the Applicable Statute of Limitations

[21] Blas contends there was insufficient evidence to sustain his Invasion of Privacy conviction because no evidence at trial proved that he used the device within the applicable statute of limitations. Appellant's Br. at 11 (Aug. 29, 2014). Blas also believes that the People erroneously conflate the dates of the use of the product of the device installation (i.e., the collected images) with the transfer of those images from a viewing device onto computers or disks. Appellant's Reply Br. at 4-9 (Jan. 22, 2015). Instead, he argues that the only evidence on the record supporting the date the device (i.e., the camera) was used was June 2, 2008, which was more than one year prior to the filing of the misdemeanor charges on July 8, 2009. Appellant's Br. at 13 (citing RA, tab 1 at 2 (Compl.)); *see also* Tr. at 43 (Jury Trial, Day 3) (the Examiner testified regarding an image with a June 2, 2008 creation date). Under 8 GCA § 10.30, a misdemeanor offense such as Invasion of Privacy offense must be charged within one year after it is committed. 8 GCA § 10.30 (2005).

[22] The People counter that Blas's argument fails to focus on additional evidence presented and how that evidence relates to the charge. Appellee's Br. at 10 (Dec. 19, 2014). The charge does not relate to a specific image or video, but rather that the installation of a device within a private place occurred between April 1, 2009 through May 31, 2009, for the purpose of

"observing, photographing, recording, amplifying or broadcasting sounds or events in such a place." RA, tab 1 at 1-2 (Compl.). Although there is no clear date showing when filming began, the People argue sufficient evidence was provided for a jury to conclude that Blas engaged in an ongoing course of illegal conduct following his discovery of the hole, and until the camera was discovered on May 13, 2009. Appellee's Br. at 12.

[23] In evaluating whether the evidence was sufficient to support Blas's criminal conviction, we must determine "'whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt'" within the applicable statute of limitations. *See Campbell*, 2006 Guam 14 ¶ 10 (quoting *Maysho*, 2005 Guam 4 ¶ 8). In doing so, we review the evidence presented in a light most favorable to the People, and the conviction will be upheld if "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged." *Id.* (citations omitted).

[24] We have said that in the criminal sexual conduct context, "a conviction may be attacked if the evidence at trial demonstrates that the date proved was not 'reasonably near' the date alleged in the indictment" even though time is not an essential element of the crime. *Id.* ¶ 17 (quoting *People v. Atoigue*, DCA No. CR 91-95A, 1992 WL 245628, at *7 (D. Guam App. Div. Sept. 11, 1992)). Although this is an Invasion of Privacy case in which time is not an essential element, the "reasonably near" principle described in *Campbell* is equally applicable. Thus, proving "'any date before the return of the indictment and within the statute of limitations is sufficient'" to sustain a conviction. *See id.* (quoting *Atoigue*, 1992 WL 245628, at *7). Variance between the dates alleged in the indictment or information and those proved at trial is permissible "[a]s long as a defendant is neither surprised nor hampered in preparing his defense."

Id. (citing *Tingley v. State*, 549 So. 2d 649, 650 (Fla. 1989) ("[T]he exact date of the offense need not be alleged."); *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997)).

[25] Turning to the facts of this case, it is apparent that Blas's concentration on the image created on June 2, 2008, fails to focus on additional evidence and how that evidence relates to the Invasion of Privacy charge. Title 9 GCA § 70.35(a)(2) (2005), before being repealed and reenacted by Pub. L. 32–144:2 (Apr. 28, 2014), criminalized "install[ing]" or "us[ing] any such unauthorized installation," and sufficient evidence showed the camera was used because each separate instance of filming would constitute an "installation" or "use" of an unauthorized installation.[2] For example, bank personnel testified Blas stated he knew about the hole in the inner utility room since 2008, but chose not to cover it up. Tr. at 62-63 (Jury Trial, Day 2, Dec. 18, 2013). Blas was also identified as the only bank employee with working keys to the inner utility room. Tr. at 146 (Jury Trial, Day 1). This evidence could lead the jury to infer that Blas began filming in 2008, and continued between July 2008 and May 12, 2009. Additional compelling evidence came from the Examiner who testified that the "Valued Customer" profile was created in Blas's laptop on February 10, 2009, and that the profile had been used on May 12, 2009. Tr. at 9-10 (Jury Trial, Day 2). The Examiner further testified "Valued Customer" was the only active profile, containing 5.89 gigabytes of data. Tr. at 10, 13 (Jury Trial, Day 3). Also,

[2] Under former 9 GCA § 70.35(a)(2):

> (a) A person commits a misdemeanor if, except as authorized by law, he:
>
> . . . .
>
> (2) installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place, or uses any such unauthorized installation.

9 GCA § 70.35(a)(2) (2005).

images on Blas's computer were similar to those found in the SD card. Tr. at 25-27 (Jury Trial, Day 2). Moreover, the second victim testified that she observed Blas exiting the men's bathroom on the sixth floor at the same time she exited the ladies room even though he worked on the seventh floor. Tr. at 85, 95 (Jury Trial, Day 3). This peculiar coincidence occurred more than three times. *Id.* at 85. Furthermore, the laptop, camera, and charging battery were still physically present at the Bank as of May 13, 2009. Tr. at 41 (Jury Trial, Day 1); Tr. at 62-63 (Jury Trial, Day 2).

[26] It was reasonable for the jury to conclude the camera setup was used within the applicable statute of limitations period, through May 12, 2009, exclusive of any malleable time-stamping. Taken together, the facts that the "Valued Customer" profile showed substantial data and high activity since February 10, 2009, testimony identified Blas as the only individual with keys to the utility room, and the camera with illicit images was found on May 13, 2009, provided sufficient evidence for a jury to determine that Blas used the device within 8 GCA § 10.30's one-year statute of limitations. *See Campbell*, 2006 Guam 14 ¶ 10; *see also* Tr. at 41, 146 (Jury Trial, Day 1); Tr. at 30 (Jury Trial, Day 3). The evidence shows the date of recording the images and videos entered into evidence was "reasonably near" the dates alleged in the Complaint. *See Campbell*, 2006 Guam 14 ¶ 17 (citations and internal quotation marks omitted). Under the highly deferential standard under which a sufficiency of the evidence challenge is viewed, a rational trier of fact could have found Blas guilty beyond a reasonable doubt. *See id.* ¶ 10. Therefore, Blas's sufficiency of the evidence challenge fails.

B. Whether Blas Presented a Reviewable "Unit of Prosecution" Challenge

[27] After the People presented their case, Blas argued that the Complaint improperly alleged an identical crime twice. Tr. at 106 (Jury Trial, Day 3). The trial court denied Blas's motion for acquittal, allowing the charge to go forward as a single charge with two counts. *Id.* at 117. Although not present in his statement of issues, Blas briefly mentions on appeal that "there was only a single charge as the offense provided for the offense to be against multiple persons," but the court denied the motion for acquittal. Appellant's Br. at 11. This purported "unit of prosecution" argument is not developed by Blas further, but is discussed at length by the People. Appellee's Br. at 13-15.

[28] Pursuant to the Guam Rules of Appellate Procedure ("GRAP"), an Appellant's brief must contain an argument, which must state the "Appellant's contentions and reasons for them" with citations to authorities and the record. GRAP 13(a)(9)(A). Furthermore, "[i]ssues raised in a brief which are not supported by argument are deemed abandoned . . . . We will only review an issue not properly presented if our failure to do so would result in manifest injustice." *People v. Quinata*, 1999 Guam 6 ¶ 26 (quoting *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992)); *see also United States v. Turner*, 898 F.2d 705, 712 (9th Cir. 1990). We determine that Blas's failure to develop this argument resulted in an abandonment of the issue, and that no manifest injustice will result if it is disregarded.

C. Whether the Prosecution Engaged in an Improper Closing Argument that Tainted the Underlying Fairness of the Proceeding

[29] Blas next argues that the prosecutor engaged in misconduct through making improper closing arguments that the trial court failed to cure. Appellant's Br. at 13. The People argue

their statements merely anticipated the doubt Blas would suggest was unreasonable, which is permissible. Appellee's Br. at 16.

[30] "[W]hen addressing claims of prosecutorial misconduct, we first determine whether the challenged statements were indeed improper." *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (citing *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999)). However, an improper argument is not a per se violation of the defendant's constitutional rights. *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (citations omitted). For prosecutorial misconduct to rise to the level of a constitutional violation, the "'prosecutor's "comments" [must have] so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *See Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Wainwright*, 477 U.S. at 181). Even if the People's comments to the jury are "'undesirable or even universally condemned,'" the remarks are not necessarily "tantamount to a constitutional violation." *Id.* (quoting *Wainwright*, 477 U.S. at 181).

[31] It is improper for the prosecution to "suggest that the defendant has the burden to produce evidence." *United States v. Balter*, 91 F.3d 427, 441 (3d Cir. 1996), *as amended* (Aug. 16, 1996) (citations omitted). Yet several jurisdictions hold that it is allowable for the prosecution to comment upon the failure of the defense to offer evidence in support of its case. *Orellana v. State*, 381 S.W.3d 645, 655 (Tex. App. 2012) ("[I]t is generally permissible for the State to comment on a defendant's failure to present favorable evidence, and such comments do not shift the burden of proof."); *see also* 75A Am. Jur. 2d *Trial* § 506 (2015).

[32] Specifically, some courts acknowledge that a prosecutor's remark that defense counsel's theory of doubt is "unreasonable" rather than "reasonable" is not necessarily improper burden-

shifting. Appellee's Br. at 17. For example, in *People v. Stewart*, the defendant challenged the prosecutor's following comment challenging the defense to provide a reasonable interpretation of the evidence showing defendant's innocence:

> "Now, we're starting to get a little better sense of what 'burden of proof beyond a reasonable doubt' means. It means: Is there a reasonable interpretation of this evidence other than [defendant] killed three people? The answer to that question is no. And, ladies and gentlemen, I'll do it right now. I *challenge defense counsel to talk about the evidence in this case, and tell you—give you—let us all listen very carefully to see if he does it—a reasonable interpretation of this evidence that says that [defendant] is not guilty. . . .*"

93 P.3d 271, 327 (Cal. 2004) (emphasis added). The prosecutor continued, stating that although the defendant was entitled to "reasonable doubt," he was not similarly entitled to "unreasonable doubt." *Id.* at 328. Unlike this case, the defendant in *Stewart* did not object to the prosecutor's argument. *Id.* at 327-28. However, the court assessed the argument in *dicta* and reasoned that "any misconduct would be harmless" because "[t]he statement was plainly an attempt to elaborate on the interaction between the concepts of reasonable and unreasonable doubt, and the burden of proof beyond a reasonable doubt." *Id.* at 327.

[33] Similarly, the prosecutor in *People v. Collins* stated in rebuttal that the defendant's "absurd" theory "as to why the jury should find a reasonable doubt was so unlikely as to strain credibility." 250 P.3d 668, 678 (Colo. App. 2010). Using an abuse of discretion standard, the appellate court concluded that the comments "permissibly focused the jury's attention on the evidence and the inferences that could reasonably be drawn from the evidence." *Id.* (citing *Harris v. People*, 888 P.2d 259, 263-64 (Colo. 1995)).[3] The court determined the record did not

[3] The court also noted that "a prosecutor may 'employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as [the argument] does not thereby induce the jury to determine guilt on the basis of passion or prejudice.'" *Collins*, 250 P.3d at 678 (quoting *People v. Allee*, 77 P.3d 831, 837

suggest the comments "induce[d] the jury to make a decision on a basis other than the merits of the evidence and the court's instructions of law." *Id.* at 679.

[34] Here, the prosecutor stated during closing argument that "[defense counsel] is probably going to get up here later and talk about reasonable doubt, and he's going to tell you some reasons why he thinks that the evidence fails." RT, at 3 (Dec. 20, 2013). The People also stated that "the reasonable doubt that may be created later or [Blas's counsel] may try to create later, are not going to come up together to make a reasonable alternative as to what happened. It will not be reasonable doubt." RT, at 3 (Dec. 20, 2013). Blas objected to these statements and subsequent arguments, but all sidebar conferences were indiscernible. *Id.* at 3, 11-12.

[35] During his own closing argument, Blas argued as predicted by the prosecutor that the People's evidence was insufficient to convict Blas of Invasion of Privacy due to various evidentiary failures and errors by defense witnesses. Tr. at 5-24 (Jury Trial, Day 4). Blas's defense counsel took the opportunity to emphasize that the burden of proving a case is on the People:

> Now, they'll say, well, did the -- did the defendant show you that? Did you then hear the jury instruction saying that -- saying that's what you heard at the beginning of the trial? A defendant never has to prove anything. A defendant has no obligation to present any witnesses, if from the evidence that is presented, there are reasonable questions you must determine that there is reasonable doubt.

Id. at 7. As a prosecutor may comment that defense counsel's theory as unreasonable, we determine that the above statements by the prosecutor permissibly elaborated on the concepts of

(Colo. App. 2003)). Furthermore, "a prosecutor has considerable latitude in replying to opposing counsel's argument, and [c]ontentions of improper argument in a closing argument must be evaluated in the context of the argument as a whole and in light of the evidence." *Id.* (citations and internal quotation marks omitted).

reasonable and unreasonable doubt. *See Stewart*, 93 P.3d at 327. Thus, the statements made by the People prior to rebuttal were proper.

[36] On the other hand, a statement offered by the People during rebuttal is problematic. RT, at 3 (Dec. 20, 2013). The following comment is improper as it implies Blas was required to present evidence of an individual with motive or an opportunity to "frame" him:

> MS. YU: Ladies and gentlemen, as I told you, Mr. Van de Veld got up here and told you about reasonable doubt. He pointed out several pieces of evidence that he thought was the reason why the evidence failed. *But, pointing out all the holes, he doesn't give you a reasonable alternative as to what could have happened. He still hasn't come up with anyone who has a motive or an opportunity to frame the Defendant.*

RT, at 11 (Dec. 20, 2013). This comment was coupled with a statement that the defense did not have the burden to prove anything, that Blas's counsel was confusing the real issues of the case, and that any doubt generated was not reasonable. *Id.* at 12.

[37] Although the statement is improper, it is unlikely that the prosecutor's comments rose to the level of prosecutorial misconduct that so "'infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Wainwright*, 477 U.S. at 181). This objectionable comment is reviewed under a harmless error standard and will only be reversed if "it is more likely than not that the comment affected the jury's verdict" in a way that "taint[s] the underlying fairness of the proceedings." *Moses*, 2007 Guam 5 ¶ 7 (citing *Evaristo*, 1999 Guam 22 ¶ 18). "[T]he test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Meseral*, 2014 Guam 13 ¶ 42 (quoting *People v. Roten*, 2012 Guam 3 ¶ 41).

Under this harmless error test, the prosecution "bears the burden of persuasion regarding prejudice." *Id.* (citing *People v. Quitugua*, 2009 Guam 10 ¶ 43 n.9).

[38] Like *Stewart*, "any misconduct would be harmless" because "[t]he statement[s were] plainly an attempt to elaborate on the interaction between the concepts of reasonable and unreasonable doubt." 93 P.3d at 327. There is no indication that the jury shifted the burden to Blas. The instructions made by the trial court before and after trial as to the burden of proof, along with clarifications made by both parties, made clear that the burden rested on the People. Tr. at 25-27 (Jury Trial, Day 1); Tr. at 30-31 (Jury Trial, Day 4). Blas does not argue that the court's instructions were erroneous.

[39] In addition, the trial judge instructed the jury after closing arguments that "[w]hat the lawyers have said in their . . . closing arguments . . . [are] not evidence." Tr. at 28 (Jury Trial, Day 4); *see also id.* at 42. In *Evaristo*, a similar instruction compelled our conclusion that an improper comment by the prosecutor did not "influence[] the jury to the extent that the jury's conviction was not arrived at objectively." 1999 Guam 22 ¶ 21.

[40] We are also persuaded by our holding in *People v. Meseral*, 2014 Guam 13. In that case, we held that a prosecutor's improper vouching statement resulted in harmless error; in part because the trial court instructed the jury that remarks made by attorneys during closing statements were not evidence. *Meseral*, 2014 Guam 13 ¶ 43. Furthermore, we held that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.* (alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)). In this case, the

prosecutor's statement standing alone is insufficient to overturn Blas's conviction because the improper statement had little, if any, prejudicial effect on the jury. Thus, any misconduct by the prosecutor was harmless.

D. Whether the Inclusion of the Sex Offender Registry Order in the Judgment was Proper

[41] The trial court's Judgment notified Blas that he is required to register as a Level One Sex Offender. RA, tab 95 at 1-2 (Judgment, May 16, 2014). Blas contends that the trial court exceeded its authority under 9 GCA § 80.10 by imposing the registration requirement as a condition of sentence in this case. Appellant's Br. at 16-17. In Blas's view, 9 GCA § 80.10 does not provide authority to the court to require registration, and that 9 GCA § 89.03 "imposes a criminal penalty for non-compliance rather than a penalty for a sentencing violation."[4] Appellant's Br. at 17 (citing 9 GCA § 89.03 (as amended by Pub. L. 31-047 (May 23, 2011)). The People counter that sex offender registration is a civil collateral consequence of Blas's sentence, and that the law requires registration as a condition to release from incarceration. Appellee's Br. at 22.

[42] We have stated that it is "our duty . . . to interpret statutes in light of their terms and legislative intent." *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 46 n.7. "Absent clear legislative intent to the contrary, the plain meaning prevails." *People v. Flores*, 2004 Guam 18 ¶ 8 (quoting *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17).

[4] Blas highlights subsections in which violations of 9 GCA § 89.03 can result in a felony. Appellant's Br. at 22-23. Under 9 GCA § 89.03(c)(5), failure to provide a biological sample can have the same penalty as failure to register, which is a third degree felony; intentional or knowing failure to register while under supervised parole or probation, or when a person is no longer under supervised parole or probation is a felony in the third degree under 9 GCA § 89.03(d)(3)-(4). 9 GCA § 89.03 (as amended by Pub. L. 31-047 (May 23, 2011)).

[43] Individuals convicted of a sex offense who reside on Guam have "the absolute duty" to register as a sex offender. *See* 9 GCA § 89.03(a)(1) (as amended by Pub. L. 31-047:2 (May 23, 2011)). All sex offenders are required to initially register prior to completion of "a sentence of imprisonment with respect to the offense giving rise to the registration requirements." 9 GCA 89.03(d)(2)(A). Pursuant to 9 GCA § 89.02(a)(2)(K), a person convicted of the crime Invasion of Privacy as set forth in 9 GCA § 70.35 is required to register as a level one sex offender.[5] 9 GCA § 89.02(a)(2)(K) (as amended by Pub. L. 32-141:8 (Apr. 28, 2014)).

[44] The Judiciary is required by statute to inform sex offender registrants of their registration duties. *See* 9 GCA § 89.10(b). Furthermore, the Judiciary is tasked with "ensur[ing] that any person required to register under this Chapter has read and signed a form stating that the registrant's duty to register under this Chapter has been explained." 9 GCA § 89.10(c). Finally, the Judiciary shall "perform all other duties necessary to ensure the proper maintenance of the Sex Offender Registry and to ensure that all registrants comply with their registration duties as set out in this Chapter." 9 GCA § 89.10(f) (as amended by Pub. L. 30-223:2 (Dec. 30, 2010)).

[45] The duty to register as a sex offender is not intended to impose punishment, but is rather a remedial civil penalty intended to protect public safety. *See State v. Simmons*, 329 P.3d 523, 525 (Kan. Ct. App. 2014); *see also People v. Gravino*, 928 N.E.2d 1048, 1054 (N.Y. 2010) (citations omitted). These "nonpunitive collateral consequences of judgment . . . are distinct from, and *not a part of, a criminal sentence*." *Simmons*, 329 P.3d at 533 (emphasis added).

[46] The majority of jurisdictions view sex offender registration as a civil collateral consequence to a conviction. *See Magyar v. State*, 18 So. 3d 807, 811-12 (Miss. 2009)

[5] Level one sex offenders must continue to register for their lifetime. 9 GCA § 89.04(a) (as amended by Pub. L. 30-223:2 (Dec. 30, 2010)).

(presenting a survey of numerous jurisdictions with respect to the collateral consequence issue in the guilty plea context). For example, in *Leslie v. Randle*, the Sixth Circuit held that the requirement to register as a sex offender under an Ohio statute was a collateral consequence of a conviction, similar to the loss of the right to vote, which was insufficient to provide for *habeas corpus* relief. 296 F.3d 518, 522-23 (6th Cir. 2002) (citations omitted) (these examples were distinguished from an example of a prisoner released on parole because that prisoner's freedom of movement was sufficiently restrained to be "in custody" for habeas relief purposes); *see also Commonwealth v. Leidig*, 956 A.2d 399, 404 (Pa. 2008). Likewise, the United States Supreme Court recognized sex offender registration as an "effect[] of a conviction commonly viewed as collateral." *Chaidez v. United States*, 133 S. Ct. 1103, 1108 n.5 (2013) (citing *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (Alito, J., concurring) (listing other examples)). Finally, Washington courts have held that even though failure to follow sex offender registration requirements might limit a defendant's movement by future incarceration, this potentiality was dependent on the defendant's choice to comply. *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998).

[47] Blas was convicted of Invasion of Privacy as set forth in 9 GCA § 70.35. As the plain language of 9 GCA § 89.02 requires a person convicted of Invasion of Privacy to register as a level one sex offender, Blas is required to satisfy the statutory registration requirements upon his release from incarceration. *See* 9 GCA § 89.02(a)(2)(K). The requirement to register as a sex offender is merely a civil collateral consequence of Blas's conviction and is not part of his sentence. There is no *ex post facto* punishment at issue because further penalty under 9 GCA §

89.03 will result only if Blas chooses not to register.[6] Finally, it was acceptable for the trial court to inform Blas of his registration requirement in the Judgment because the Judiciary is required to "perform all other duties necessary to ensure" compliance with sex offender registration requirements. *See* 9 GCA § 89.10(f). It would make little difference if Blas was notified within the Judgment, or within a separate order. The trial court appropriately exercised its inherent authority to manage the case before it by notifying Blas of the registration requirement within the Judgment. *See Krevis v. City of Bridgeport*, 817 A.2d 628, 633 (Conn. 2003) (citations omitted) ("A trial court has the authority to manage cases before it as is necessary."). Thus, the trial court's inclusion of sex offender registration in the Judgment was permissible.

V. CONCLUSION

[48] We conclude that under the highly deferential standard under which a sufficiency of the evidence challenge is viewed, a rational trier of fact could conclude beyond a reasonable doubt that Blas captured the images within the applicable statute of limitations period. We also note that Blas's failure to develop his "unit of prosecution" argument resulted in abandonment of the issue. Next, we hold that reversal on the basis of the prosecutor's improper comment is unwarranted because it is unlikely the comment affected the jury's verdict in a way that tainted the underlying fairness of the proceedings. Finally, we determine that Blas is required by 9 GCA § 89.02(a)(2)(K) to register as a Level One Sex Offender. As this requirement was a civil collateral consequence of conviction distinct from the punitive aspects of his sentence, the

[6] Non-punitive sex offender registration requirements that create a civil regime can be applied retroactively without violating the *ex post facto* clause of the United States Constitution. *See Smith v. Doe*, 538 U.S. 84, 105-06 (2003).

court's inclusion of it in the Judgment was permissible. For the foregoing reasons, the Judgment is **AFFIRMED**.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice