IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RAYMOND TORRES TEDTAOTAO,
Defendant-Appellant.

Supreme Court Case No.: CRA14-015
Superior Court Case No.: CF0218-13-01

OPINION

Cite as: 2015 Guam 31

Appeal from the Superior Court of Guam
Argued and submitted on May 13, 2015
Dededo, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Raymond Torres Tedtaotao appeals from a final judgment convicting him of Attempted Murder (as a First Degree Felony); First Degree Robbery (as a First Degree Felony); Aggravated Assault (as a Second Degree Felony); and Burglary (as a Second Degree Felony). Tedtaotao presents five arguments on appeal. First, Tedtaotao argues that the charge of Attempted Murder presents a legal impossibility and fails to allege an offense. Second, he argues that the People failed to provide sufficient evidence on the Attempted Murder charge. Third, he argues that the trial court erred in instructing the jury on the Attempted Murder charge. Fourth, he argues that his Sixth Amendment right to speedy trial was violated. And fifth, he argues that a *Brady* violation occurred. For the following reasons, we reverse and vacate the conviction for Attempted Murder. We remand the case for resentencing and for the trial court to dismiss the Attempted Murder charge. In addition, we affirm the trial court's holding as to Tedtaotao's Sixth Amendment right to speedy trial claim. Finally, we affirm the trial court's denial of Tedtaotao's motion to exclude the testimony of the People's witness.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On May 7, 2013, Tedtaotao was indicted for Attempted Murder (as a First Degree Felony); First Degree Robbery (as a First Degree Felony); Aggravated Assault (as a Second Degree Felony); and Burglary (as a Second Degree Felony).[1] Also named in the indictment were Anthony Paul Mendiola and Kyle James Cruz. The first charge of the indictment alleged:

[1] Tedtaotao was initially indicted for Guilt by Complicity to Commit Attempted Murder (as a First Degree Felony) as well. However, that charge was subsequently stricken, as it was no longer applicable to Tedtaotao when a co-defendant's case was severed. Transcript ("Tr.") at 121-30 (Jury Trial Day 6, Nov. 13, 2013).

> On or about the 20th day of April 2013, in Guam, RAYMOND TORRES TEDTAOTAO did commit the offense of *Attempted Murder*, in that he attempted to cause the death of another human being, that is, *R.P.* under circumstances manifesting extreme indifference to the value of human life, in violation of 9 GCA §§ 16.40(a)(2), 16.40(b), 13.60(b), and 13.10.

Record on Appeal ("RA"), tab 6 (Indictment, May 7, 2013).

[3] On May 16, 2013, Tedtaotao asserted his statutory and constitutional rights to speedy trial.

[4] The court appointed new counsel for Tedtaotao on several occasions. Tedtaotao's initial counsel withdrew from the appointment in this case because Tedtaotao was a co-actor in another of that counsel's cases, and the court appointed Tedtaotao new counsel on May 21, 2013. That attorney then moved to withdraw, and the court appointed Tedtaotao new counsel on May 24, 2013. On May 30, 2013, that attorney then moved to withdraw due to a conflict of interest. A new attorney was appointed, but that attorney moved to withdraw as counsel on June 7, 2013, claiming that appointment in this matter would impinge on the attorney's ability to diligently represent a client in another case and that the matter is personally repugnant to the attorney. After another attorney exercised his right to "pass" on his appointment pursuant to MR 1.1.3.B.4 of the Local Rules of the Superior Court of Guam, the court appointed Tedtaotao new counsel on June 11, 2013. RA, tab 33 (Order Appointing Counsel, June 11, 2013). That attorney then moved to be relieved as counsel, and the attorney who represented Tedtaotao at trial was appointed on June 12, 2013.

[5] That same day, the People filed a Motion for Good Cause Continuance of Trial. The People requested that the trial be delayed six months because an essential witness, the victim, was unavailable as she was off-island receiving medical care for injuries she sustained as a result of the crimes with which the defendants were charged. On June 17, 2013, the trial court granted

the People's motion. The court reasoned that good cause existed to continue the trial due to the unavailability of an essential witness. Furthermore, the trial court also found that good cause existed in order to allow additional time for the People to conduct DNA testing on Tedtaotao. However, the court refused to "delay the trial for six months . . . without sufficient justification to support such a delay in the face of Defendant['s] asserted right to a speedy trial." RA, tab 39 at 4 (Dec. & Order Re Mot. for Good Cause Continuance of Trial, June 25, 2013). The court therefore ordered the People to provide information supporting the request for a six-month delay.

[6] Jury trial commenced on November 4, 2013. Tedtaotao made several dispositive motions during the course of trial: (1) two motions to dismiss for violation of Tedtaotao's Sixth Amendment right to speedy trial; (2) a motion for judgment of acquittal for failure to provide sufficient evidence at the close of the People's case-in-chief, which was subsequently renewed at the close of Defendant's case-in-chief; and (3) a motion to exclude the testimony of Kyle Cruz, a former co-defendant, as a sanction for the People's failure to disclose exculpatory information. The trial court denied all three motions.

[7] Regarding Tedtaotao's motion to exclude the testimony of Cruz, Cruz initially made a written statement in which he stated, "Then I told [Mendiola] I don't want to do it. Then he popped out a gun and said you are." Tr. at 72 (Jury Trial Day 10, Nov. 22, 2013). Cruz later retracted that statement. The People stated that they became aware of this retraction during witness preparation after trial had already begun. The People provided no written discovery to this effect, nor did they notify Tedtaotao in any way. Tedtaotao became aware of the retraction during his cross-examination of Cruz, when Cruz testified that the statement was false and that he had retracted it.

[8] The jury found Tedtaotao guilty of Attempted Murder (as a First Degree Felony); First Degree Robbery (as a First Degree Felony); Aggravated Assault (as a Second Degree Felony); and Burglary (as a Second Degree Felony). Tedtaotao filed a timely Notice of Appeal.

II. JURISDICTION

[9] This court has jurisdiction over this appeal from a final judgment in a criminal case. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 114-61 (2015)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[10] Whether a charge against a defendant lawfully alleges a crime as a result of a legal impossibility is a question of law reviewed *de novo*. *See People v. Anastacio*, 2010 Guam 18 ¶¶ 10, 16.[2]

[11] This court reviews *de novo* a defendant's Sixth Amendment speedy trial claim. *People v. Mendiola*, 1999 Guam 8 ¶ 22.

[12] "Alleged *Brady* violations are reviewed *de novo*." *People v. Fisher*, 2001 Guam 2 ¶ 12 (quoting *United States v. Alvarez*, 86 F.3d 901, 903 (9th Cir. 1996)).

IV. ANALYSIS

A. The Charge of Attempted Murder Does Not Allege a Crime

[13] The first issue before this court is whether it is legally impossible to commit Attempted Murder when the underlying crime is murder committed recklessly under circumstances

[2] The People seem to argue that any defect in the original indictment is overcome by harmless error. *See* Appellee's Br. at 7-10. However, the harmless error standard of review is inapplicable to this issue. This court has, in the past, conducted a *de novo* review when dealing with the issue of whether it is legally impossible to commit a crime as alleged. *See Anastacio*, 2010 Guam 18 ¶¶ 11-15.

manifesting extreme indifference to the value of human life.[3] Before addressing the merits, we must examine the timeliness of raising the issue.

[14] The People seem to argue that the issue of whether the charge of Attempted Murder alleged a crime is time barred because Tedtaotao failed to challenge the defect in the indictment prior to the start of trial. Appellee's Br. at 11-12 (Jan. 24, 2015). On the other hand, Tedtaotao asserts, "At trial, Tedtaotao objected that he could not have attempted to recklessly cause the death of the victim." Appellant's Reply Br. at 2 (Feb. 6, 2015). Although both Tedtaotao and the People allege that Tedtaotao's counsel objected to the Attempted Murder charge at some point during the trial court proceedings, such objections were made in relation to the jury instructions, rather than the indictment. Appellee's Br. at 7, 11-12; Reply Br. at 2. Thus, there is no evidence in the record of an objection to the indictment, either before or during trial.

[15] Regardless, the issue of whether an indictment alleges a crime can be raised for the first time on appeal. Title 8 GCA § 65.15 reads, in pertinent part:

> Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following shall be raised prior to trial:
>
> . . . .
>
> (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings) . . . .

8 GCA § 65.15 (2005). Generally, a defendant who fails to object to an indictment prior to trial waives the objection; however, objections based on lack of jurisdiction or failure to charge an

[3] The People previously appealed the sentencing for Attempted Murder in *People v. Tedtaotao*, 2015 Guam 9. There, although we affirmed the trial court's sentence for Attempted Murder, our analysis focused on the maximum sentence for Attempted Murder, and we did not evaluate whether Attempted Murder, as charged, presented a legal impossibility. *See People v. Tedtaotao*, 2015 Guam 9 ¶¶ 10-16.

offense may be made at any time, including for the first time on appeal. *See* 8 GCA § 65.15(b); *People v. Diaz*, 2007 Guam 3 ¶ 51 ("[O]nly certain objections to an indictment may be made for the first time on appeal. Those are the limited exceptions, such as when there is an objection to jurisdiction or an assertion that the indictment failed to allege a crime."). Thus, the issue of whether the Attempted Murder charge presents a legal impossibility and fails to allege a crime is properly before this court.

[16] Guam law defines "Attempt" as follows:

> A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

9 GCA § 13.10 (2005).

[17] Pursuant to 9 GCA § 16.40(a), a "criminal homicide constitutes murder when: (1) it is committed intentionally or knowingly; or (2) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." 9 GCA § 16.40(a)(1)-(2) (2005).

[18] The indictment for Attempted Murder alleged that Tedtaotao "attempted to cause the death of another human being . . . under circumstances manifesting extreme indifference to the value of human life, in violation of 9 GCA §§ 16.40(a)(2), 16.40(b), 13.60(b), and 13.10." RA, tab 6 at 1 (Indictment). Tedtaotao posits that "one cannot be found guilty of attempted murder pursuant to a statute that requires the actual result of death because of reckless conduct." Appellant's Br. at 11 (Dec. 24, 2014).

[19] In support of his argument, Tedtaotao primarily relies on *Dominguez v. State*, 840 N.W.2d 596 (N.D. 2013). In that case, the Supreme Court of North Dakota addressed the issue

of whether murder under circumstances manifesting an extreme indifference to the value of human life could be the underlying charge for an attempt crime. *Id.* at 598.

[20] In addressing the issue, the court first analyzed the plain language of the statutory scheme for Attempted Murder. The court noted that under the plain language of North Dakota's attempt statute, to commit an attempt offense, the accused must intentionally engage in conduct strongly corroborative of the firmness of the actor's intent to complete the commission of the underlying offense. *Id.* at 599 (citing N.D. Cent. Code § 12.1-06-01(1)). The court further noted that murder under circumstances manifesting an extreme indifference to the value of human life is a general intent crime and does not require a person act with specific intent to kill, and thus, "extreme indifference murder results in an unintentional death." *Id.* at 600 (quoting *State v. Borner*, 836 N.W.2d 383, 390 (N.D. 2013)). The court observed the inconsistency between criminal attempt, which requires an intent to complete the commission of the underlying crime, and murder committed under circumstances manifesting an extreme indifference to the value of human life, which results in an unintentional death and does not require an intent to commit that particular offense. *Id.* Thus, the court held that attempted murder under circumstances manifesting an extreme indifference to the value of human life is not a cognizable offense. *Id.* at 598.

[21] Second, the North Dakota Supreme Court explored the legislative history of North Dakota's attempt statute. *Id.* at 600-01. In doing so, the court noted that "[i]mplicit in the notion of attempt is the requirement that whatever the person is doing is being done with the purpose of committing a crime." *Id.* at 601 (quoting *Working Papers of the National Commission on Reform of Federal Criminal Laws* 354 (1970)). Further, the court reasoned that:

> Murder committed under circumstances manifesting an extreme indifference to the value of human life, like negligent homicide, results in an unintentional death, and the fact that death resulted turned the party's willful conduct into the offense of murder; the mere performance of the willful conduct was not an attempt to commit murder.

Id.

[22] Third, the court noted the consistency of its analysis with other provisions of North Dakota's statutory scheme. *Id.* at 602. Namely, the court observed the harmony between its decision and the statute providing for the offense of reckless endangerment:

> Under the statutory scheme, a person is guilty of reckless endangerment if he creates a substantial risk of serious bodily injury or death to another under circumstances manifesting an extreme indifference to the value of human life, but a death does not result. The person is guilty of murder, however, when he causes the death of another under the same circumstances. Causing the death of another is an element of murder under N.D.C.C. § 12.1-16-01(1)(b), and the individual is guilty of reckless endangerment, not attempted murder, when the same act does not cause the death of another and there is no intent to kill.

Id. The court concluded that "reckless endangerment is the appropriate offense when a person's conduct manifests an extreme indifference to human life and there is no evidence of an intent to kill." *Id.*

[23] The North Dakota Supreme Court's reasoning is convincing in light of the fact that North Dakota's statutory scheme for attempted murder is substantially similar to that of Guam. *Compare* 9 GCA § 13.10 (2005) ("A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime."), *and* 9 GCA § 16.40 (2005) ("Criminal homicide constitutes murder when: (1) it is committed intentionally or knowingly; or (2) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life . . . ."), *with*

N.D. Cent. Code § 12.1-06-01(1) ("A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A 'substantial step' is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime."), *and* N.D. Cent. Code § 12.1-16-01(1)(a)-(b) ("A person is guilty of murder, a class AA felony, if the person: a. Intentionally or knowingly causes the death of another human being; b. Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life . . . .").

[24] While there is no definition of "substantial step" in Guam's statutes or case law, it is logical to conclude that attempt requires intent to complete the commission of the underlying crime. For instance, this court has previously noted that "attempted robbery involves the intent to commit robbery." *People v. Angoco*, 2004 Guam 11 ¶ 25 n.8. Moreover, murder committed under 9 GCA § 16.40(a)(2), reckless murder, is unintentional. Accordingly, since criminal attempt requires an intent to complete the commission of the underlying crime and reckless murder results in an unintentional death, attempted reckless murder is not a cognizable offense.

[25] Additionally, the North Dakota Supreme Court's analysis of murder and reckless endangerment can be replicated using Guam's murder and aggravated assault statutes. In Guam, "[a] person is guilty of aggravated assault if he either recklessly causes or attempts to cause: (1) serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life . . . ." 9 GCA § 19.20(a)(1) (2005). However, a person is guilty of murder when a homicide results from the same circumstances. 9 GCA § 16.40(a)(2). Aggravated assault, not attempted murder, is the appropriate offense when a defendant's conduct manifests an extreme indifference to the value of human life and no homicide occurs.

[26] Notably, a majority of jurisdictions have also adopted the North Dakota Supreme Court's holding. *Dominguez* itself noted:

> A majority of other jurisdictions . . . have also held that attempt requires an intent to complete the commission of the underlying offense or to attain the result of the underlying offense and that the offense of attempted murder under circumstances manifesting an extreme indifference to the value of human life does not exist.

Dominguez, 840 N.W.2d at 601 (citing *State v. Curry*, 931 P.2d 1133, 1137 (Ariz. Ct. App. 1996); *State v. Shannon*, 905 P.2d 649, 652-53 (Kan. 1995); *State v. Johnson*, 707 P.2d 1174, 1177-79 (N.M. Ct. App. 1985); *State v. Smith*, 534 P.2d 1180, 1184-85 (Or. Ct. App. 1975); *State v. Vigil*, 842 P.2d 843, 848 (Utah 1992); *State v. Dunbar*, 817 P.2d 1360, 1363 (Wash. 1991)). The court further recognized that "[a] majority of courts considering other types of attempted murder have also held the offense of attempted murder requires an intent to kill and the offense does not exist if the underlying murder offense does not require a specific intent to kill." *Id.* at 601-02 (citing *Huitt v. State*, 678 P.2d 415, 418-20 (Alaska Ct. App. 1984); *State v. Luke*, 1 P.3d 795, 801 (Idaho 2000); *State v. Howard*, 405 A.2d 206, 212 (Me. 1979); *State v. Dahlstrom*, 150 N.W.2d 53, 58-59 (Minn. 1967); *Ramos v. State*, 592 P.2d 950, 951 (Nev. 1979); *State v. Coble*, 527 S.E.2d 45, 47-48 (N.C. 2000); *Commonwealth v. Griffin*, 456 A.2d 171, 177-78 (Pa. Super. Ct. 1983); *State v. Lyerla*, 424 N.W.2d 908, 912-13 (S.D. 1988); *State v. Kimbrough*, 924 S.W.2d 888, 890-92 (Tenn. 1996); *Flanagan v. State*, 675 S.W.2d 734, 741-42 (Tex. Crim. App. 1982)). Other jurisdictions that have adopted this rule include California, New Jersey, Michigan, and the federal courts. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 351 n.2 (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill."); *United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994); *People v. Smith*, 124 P.3d 730, 739 (Cal. 2005) ("Murder does not require the

intent to kill. . . . In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.'" (alteration in original) (citations omitted)); *People v. Long*, 633 N.W.2d 843, 847-48 (Mich. Ct. App. 2001); *State v. Robinson*, 643 A.2d 591, 595 (N.J. 1994) ("Thus, a person charged with attempted murder must be found to have acted with the culpability required for the crime of murder, as well as to have acted with the purpose of causing the result that is an element of murder, namely, the death of another.").

[27] Accordingly, we find that it is logically and legally impossible for one to attempt murder under circumstances manifesting extreme indifference to the value of human life because under those circumstances, there is no intent to kill. In turn, we hold that the indictment for Attempted Murder, as charged, failed to allege a crime.

B. Sufficiency of the Evidence on the Attempted Murder Charge

[28] This court has "previously held that even if a defendant's conviction can be vacated on other grounds, if the defendant also raises sufficiency of evidence as one ground, the court must consider this argument because 'a finding of insufficiency would result in acquittal rather than a less favorable outcome to the defendant, such as vacating the conviction and exposing him to possible retrial.'" *Anastacio*, 2010 Guam 18 ¶ 16 (quoting *People v. Tennessen*, 2009 Guam 3 ¶ 11).

[29] However, this court's finding that Attempted Murder under circumstances manifesting an extreme indifference to the value of human life is a legal impossibility results in vacation of Tedtaotao's conviction as to the Attempted Murder Charge and would not expose him to retrial on that charge. *See id.* Thus, this court's reversal of the Attempted Murder conviction for the

indictment's failure to allege a crime negates the need to evaluate the sufficiency of the evidence for this charge. *See id.*

[30] Accordingly, the issue of whether the People provided sufficient evidence on the Attempted Murder charge is moot.

C. Jury Instructions on the Attempted Murder Charge

[31] Likewise, because we find that the Attempted Murder charge failed to allege a crime, the issue of whether the trial court properly instructed the jury on the Attempted Murder charge is moot.

D. Sixth Amendment Right to Speedy Trial

[32] The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. The substance of the speedy trial right is defined through analysis of the peculiar facts and circumstances of each case. *People v. Flores*, 2009 Guam 22 ¶ 41.

[33] In evaluating a claimed speedy trial violation, this court employs the four-part balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "Under the *Barker* test, the following factors are considered: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the presence or absence of prejudice resulting from the delay." *Flores*, 2009 Guam 22 ¶ 42. "None of these factors alone . . . are dispositive. Rather, the factors must be considered together and balanced in relation to all of the relevant circumstances of the delay in bringing the defendant to trial." *Id.* ¶ 42 (citing *Barker*, 407 U.S. at 533).

1. Length of Delay

[34] "The length of delay is measured from the point of arrest or indictment until trial." *People v. Naich*, 2013 Guam 7 ¶ 50. "In evaluating the impact of the length of the delay, the court must consider the conduct of the prosecution and the defense, as well as the nature of the case." *Id.* "Under the *Barker* analysis, '[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.'" *Flores*, 2009 Guam 22 ¶ 44 (quoting *Barker*, 407 U.S. at 530).

[35] "How much time may pass before the delay is considered presumptively prejudicial depends on the circumstances of the case." *United States v. Chahia*, 544 F.3d 890, 898 (8th Cir. 2008). For example, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. The U.S. Supreme Court has noted that "courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992).

[36] However, despite these guidelines, the precise length of time necessary to trigger a constitutional violation cannot be quantified into a specific number of days or months. *Barker*, 407 U.S. at 523; *Flores*, 2009 Guam 22 ¶ 43; *People v. Mendiola*, 2015 Guam 26 ¶ 15. Instead, the court must examine the particular circumstances and complexities of the case to determine whether the length of delay gives rise to a presumption of prejudice. *Barker*, 407 U.S. at 530-31.

[37] In certain cases, the Ninth Circuit has found that a six-month delay of trial was a "borderline case" sufficient to trigger an inquiry into the remaining three factors. *See, e.g.*, *United States v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986); *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir. 1976). *But cf. United States v. Lozano*, 413 F.3d 879, 883 (8th Cir. 2005)

(finding that a period of slightly less than seven months is too brief a delay to trigger defendant's Sixth Amendment speedy trial claim); *United States v. White Horse*, 316 F.3d 769, 774 (8th Cir. 2003) (concluding that a nine and one-half month interval is too short to be presumptively prejudicial); *United States v. McFarland*, 116 F.3d 318 (8th Cir. 1997) (holding that a period of a little over seven months is too brief a delay to trigger review of defendant's Sixth Amendment speedy trial claim).

[38] In the instant case, Tedtaotao was arrested and brought before a magistrate judge on April 27, 2013, indicted on May 7, 2013, and brought to trial on November 4, 2013. The elapsed time from arrest to trial was 191 days, or 6 months and 8 days. The trial court found that such a delay was not presumptively prejudicial and ended its analysis there. We find this to be in error. We find that this delay is a "borderline case" sufficient to trigger inquiry into the remaining *Barker* factors. *See Mendiola*, 2015 Guam 26 ¶ 15. However, because a six-month delay is a relatively short period when considering the seriousness and complexity of Tedtaotao's charges, we find that this factor weighs in favor of the People. *See id.*

2. Reason for Delay

[39] In analyzing reasons for the delay, this court examines which party was responsible for the delay. *Flores*, 2009 Guam 22 ¶ 45; *see also United States v. Schreane*, 331 F.3d 548, 554 (6th Cir. 2003) ("Finally, it should be noted that the second *Barker* factor is not a search for a blameless party; instead, the concern is with whether the government or the criminal defendant is more to blame for the delay." (alterations, citations, and internal quotation marks omitted)). *Barker* identifies three types of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. *Flores*, 2009 Guam 22 ¶ 45 (citing *Barker*, 407 U.S. at 531). "Different weights are assigned different reasons for delay." *Id.* Deliberate delay, including attempts to

delay the trial in order to hamper the defense or to gain some tactical advantage over defendants or to harass them, is weighted heavily against the People. *Id.* Although negligent delay is weighted less heavily against the People than deliberate delay, it "should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* (quoting *Barker*, 407 U.S. at 531). Justified delay includes occurrences such as missing witnesses or delay for which a defendant is primarily responsible and is not weighted against the People. *Id.*

[40] Our review of the record reveals three potential sources of delay: (1) multiple appointments of Tedtaotao's counsel;[4] (2) the People's Motion for Good Cause Continuance of Trial; and (3) the People's motion to sever the three defendants named in the indictment[5].

[41] First, between May 21, 2013, and June 12, 2013, the trial court withdrew and appointed eight attorneys to Tedtaotao. Arguably, the need to change counsel so many times delayed the case. However, the record indicates that the reasons for most of the withdrawals of counsel were for conflicts of interest and not for any fault on the part of Tedtaotao. Thus, this reason for delay does not weigh against Tedtaotao. *See Mendiola*, 1999 Guam 8 ¶ 28 ("Without evidence of deliberate delay, fault on the part of the prosecution, or improper court administration, we have no reason to find that the delay in this case should weigh significantly against either party."); *cf. Naich*, 2013 Guam 7 ¶ 52 (finding fault in the defendant for delays when it was not clear from the record why defendant changed counsel repeatedly or requested continuances).

[42] Second, after the trial was set for June 26, 2013, the People filed a Motion for Good Cause Continuance of Trial based on the unavailability of an essential witness, the victim, who

[4] This delay was not raised by either party, in either the trial court or on appeal.

[5] This delay was raised by Tedtaotao in the trial court but not on appeal.

was off-island receiving medical treatment for the injuries she received as a result of the crimes for which the defendants were charged. RA, tab 34 (Mot. for Good Cause Continuance of Trial, June 12, 2013). The trial court granted the motion, and eventually, the trial was rescheduled for November 4, 2013. RA, tab 39 (Dec. & Order re Mot. for Good Cause Continuance of Trial, June 25, 2013); RA, tab 52 (Asserted Criminal Trial Scheduling Order, Oct. 24, 2013).

[43] The unavailability of a witness is a valid reason for a delay. *See Schreane*, 331 F.3d at 554; *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000) ("[T]he four-month continuance sought by the government prior to [defendant's] second trial was prompted by the unavailability of a witness, which has been explicitly recognized as a legitimate justification for a continuance."). While the June to November 2013 delay is clearly attributable to the People, that delay was justified by a valid reason—the unavailability of a witness.[6] Accordingly, this delay is not weighted against the People.

[44] Third, at trial, Tedtaotao claimed that the case was delayed due to the People's motion to sever the case. Tr. at 43-44 (Jury Trial Day 10). Tedtaotao does not raise this argument on appeal. Although there is no trial court order granting the motion to sever, trial proceeded with only one defendant, Tedtaotao, and the trial transcript indicates that the court granted the People's motion to sever. *Id.* at 45. The trial transcript indicates that the People moved to sever

[6] Tedtaotao seems to argue that the delay is not justifiable because the witness was not an "essential witness." Appellant's Br. at 18-19. However, case law suggests that a government witness need not be "essential." *See Barker*, 407 U.S. at 530 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay."); *Schreane*, 331 F.3d at 554 ("A 'valid reason' for a delay, such as an unavailable witness, weighs in favor of the government."); *Mendiola*, 2015 Guam 26 ¶ 17 (holding that the "essential witness" inquiry is not a Sixth Amendment requirement); *Mendiola*, 1999 Guam 8 ¶ 25 ("Alternatively, a missing witness should serve as a valid reason, justifying the delay.").

the defendants due to the People's plan to use evidence of statements made by a co-defendant to the police against the other co-defendants.[7] *See id.* at 44-45.

[45] Nothing in the record suggests that this delay, if any, was motivated by bad faith, harassment, or a governmental desire to seek a tactical advantage. Rather, the delay seems to have occurred in an effort to protect the defendants' right to fair trial. Without evidence of deliberate delay, fault on the part of the prosecution, or improper court administration, we find that this delay does not weigh significantly against either party.

3. Assertion of Speedy Trial Right

[46] In order to successfully argue that a Sixth Amendment violation has occurred, "[a] defendant has the responsibility to assert a speedy trial claim." *Mendiola*, 1999 Guam 8 ¶ 29 (citation and internal quotation marks omitted). It is undisputed that Tedtaotao asserted his Sixth Amendment right to speedy trial on May 16, 2013. RA, tab 11 (Assertion of Speedy Trial, May 16, 2013). Accordingly, this factor weighs in Tedtaotao's favor.

4. Prejudice to the Defendant

[47] "A long, unexplained pretrial delay may give rise to a presumption of prejudice and shift the burden to the government to justify the delay." *Flores*, 2009 Guam 22 ¶ 49 (citation omitted). A court considers three interests protected by the speedy trial right in evaluating whether the defendant was prejudiced: "(1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired." *Id.* (citing *Barker*, 407 U.S. at 532). Of these interests, the most serious is the impairment of the defense "because the inability of a defendant adequately to prepare his case

[7] Specifically, the People planned to use statements by Cruz against Tedtaotao and Mendiola. The trial court granted the People's motion to sever before Cruz pleaded guilty.

skews the fairness of the entire system." *Id.* (quoting *Barker*, 407 U.S. at 532). Nonetheless, the impairment must be "serious enough to amount to a constitutional deprivation." *Id.* "[E]vidence of a lengthy pre-trial incarceration, standing alone, is insufficient to establish that a defendant's right to a speedy trial has been violated . . . where the defendant neither asserts nor shows that the delay weighed particularly heavily on him . . . ." *Naich*, 2013 Guam 7 ¶ 56 (quoting *Flores*, 2009 Guam 22 ¶ 50). Moreover, "[o]ppression, anxiety, and concern of a defendant incarcerated while awaiting trial are certainly present to some degree in every case." *Flores*, 2009 Guam 22 ¶ 50. In order to establish prejudice based on anxiety, rather than simply making an assertion, a defendant "must show that the alleged anxiety and concern had a specific impact on [his] health or personal or business affairs." *Id.* ¶ 51.

[48] Tedtaotao has not argued that the time he spent in prison before trial was particularly oppressive. Tedtaotao claims that due to his pretrial incarceration, his personal life was impacted in that his significant other left him and that this loss added to the anxiety and concern that he had about his family. However, it is unclear whether his significant other's leaving him was a particularized effect of his alleged anxiety. Further, that fact is not in the record below. Even assuming that fact is true, however, it is overcome by the fact that Tedtaotao suffered no impairment as to his defense. Tedtaotao has not pointed to any actual prejudice caused by the delay in preparing for trial. As such, this factor does not support finding a constitutional violation of Tedtaotao's right to a speedy trial.

5. Conclusion

[49] In considering the *Barker* factors as a whole, we find that Tedtaotao's constitutional right to speedy trial was not violated. A roughly six-month delay from arrest to trial was not very long relative to the delays of four-and-a-half and six years in *Mendiola* and *Flores*, respectively. *Id.* ¶

44; *Mendiola*, 1999 Guam 8 ¶ 35. Moreover, any delay caused by the People was justifiable. Finally, although Tedtaotao did assert his right to speedy trial, he has not argued any prejudice as to the preparation of his defense.

E. *Brady* Violation

[50] Tedtaotao asserts that the trial court erred in denying his request to exclude Cruz's testimony based on an alleged *Brady* violation. Appellant's Br. at 19. Specifically, Tedtaotao argues that the People should have disclosed that Cruz retracted an earlier written statement in which Cruz stated, "Then I told [Mendiola] I don't want to do it. Then he popped out a gun and said you are." Tr. at 72 (Jury Trial Day 10).

[51] In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). A defendant must prove three elements to show a *Brady* violation. First, the suppressed evidence must be favorable to the accused, either because it is exculpatory or because it impeaches a government witness. *People v. Kitano*, 2011 Guam 11 ¶ 21; *see also United States v. Bagley*, 473 U.S. 667, 676 (1985). "Second, the evidence must have been suppressed by the government, either willfully or inadvertently." *Kitano*, 2011 Guam 11 ¶ 21 (quoting *Flores*, 2009 Guam 22 ¶ 61). Third, the suppression of the evidence must have deprived the defendant of a fair trial. *Id.* (citing *Flores*, 2009 Guam 22 ¶ 61).

[52] However, no *Brady* violation occurs "if previously undisclosed evidence is disclosed during trial, unless the defendant is prejudiced by the delay in disclosure." *Flores*, 2009 Guam 22 ¶ 62 (citing *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986)). "[I]n such a case, the appropriate standard to apply is essentially whether the disclosure came so late as to prevent the

defendant from receiving a fair trial." *Id.* "If a defendant receives exculpatory evidence in time to make effective use of it, a new trial is generally not warranted." *Id.* (internal quotation marks omitted).

[53] In the instant case, Cruz initially made a written statement in which he stated, "Then I told [Mendiola] I don't want to do it. Then he popped out a gun and said you are." Tr. at 72 (Jury Trial Day 10). Cruz later retracted that statement. RA, tab 133 at 9 (Dec. & Order on Def.'s Trial Mots.). The People stated that they became aware of this retraction during witness preparation on November 15, 2013, after trial had already begun. *Id.* The People provided no written discovery to this effect, nor did they notify Tedtaotao in any way. *Id.* Tedtaotao became aware of the retraction during his cross-examination of Cruz, when Cruz testified that the statement was false and that he had retracted it. *Id.*

[54] Evidence that Cruz had retracted an earlier statement is clearly *Brady* material because it impeaches a government witness. Moreover, the People did not provide Tedtaotao with this information when they had a duty to do so.

[55] However, Tedtaotao was not deprived of a fair trial. Tedtaotao had full opportunity to cross-examine Cruz regarding Cruz's retraction and retracted statements. Moreover, as the trial court noted, "[Cruz] was also listed on [Tedtaotao's] witness list and [Tedtaotao] was free to call [Cruz] on the stand, further question [Cruz] in front of the jury, and further attack his credibility, bias, and truthfulness." RA, tab 133 at 9-10 (Dec. & Order on Def.'s Trial Mots.). Finally, the fact that Tedtaotao did not move for a continuance in order to prepare his case in chief in light of the new evidence hurts any argument that he suffered prejudice as a result of the delay. *See Kitano*, 2011 Guam 11 ¶ 27.

[56] Accordingly, this court finds that no *Brady* violation occurred.

V. CONCLUSION

[57] We find that the crime of Attempted Murder when the underlying crime is murder committed recklessly under circumstances manifesting extreme indifference to the value of human life is not a cognizable offense. Thus, we hold that the charge of Attempted Murder failed to state an offense. In turn, we find that the issues regarding the sufficiency of evidence and jury instructions of the Attempted Murder charge are moot. Accordingly, we **REVERSE** and **VACATE** the conviction for Attempted Murder and **REMAND** the case for resentencing and for the trial court to dismiss the charge of Attempted Murder. Moreover, we overrule our opinion in *People v. Tedtaotao*, 2015 Guam 9, to the extent that it is inconsistent with this opinion. Furthermore, we find that Tedtaotao's Sixth Amendment right to speedy trial was not violated and **AFFIRM** the trial court's holding as to Tedtaotao's Sixth Amendment right to speedy trial claim. Finally, we find that no *Brady* violation occurred and **AFFIRM** the trial court's denial of Tedtaotao's motion to exclude Cruz's testimony.

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