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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JOSEPH LEE PUGH,
Defendant-Appellant.

Supreme Court Case No.: CRA15-018
Superior Court Case No.: CF0572-12

AMENDED OPINION ON REHEARING

Cite as: 2018 Guam 14

Appeal from the Superior Court of Guam
Argued and submitted on February 11, 2016
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] On August 11, 2016, we issued an earlier opinion in *People v. Pugh*, 2016 Guam 22. The opinion overlooked the impact of unfairly prejudicial error on the defendant's affirmative defenses. On rehearing, we determined that this court misapprehended this analysis. *People v. Pugh*, CRA15-018 (Order Granting Pet. Reh'g, June 14, 2017). We now issue this Amended Opinion, which supersedes our prior opinion in *People v. Pugh*, 2016 Guam 22, in its entirety.

[2] Defendant-Appellant Joseph Lee Pugh appeals his convictions for illegal possession of a concealed firearm, possession of a firearm without a firearm-identification card, and possession of an unregistered firearm. Pugh argues that the People's evidence relating to an uncharged and unrelated burglary, where the weapon he possessed was stolen from its owner, was unfairly prejudicial and resulted in the denial of a fair trial. Additionally, Pugh asserts a Fifth Amendment violation due to a comment on his silence during questioning, made by a Guam Police Department officer testifying at trial. For the following reasons, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] A grand jury returned an indictment charging Pugh with one count each of illegal possession of a concealed firearm under 10 GCA § 60121(c), possession of a firearm without a firearm-identification card under 10 GCA § 60121(e), possession of an unregistered firearm under 10 GCA § 60121(a), and reckless conduct under 9 GCA § 19.40(a)(2), as well as three counts of child abuse under 9 GCA § 31.30(a)(2)(C).

[4] Before trial, Pugh filed a memorandum indicating that he planned to assert duress or necessity as affirmative defenses to the weapons charges, claiming he feared for his safety and

the safety of his family, following an altercation near his residence. Additionally, Pugh's Motion in Limine sought to exclude evidence that the gun had been stolen, questioning the relevance to his charges, asserting it was overly prejudicial, could confuse the issues, and mislead the jury. Admitting this evidence, Pugh argued, would be a violation of Guam Rule of Evidence ("GRE") 403, and would also constitute impermissible evidence of bad character or prior bad acts in violation of GRE 404(a) and (b). The People asserted that establishing that the gun belonged to another person and that the gun was stolen was necessary to show ownership by someone other than Pugh, and thus Pugh could not argue he acquired the gun legally and simply forgot to register it.¹ The People also argued that evidence of the almost two-month gap between Pugh's altercation and when the gun was stolen was relevant to undermine the affirmative defenses of duress or necessity. The trial court denied the motion to exclude evidence of the burglary, finding the evidence relevant and not unduly prejudicial in light of the People's intended arguments.

[5] At trial, the People first put on evidence of the gun's origin. John Travers testified that in July 2012, he bought a SIG Sauer P266 handgun in Las Vegas, Nevada, for his wife, Marthella, bringing it to Guam on August 12, 2012. Travers reported the gun missing after a burglary of their home on September 18, 2012. Travers also testified about getting in contact with the Guam Police, who had recovered the gun in the possession of Pugh, after identifying the serial number. He identified photographs of the weapon in court, matching the serial number with his records. On cross-examination, both of the Traverses admitted they had no way of knowing how the weapon ended up in Pugh's hands, or if he was involved in the burglary of their home. The

¹ While the transcripts attribute these and the arguments following to Pugh's attorney, it is clear from the content of the statements and context of the proceeding that these arguments belonged to the People.

Traverses also testified that they were able to obtain firearm-identification cards in ten and thirty days' time.

[6] Following the Traverses' testimony, Pugh moved for a mistrial, reasserting that evidence of the gun being stolen was not relevant to prove it was unregistered, and regardless, any relevance was outweighed by the risk of unfair prejudice. The trial court denied the motion for the same reasons that it allowed the evidence in the first place and expressed concern that Pugh had asked questions on cross-examination regarding the subject he claimed was grounds for a mistrial.

[7] In large part, the trial court allowed the testimony to disprove an affirmative defense explaining why Pugh was in possession of an unregistered gun. Pugh had asserted the defense of necessity, based on an altercation at his home that transpired almost three months before the burglary. Pugh's live-in partner, Vanessa Aguilo, testified that a group of neighbors attacked Pugh with rocks and a kitchen knife, resulting in his injury. L.P., Pugh's minor daughter, similarly described this incident. Officer Benjamin Palomo of the Guam Police Department testified that he responded to the fight at Pugh's home, taking a report of the incident that Aguilo had described in court. Aguilo further testified that it was her understanding that Pugh obtained the gun for their family's protection following this incident, claiming that she still felt threatened by their neighbors. On cross-examination, Aguilo admitted she did not know where Pugh had obtained the weapon, or whether he had the proper license.

[8] Pugh was arrested for the current charges about a month after the burglary. Guam Police Officers Donny Pangelinan and William Naval responded to reports of a man with three children pointing a gun at several individuals who had been following or approaching them. The officers located Pugh, who matched the caller's description, in the parking lot of Harmon Drugs. Finding

him nervous, the officers patted Pugh down, recovering the gun. Officer Pangelinan testified that when asked, Pugh stated he possessed the correct documents for possession of the gun, but did not have them on his person at the time of the arrest. Officer Pangelinan continued:

I inquired if he had pointed the firearm at anybody. He stated that he has no idea what I'm talking about. Then when I inquired as to where he had acquired the firearm, *he stated he does not want to speak to me any further.*

Transcript (“Tr.”) at 83 (Jury Trial, Jan. 30, 2015) (emphasis added). Upon this comment, Pugh objected and moved for a mistrial on the grounds that this comment violated his Fifth Amendment right to remain silent. The People asserted that the officer’s comment was simply an ill-phrased indication that the conversation ended at that point. The trial court denied the motion for a mistrial and overruled the objection. Pugh did not move to strike the testimony. Notably, the People did not comment on this testimony during the remaining portions of the trial.

[9] Lorraine Alcantara of the Guam Police Department testified that while a firearm-identification card is required to register a gun and obtain a concealed permit, Pugh possessed no registration or firearm-identification card. John Tyquiengco, of the Firearm Identification Unit, testified that the gun indeed was a functioning firearm.

[10] Finally, the People called private investigator Agnes Blas without objection as a rebuttal witness. Blas was hired by the Traverses to investigate the burglary of their home which resulted in Blas interviewing Aguilo, who had testified as to not remembering the substance of this conversation. The People wished to show that, contrary to her testimony at trial, Aguilo had told Blas that she was not aware of Pugh owning a gun for protection, which presumably tended to undermine the defense of necessity. A controversy then arose over how Blas had obtained Aguilo’s name in the investigation of the burglary. Blas testified that after receiving a list of possible witnesses from Marthella Travers, she “was able to locate [Aguilo].” Tr. at 7 (Jury

Trial, Feb. 5, 2015). Pugh objected that this testimony could be wrongly interpreted as evidence that Pugh committed the Travers burglary, casting him in a prejudicial light to the jury. The People responded that Blas simply stated that she received the name during her investigation, and the trial court found no violation, advising that Pugh could inquire into the subject. On cross-examination, Pugh asked Blas if she had obtained Pugh or Aguilo's name based only on Pugh's arrest. Blas responded, "No, that's incorrect." *Id.* at 10. Pugh immediately ceased questioning and objected that this testimony was irrelevant and overly prejudicial in implying Pugh was a suspect, and tending to implicate him in the burglary. The trial court overruled the objection. Pugh then moved for another mistrial for the same reasons given for his objection. The People responded that Blas had not stated that Pugh committed the burglary, and that the purpose of her testimony was to show the timeline of when the gun was stolen, helping to rebut Pugh's affirmative defense. The trial court denied the motion for mistrial, noting that it could give curative instructions if Pugh so desired—an offer that was not accepted. Pugh next moved for judgment of acquittal on the child abuse charges under 8 GCA § 100.10, which the court also denied.

[11] Pugh then renewed his earlier motion for a mistrial, reasserting that Officer Pangelinan's testimony violated his Fifth Amendment right to remain silent, and that the court erred in allowing testimony that the gun was stolen. The court noted that while it is generally impermissible to comment on a defendant's silence, a court need not declare a mistrial if it undertook certain remedial actions. However, the trial court's cited authorities do not precisely

correlate to the record.² The court again denied the motion, and additionally found the testimony was not unduly prejudicial.

[12] In reviewing jury instructions, the People proposed supplemental instructions to explain that Pugh's refusal to answer questions when arrested should not be considered in reaching a decision. However, Pugh rejected the proposal, asserting that no instruction could satisfactorily cure the prejudice, and in fact would only further draw the jurors' attention to the error. Nevertheless, standard jury instruction 3K did remind the jury that Pugh was on trial only for the crimes charged.³ Furthermore, during closing arguments, *both* parties emphasized that Pugh was not accused of committing the burglary, and that the jury should not assign him any blame on the assumption that he had some part in it.

[13] Following deliberation, the jury returned a verdict of guilty for illegal possession of a concealed firearm, possession of a firearm without a firearm-identification card, and possession of an unregistered firearm. However, the jury found Pugh not guilty of the reckless conduct and child abuse counts. The court sentenced Pugh to two years' imprisonment for each of his three convictions, to be served concurrently. Pugh timely filed a Notice of Appeal.

[14] After oral argument, this court issued an opinion on August 11, 2016. Pugh filed a Petition for Rehearing. After ordering a Reply from the People, we granted rehearing. This opinion follows.

² The trial court cited *Greer v. Miller*, 483 U.S. 756 (1987), for the tenet that a comment on a defendant's silence does not warrant a mistrial where the court sustains an objection and ceases questioning on the topic, advising the jury to disregard any questions to which an objection was sustained, and when the reference was not overly unfair. However, the record shows that the court in fact overruled the objection to the comment on Pugh's silence, and did not give an immediate instruction to disregard the statement.

³ Instruction 3K reads: "The defendant is on trial for the crimes charged in the Indictment, not for any other activities." Tr. at 47 (Jury Trial, Feb. 6, 2015).

II. JURISDICTION

[15] This court has jurisdiction over appeals from final judgments of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-223 (2018)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005). This court may also entertain Petitions for Rehearing, *see* Guam R. App. P. 30, which stay this court’s mandate, *see* Guam R. App. P. 27(c)(4), allowing this court to alter its disposition prior to remitting the judgment to the trial court, *see* 8 GCA § 130.80 (2005).

III. STANDARD OF REVIEW

[16] “Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent prejudice affecting the verdict.” *People v. Hall*, 2004 Guam 12 ¶ 34 (citation omitted); *see also People v. Torres*, 2014 Guam 8 ¶ 18; *People v. Chinel*, 2013 Guam 24 ¶ 18 (“When a defendant objects to an evidentiary ruling, we review a trial court’s decision to admit evidence for an abuse of discretion.” (citations omitted)). Where the trial court has abused its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *People v. De Soto*, 2016 Guam 12 ¶ 43; *see also People v. Jesus*, 2009 Guam 2 ¶¶ 53-55; *see also* Guam R. Evid. 103(a).

IV. ANALYSIS

[17] Pugh raises numerous allegations of error and argues that collectively the errors denied him a fair trial. We find the introduction of evidence related to an uncharged burglary violated GRE 403 and prejudiced Pugh’s defense. For this reason, we reverse Pugh’s conviction and remand for a new trial.

A. Denial of the Motion in Limine

[18] Pugh appeals the denial of his pre-trial motion to exclude evidence that the firearm found in his possession was stolen, and that the firearm owner’s home was burglarized. Appellant’s Br.

at 3 (Sept. 18, 2015). He challenges the introduction of this evidence under Guam Rules of Evidence 403 and 404. We conclude that, under GRE 403, the introduction of the uncharged theft and burglary was reversible error. Because the issues in this case are limited based on the Petition for Rehearing, we assume without deciding for purposes of this opinion that the uncharged burglary was admissible under GRE 404 and decline to address Pugh's challenge under Rule 404.

1. The Trial Court Abused Its Discretion in Admitting Evidence of the Uncharged Burglary Under GRE 403's Balancing Test

[19] Pugh's Motion in Limine sought to exclude any and all evidence relating to the burglary of the Traverses' home under GRE 403. Evidence of "other crimes," meaning acts not charged in the indictment, is admissible only if it satisfies the standards set forth in GRE 402, 403, and 404, among other evidentiary rules. *Cf. State v. Johnson*, 832 P.2d 443, 445-46 (Or. 1992) (en banc) (examining admissibility of other crimes evidence under Oregon Rules of Evidence 402, 403, and 404). While all relevant evidence is generally admissible subject to constitutional and statutory limitations, *see* Guam R. Evid. 402; *People v. Castro*, 2013 Guam 20 ¶ 26, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Guam R. Evid. 403. This requires the Superior Court to balance between "the probative value and prejudicial effect of the testimony." *See People v. Tedtaotao*, 2016 Guam 9 ¶ 37. "The trial court's balancing under Rule 403 is reviewed for an abuse of discretion." *People v. Palisoc*, 2002 Guam 9 ¶ 28 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 6; *United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993)).

[20] Pugh moved to exclude evidence that the firearm was stolen on the grounds it carried a substantial risk of unfair prejudice, confusion of the issues, or misleading the jury. Record on Appeal (“RA”), tab 82 at 1-2 (Mot. in Lim., Jan. 29, 2015). Pugh asserted that the People were attempting to imply he committed the burglary, which was unfairly prejudicial. Tr. at 6-7 (Jury Trial, Jan. 30, 2015). The People responded that evidence of the burglary was probative to show a timeline of the gun’s possession, which went to undermine Pugh’s defense that he obtained a weapon out of immediate fear for his safety following being attacked by his neighbors. *Id.* at 8-11. After receiving each party’s arguments, the trial court denied the motion, finding that the prejudice was “not so severe” against Pugh. *Id.* at 12.

[21] Pugh asserts that the People’s claim that the evidence was relevant to negate the affirmative defenses of duress or necessity is faulty. Appellant’s Br. at 19. Pugh maintains that even if the evidence supports a finding that he did not obtain *this* firearm until three months after his beating, it does not contradict the fact that he *still* feared for his safety and needed a firearm—choosing to obtain it without the necessary licenses. *Id.* He alleges that the jury may have convicted him because the firearm was stolen in a burglary, and not on the basis of the failure to license and register a firearm—charges for which he asserts affirmative defenses. Therefore, any probative value it may have had to impeach Pugh’s duress or necessity defenses was far outweighed by the greater likelihood that it implied he committed the Travers burglary. *Id.* The People respond that the evidence was probative to show that the gun went missing at a time sufficiently remote from Pugh’s altercation so as to cast strong doubt on his affirmative defenses of duress or necessity. Appellee’s Br. at 17 (Nov. 4, 2015). The People also assert that they did not portray Pugh as the perpetrator of the burglary. *Id.* at 16. Therefore, they argue, the probative value of the evidence outweighed any prejudicial effect. *Id.* at 18.

[22] First, we examine the probative value. *See* Guam R. Evid. 403. The People argue that the evidence of the burglary was necessary to show that Pugh did not obtain the firearm immediately after, or contemporaneously with, the attack on his person. *See* Appellee’s Br. at 17-18. The People presented the “other crimes” evidence to show that the gun went missing a substantial period of time after the alleged assault, and to suggest that Pugh’s possession of the gun was unrelated to the assault. *Id.* Evidence of the length of time between Pugh’s assault and his gaining possession of the gun was also probative of the argument that Pugh could possibly have obtained a legal gun in the interceding period. The Traverses testified as to when the gun was stolen. Blas testified to rebut Aguilo’s assertion of not remembering their conversation, wherein Aguilo allegedly stated she did not know of Pugh owning a gun. *See* Tr. at 2, 8-10 (Jury Trial, Feb. 5, 2015). This undermined Aguilo’s earlier testimony that she knew Pugh had a gun for protection, due to continued incidents with the neighbors. Tr. at 2-3, 6 (Jury Trial, Feb. 5, 2015); *see also* Tr. at 42-43, 56 (Jury Trial, Feb. 4, 2015). Other courts have found evidence of uncharged misconduct probative for establishing ultimate facts or negating theories. *See, e.g., United States v. Siegel*, 536 F.3d 306, 317-19 (4th Cir. 2008) (finding other bad acts evidence admissible to show motive and modus operandi); *People v. Rath*, 44 P.3d 1033, 1042-43 (Colo. 2002) (en banc) (finding evidence of other crimes probative to establish a pattern); *State v. Anderson*, 912 P.2d 801, 804 (Mont. 1996) (allowing other crime evidence to show lack of a mistake or accident). We find that the evidence of when the gun went missing from the Traverses’ home was probative of the connection between Pugh’s assault and his possession of the firearm as it relates to his defenses of duress and necessity. *See* Tr. at 23, 41 (Jury Trial, Jan. 30, 2015).

[23] Second, we must weigh the prejudice of allowing the evidence of an alleged uncharged burglary. Courts find evidence of uncharged misconduct unfairly prejudicial when it “tends to suggest[] decision on an improper basis.” *See State v. Taylor*, 593 S.E.2d 645, 649-50 (W. Va. 2004) (citation omitted). “[E]vidence of uncharged misconduct is admissible in nonsex crime cases to establish the existence of a common scheme or plan only if it supports a ‘permissive inference that both crimes were related to an overall goal in the defendant’s mind.’” *State v. Randolph*, 933 A.2d 1158, 1178 (Conn. 2007) (citation omitted), *abrogated on other grounds by State v. Payne*, 34 A.3d 370 (Conn. 2012). However, evidence of certain alleged crimes, especially when compared to the crimes charged, carry the risk of severe prejudice. *Taylor*, 593 S.E.2d at 650 (noting severe prejudice that can result from introduction of evidence of narcotics-based offenses). In weighing the prejudicial effect, we consider that both of the Traverses testified that they did not know how Pugh obtained the weapon. Tr. at 37, 44 (Jury Trial, Jan. 30, 2015). However, Blas’s testimony—that she received Aguilo’s or Pugh’s name in connection with the burglary investigation—suggested that Pugh was involved in the burglary. *See* Tr. at 7-8 (Jury Trial, Feb. 5, 2015). Additionally, Officer Pangelinan’s comment on Pugh’s silence about where he obtained the gun suggested that he had committed the burglary. *See* Tr. at 83 (Jury Trial, Jan. 30, 2015). These references to the Travers burglary implied that Pugh committed the crime, casting him in a negative light to the jury. Moreover, this prejudicial effect was amplified because the crime of burglary is unrelated to the crime for which Pugh was ultimately convicted. *Cf. United States v. Blankenship*, 775 F.2d 735, 740 (6th Cir. 1985) (finding evidence of earlier thefts was admitted in error because they were not based on a “substantial similarity” to the crime charged). Additionally, the probative value of the burglary evidence is the establishment of a timeline related to when Pugh may have obtained the weapon,

not the commission of the burglary itself. The People could have established the weapon left the Traverses' possession at a certain time without introducing such extensive evidence referencing the burglary. The implications of Pugh's association to the burglary, and the availability of significantly less prejudicial means of establishing a timeline regarding the firearm's whereabouts, lead us to the conclusion that the prejudice outweighs the probative value.

[24] Furthermore, there is a significant difference between the intent elements of burglary and the intent elements of the gun possession, reckless conduct, and child abuse charges for which Pugh was indicted. On the charges for which Pugh was convicted, the People charged him with "knowingly" possessing a concealed weapon, "knowingly" possessing a firearm without an identification card, and "knowingly" possessing or owning an unregistered firearm. *See* RA, tab 7 (Indictment, Oct. 25, 2012); *see also* 10 GCA § 60121(a), (c), (e) (2005). On the charges for which Pugh was acquitted, the People charged him with "reckless conduct" through "intentionally pointing a firearm" and "unreasonably" endangering his children. RA, tab 7 (Indictment); *see also* 9 GCA § 19.40(a)(2), (b) (2005); 9 GCA § 31.30(a)(2)(C), (b) (2005). Burglary requires specific intent, *see* 9 GCA § 37.20 (amended by Guam Pub. L. 32-162:4 (May 23, 2014)), while Pugh's indictment alleged knowing and reckless mental states. We find the prejudice related to these crimes to be in different categories. *See, e.g., Taylor*, 593 S.E.2d at 650. There is a significant risk that the jury may have attempted to punish Pugh on these charges that contain a lesser intent element because it found him to be a thief or burglar instead. *See, e.g., People v. Crawford*, 582 N.W.2d 785, 795-96 (Mich. 1998).

[25] Accordingly, the danger of unfair prejudice of the uncharged misconduct evidence substantially outweighed the probative value. The trial court abused its discretion in admitting the evidence.

2. The People Failed to Meet Their Burden of Proof in Demonstrating that the GRE 403 Error Was Not Harmless Beyond a Reasonable Doubt

[26] Because admission of the evidence related to the burglary under GRE 403 was an abuse of discretion, we are required to reverse the conviction unless the prosecution demonstrates that the error is harmless. See *De Soto*, 2016 Guam 12 ¶ 43; see also *Jesus*, 2009 Guam 2 ¶¶ 53-55. “A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict.” *Id.* ¶ 54. “This standard requires that the prosecution show a ‘fair assurance’ that the verdict was not substantially swayed by error.” *Id.* (citation omitted). Jury questions related to affirmative defenses can materially affect the verdict.⁴ Cf. *United States v. MacDonald*, 73 M.J. 426, 438-39 (C.A.A.F. 2014) (analyzing in harmlessness of constitutional error). Harmless error is a defense to reversal, which can be waived by the prosecution’s failure to raise the issue. See *Lam v. Kelchner*, 304 F.3d 256, 269-70 (3d Cir. 2002).

[27] In their principal briefing, the People failed to demonstrate that the error is harmless. A careful analysis of the People’s Opposition Brief shows the prosecution failed to argue that any error in admitting evidence of the uncharged burglary was harmless. See Appellee’s Br. at 16-21. The People’s two principal arguments on appeal related to Pugh’s allegation of error regarding introduction of the uncharged burglary evidence were (1) there was no error and (2) any 403 prejudice was mitigated with cautions to the jury via instructions and closing arguments. Appellee’s Br. at 16-22. Both arguments involve the weight of the prejudice and the probative value of the evidence, which go to the existence of error. Once error is established, the burden is

⁴ We have previously outlined and relied on several non-exclusive factors that impact the harmless error analysis. See, e.g., *People v. Roten*, 2012 Guam 3 ¶ 41 (citing *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005)) (discussing erroneously admitted hearsay and opinion evidence); *People v. Cruz*, 2016 Guam 15 ¶ 22 (citing *People v. Muritok*, 2003 Guam 21 ¶ 24) (discussing Fifth Amendment infringements); *People v. Moses*, 2007 Guam 5 ¶ 21 (citing *People v. Ueki*, 1999 Guam 4 ¶ 24) (discussing prosecutor’s vouching). “Harmless error determinations are highly fact-specific,” and “often involve a review of the entire trial record.” See *Inthavong v. Lamarque*, 420 F.3d 1055, 1060 (9th Cir. 2005).

on the People to demonstrate harmlessness. *Jesus*, 2009 Guam 2 ¶¶ 54 (“This standard requires that the prosecution show a ‘fair assurance’ that the verdict was not substantially swayed by error.” (citation omitted)). There is no mention of the harmless error test in the People’s brief as it relates to the uncharged misconduct evidence.

[28] Related to the uncharged burglary, the People raise the harmless error analysis for the first time in their Answer to the Petition for Rehearing. *See* People v. Pugh, CRA15-018 (People’s Mot. for Leave & Answer, Mar. 20, 2017). The defendant, on the other hand, argued in his Opening Brief why the error in introducing the uncharged burglary evidence prejudiced his duress and necessity defenses and encouraged the jury to convict on an improper basis. *See* Appellant’s Br. at 22. Even if we were to exercise our discretion to review for harmlessness, *see, e.g., United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), *new trial granted on remand*, 89 F. Supp. 2d 617 (E.D. Pa. 2000), we would still reverse. The People prejudicially introduced evidence of a burglary and implied Pugh committed it. The law highly disfavors unproven imputations of criminality. *See, e.g.,* Guam R. Evid. 404(b); 19 GCA § 2104 (2005) (defining slander). The People admit that the evidence of the uncharged burglary “cast strong doubt on [Pugh’s] affirmative defense of necessity.” *See* Appellee’s Br. at 16 (Nov. 4, 2015). The People would not be able to claim that the evidence of the uncharged burglary did not materially affect the verdict as related to Pugh’s affirmative defense, while simultaneously arguing that the evidence was used to cast strong doubt on the same defense. Even if the People were attempting to show the remoteness of Pugh’s possession and the violent altercation, this could have been done without reference to the uncharged burglary. To the extent that the jury may have convicted Pugh based on the uncharged burglary, instead of acquitting on the basis of the affirmative defenses, the error would not be harmless. While a jury may have reached the

same conclusion even in the absence of the evidence, it is hard to say that the uncharged misconduct evidence did not materially affect the verdict. *See, e.g., Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000) (discussing due process violations) (“[T]he mere fact that the properly admitted evidence, standing alone, would have been sufficient to support the conviction is not determinative of whether the improperly admitted evidence had a substantial and injurious effect . . .”).

[29] We are not overlooking the harmless error analysis in this case, but hold that the People waived the argument by their complete failure to address it in their principal briefing. As it was the People’s burden to prove harmlessness, we find that their waiver results in a failure to meet this burden. Since the People failed to meet their burden, reversal of Pugh’s conviction is required.

B. Pugh’s Other Allegations of Error

[30] Pugh also alleges that the trial court erred in denying his motions for mistrial and infringing upon his Fifth Amendment rights to remain silent and to a fair trial. Because of our reversal on other grounds, we need not consider the merits of these claims as they are “unnecessary to the resolution of the case.” *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33.

V. CONCLUSION

[31] For these reasons, we **REVERSE** the judgment of conviction and **REMAND** for a new trial.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

ROBERT J. TORRES
Associate Justice

MARAMAN, C.J., concurring:

[32] I join the majority opinion in full, but write separately to elaborate on the availability of the duress and necessity defenses in the context of gun possession crimes, such as in this case. While the justification defenses are statutorily available as defenses to all crimes, *see* 9 GCA § 7.61, it seems to me as though gun possession crimes are sometimes akin to strict liability offenses, *see, e.g., State v. Castrillo*, 819 P.2d 1324, 1329 (N.M. 1991) (finding felon-in-possession crimes to be “approaching strict liability”). *But see State v. Anderson*, 5 P.3d 1247, 1252-53 (Wash. 2000) (en banc) (holding gun possession crimes not to be strict liability). In this case, the trial court found sufficient evidence to give the justification defense instructions. *Cf. Castillo*, 819 P.2d at 1329 (“Thus, for example, a felon who is attacked and wrestles a weapon from his attacker would be criminally liable absent the availability of a justification defense.”). The People, on appeal, did not challenge the availability of the defenses related to Pugh, who is not a felon, until they responded to the Petition for Rehearing—despite having the opportunity and incentive to do so in the principal briefing. *Cf. People v. Tedtaotao*, 2017 Guam 12 ¶ 16 (finding belatedly raised arguments waived). Any substantive consideration of the People’s belated argument by us would seem to implicate questions of due process. *See Parker-Cyrus v. Justice Admin. Comm’n*, 160 So. 3d 926, 928-29 (Fla. Dist. Ct. App. 2015). It would be imprudent for this court to consider the defense’s jury instructions when the issue was not properly presented. However, on remand, the trial court will be free to consider, based on the submissions at a new trial, whether the defendant has presented sufficient evidence to support his justification defenses. *See State v. Thorngren*, 240 P.3d 575, 582 (Idaho 2010) (“[P]retrial evidentiary rulings are subject to the discretion of the court and may be changed, for example, when the court finds a more accurate interpretation of the law warrants a new ruling on the

issue.” (citation omitted)). Therefore, based on the People’s waiver and the understanding that the trial court can consider the jury instructions for the defenses anew, I concur in the opinion and judgment of the majority.

/s/

KATHERINE A. MARAMAN
Chief Justice