IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ZAKIR KHAIR,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2019 Palau 18
Criminal Appeal No. 18-004
Appeal from Criminal Case Nos. 17-184 & 17-188

Decided: June 14, 2019

Counsel for Appellant ..... Danail M. Mizinov
Counsel for Appellee ..... No appearance

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] Appellant Zakir Khair was convicted of multiple counts of labor and people trafficking. On appeal, he challenges the sufficiency of the evidence supporting his convictions.

[¶ 2] For the reasons set forth below, we **VACATE** Appellant's convictions.

[1] Although Appellant requests oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a). The Republic of Palau chose not to file a response brief in this matter.

BACKGROUND

[¶ 3] Appellant was charged with ten counts of violating a variety of labor and people trafficking statutes. He had two separate informations brought against him in two separate criminal cases (Criminal Case Nos. 17-184 & 17-188), which were later consolidated for trial.

[¶ 4] The information in Criminal Case No. 17-184 charged Appellant with five counts: Labor Trafficking in the First Degree, in violation of 17 PNC § 2002(a)(6); Labor Trafficking in the First Degree, in violation of 17 PNC § 2002(a)(10); Labor Trafficking in the Second Degree, in violation of 17 PNC § 2003(a); People Trafficking, in violation of 17 PNC § 2106; and Exploiting a Trafficked Person, in violation of 17 PNC § 2108; and, critically, identified three victims in the alternative: Abdul Kalam, Ariful Islam, or MD Juel Rana.[2] The information in Criminal Case No. 17-188 charged Appellant with the same five counts, but identified two victims in the alternative: Ariful Islam or Roman Hossain.[3]

[¶ 5] Each of the alleged victims testified at trial, and prior to closing statements, defense counsel made a Motion for a Judgment of Acquittal, alleging that the Republic had failed to prove at least one element of every

[2] The information initially named Mohammad Gious Uddin as a victim in the alterative. However, the information was amended at trial to exclude Mr. Uddin as a potential victim.

[3] For example, Count one in the information for Criminal Case No. 17-188 reads:

> **LABOR TRAFFICKING IN THE FIRST DEGREE**, in that the Defendant, **ZAKIR KHAIR**, intentionally or knowingly provided or obtained, or attempted to provide or obtain ROMAN HOSSAIN or ARIFUL ISLAM, for labor services by any of the following means committed against ROMAN HOSSAIN or ARIFUL ISLAM, committed any acts described in 17 PNC Section 2002, (a), (6), with reference to the definition of deception pursuant to 17 PNC section 2301, or fraud, which means making material false statements, misstatements, or omissions to induce or maintain the person to engage or continue to engage on the labor or services, namely by making false statements and misstatements to ROMAN HOSSAIN or ARIFUL ISLAM, in coming to work in the Republic of Palau, knowing that the statements used to induce were false and misleading. (This offense is classified as a class A felony, punishable by 1-25 years imprisonment and an optional fine up to $50,000)[.]

offense charged. The trial court denied the motion and the matter was submitted to the jury.

[¶ 6] The jury was provided with the informations in the case, identifying Abdul Kalam, Ariful Islam, or MD Juel Rana as victims in the alternative for Criminal Case No. 17-184 and Ariful Islam or Roman Hossain as victims in the alternative for Criminal Case No. 17-188. The jury was also provided with jury instructions that described the elements of each charged offense. For example, Jury Instruction No 17 states:

> **NO. 17 LABOR TRAFFICKING IN THE FIRST DEGREE (17 PNC § 2002)**
>
> Defendant Zakir Khair stands charged in Count One of Criminal Case No. 17-184 and Count Two[4] of Criminal Case No. 17-188 with Labor Trafficking in the First Degree, in violation of 17 PNC § 2002. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: (1) within the Republic of Palau; (2) on or about October 18, 2017, (3) the Defendant knowingly; or intentionally, provides or obtains or attempts to provide or obtain, another person for labor or services; (5) by making false statements and misstatements; to induce Roman Hossain, or Ariful Islam, or Abul Kalam or MD Juel Rana; (6) to come to work in the Republic of Palau; (7) knowing the statements and misstatements were false and misleading.

[¶ 7] Additionally, the jury was provided with separate verdict forms for Criminal Case No. 17-184 and Criminal Case No. 17-188. Although the verdict forms asked the jury to indicate whether it found Appellant guilty or not guilty, it did not ask the jury to identify which victim or victims it relied upon in reaching that conclusion. Furthermore, while the jury was given a generalized unanimity instruction stating that its verdict on each of the

[4] This is an error in the instructions. It was supposed to say "Count One of Criminal Case No. 17-184 and Count One of Criminal Case No. 17-188." This is clear because, while the jury instructions do not identify the specific subsection of 17 PNC § 2002 that is at issue, the elements match subsection (a)(6) of the statute, which was charged in Count One of both informations.

charged offenses "must be unanimous," it was not told that it must agree on the factual basis, *i.e.*, which victim or victims related to which count. Jury Instruction No. 27.

STANDARD OF REVIEW

[¶ 8] This Court reviews the Trial Division's findings of fact for clear error and questions of law *de novo*. *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4 (internal citations omitted).

[¶ 9] Whether there is sufficient evidence to support a criminal conviction is a factual question, which is consequently reviewed for clear error. *Wasisang v. Republic of Palau*, 19 ROP 87, 90 (2012). We review the evidence "in the light most favorable to the prosecution" and give due deference to the fact finder's weighing of the evidence and credibility determinations. *Id.* (internal quotation marks omitted). "If the evidence presented was sufficient for a rational fact finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime, we will affirm." *Id.* (internal quotation marks and alterations omitted).

DISCUSSION

[¶ 10] Appellant raises two issues on appeal. First, he asserts that the Trial Division erred in denying his motion for a new trial based on newly discovered evidence, pursuant to ROP R. Crim. P. 33. Second, he asserts that there is insufficient evidence to support the charges against him. Because a favorable decision on Appellant's second issue would render the first issue moot, we begin our analysis with the sufficiency of the evidence claims. However, an underlying deficiency regarding the way in which the jury instructions, informations, and verdict forms were submitted to the jury presents a problem with jury unanimity which must be resolved first. While the unanimity issue was not raised by Appellant, as discussed below, it is inextricably intertwined with Appellant's sufficiency of the evidence claims. Because it is nearly impossible for the Court to address the sufficiency of the evidence challenges without confronting the issue of unanimity, we address this issue *sua sponte*. *See* ROP R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *see also United States v. Whitfield*, 590 F.3d 325,

346–47 (5th Cir. 2009) (citing the identically worded Fed. R. Crim. P. 52(b) as grounds to address an argument not raised by the parties in a criminal appeal); *United States v. Pugh*, 405 F.3d 390, 402 (6th Cir. 2005) (same).

I. Jury Unanimity[5]

[¶ 11] It is well established that a criminal defendant is constitutionally entitled to a unanimous jury verdict. *Schad v. Arizona*, 501 U.S. 624, 634 & n.5 (1991). Specifically, to obtain a criminal conviction, the jury must unanimously agree that the government "present[ed] evidence sufficient to prove *each element* of a criminal offense beyond a reasonable doubt." *United States v. Delgado*, 672 F.3d 320, 331 (5th Cir. 2012) (emphasis added). "[Jury] unanimity means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." *United States v. Holley*, 942 F.2d 916, 925 (5th Cir. 1991) (alterations omitted); *see also United States v. Gipson*, 553 F.2d 453, 457–58 (5th Cir. 1977) ("The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required."). The ability of a jury to abide by the cornerstone rule that it must unanimously agree on which of a defendant's actions constituted a crime can be threatened when an element of the offense is charged in the alternative. "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *United States v. Mickey*, 897 F.3d 1173, 1182 (2018) (quoting *Schad*, 501 U.S. at 651 (Scalia, J., concurring)).

[¶ 12] Using the charge of Labor Trafficking in the First Degree, it is clear that there is a jury unanimity problem in this case. First, it is important to note that the identity of the victim is an element of the offense of Labor

[5] Because there is very limited Palauan case law on the issue of unanimity in criminal charging and jury instructions, it is appropriate to look to United States case law for guidance. *See Buck v. Republic of Palau*, 2018 Palau 27 ¶ 12 n.6 (citing *Ngiraked v. Republic of Palau*, 5 ROP Intrm. 159, 169 n.7 (1996)); *Republic of Palau v. Baconga*, 21 ROP 119, 120 (Tr. Div. 2014) (looking to United States case law for guidance on severability and joinder issues).

Trafficking in the First Degree. Appellant cannot be convicted of this offense without an identified victim. *See* 17 PNC § 2002(a)(6). The jury should have been presented with three separate offenses in Criminal Case 17-184—Labor Trafficking in the First Degree of Ariful Islam, Labor Trafficking in the First Degree of Abul Kalam, and Labor Trafficking in the First Degree of MD Juel Rana. But instead, this element—the identity of the victim—was charged in the alternative, thus presenting the jury with three unrelated, purportedly criminal acts and asking them to select one or more to support a single charged offense. Critically, the jury instructions did not indicate that the jury needed to be unanimous on which victim or victims it was basing its conviction on.

[¶ 13] Similarly, because the information in Criminal Case 17-188 identified two victims in the alternative, the jury should have been presented with two separate offenses in Criminal Case 17-188—Labor Trafficking in the First Degree of Ariful Islam and Labor Trafficking in the First Degree of Roman Hossain. Again, the jury instructions allowed the jury to pick which of the two separate, purportedly criminal acts (either labor trafficking of Ariful Islam or labor trafficking of Roman Hossain) constituted a crime without requiring the jury to come to a unanimous agreement identifying which act its conviction relied on.[6]

[6] This problem was likely compounded by the jury instruction's combination of the two criminal cases and four alleged victims for each charged offense. As a result, the jury was informed it could convict on Count One of Criminal Case 17-184 *and* 17-188 based on any of the alleged victims. This is especially concerning where one of the alleged victims—Ariful Islam—is named in both informations, making it possible for the jury to have convicted Appellant of both counts based on a single false statement to a single victim, and consequently convicting Appellant twice for the same crime. To avoid the constitutional issues presented by this case, it would behoove the prosecution to be more precise in charging criminal defendants and instructing criminal juries. *See Johnson v. Commonwealth.*, 405 S.W.3d 439, 455 (Ky. 2013):

> Where there are distinct offenses—that is, different criminal acts or transactions—lawyers and trial courts must take steps to assure the unanimity of the jury and the due process rights of the defendant. The most obvious way would be for prosecutors to charge each crime in a separate count and then for the trial court to instruct the jury accordingly at trial.

The ineptitude with which this case was handled is completely unacceptable.

[¶ 14] Although dealing with a different charged offense, this case bears a striking resemblance to *United States v. Pereyra-Gabino*, 563 F.3d 322, 328 (8th Cir. 2009). In that case, the defendant was charged with concealing or shielding from detection illegal aliens. At his trial, the jury was informed that there were three elements to the charged offense, one of which was the identity of the individual that the defendant allegedly concealed or shielded. This element was presented in the alternative, informing the jury that it must find "one or more of the following individuals was an alien in the United States in violation of the law" and listing four potential individuals. The second and third elements required the jury to find that the defendant "knew or was in reckless disregard of the fact that one or more of the individuals identified in [element one] were in the United States in violation of the law" and "knowingly shielded from detection or concealed . . . one or more of the individuals identified in [element one]." *Id.* at 327. The jury was further instructed that, to find the defendant guilty, it "must find beyond a reasonable doubt that defendant shielded from detection or concealed . . . *at least one particular alien identified [in element one]*." *Id.* (emphasis added).

[¶ 15] The defendant was convicted and on appeal, challenged the wording of the instruction because it "permitted the jury without finding that each element of the crime was committed with respect *to a particular alien* concealed or shielded." *Id.* at 328 (emphasis added). The Eighth Circuit agreed. It determined that the instructions did not require the jury to make a

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As a representative of the people of the Republic of Palau, the Office of the Attorney General is tasked with ensuring violators of the law are brought to justice, and at the same time, innocent people are vindicated. However, the inadequate performance by the Office of the Attorney General—beginning from the convoluted charging information, continuing through to the poorly worded jury instructions and verdict form, and failing to file the appellate brief—results in a miscarriage of justice and damages the fairness and integrity of our criminal justice system.

Similarly, the Office of the Public Defender has a responsibility to zealously and competently safeguard the constitutional rights of defendants. By failing to challenge the serious deficiencies in the information and jury instructions, it is clear the Public Defender also failed in its obligations.

These failings must not continue if our justice system is to provide recourse for victims and defendants. Thus, we admonish the Office of the Attorney General and the Public Defender to provide competent representation to those who come before them. To act otherwise may subject individual counsel in their respective offices to appropriate sanctions.

finding regarding which particular individual or individuals were concealed or shielded. "Instead, the instructions permitted the jury to mix and match the 'individuals identified' to the essential elements of the crime charged." *Id.*

[¶ 16] This case presents a similar situation. Based on the jury instructions and the informations, it is entirely possible that the guilty verdict resulted from half of the jury believing that Appellant trafficked, for example, Mr. Hossain, but did not traffic Mr. Islam, while the other half of the jury believed the exact opposite. What the jury actually concluded is impossible to determine with certainty. The instructions here did not explain to the jury that it must unanimously agree on the victim(s) and thus possibly led the jury to believe that a split of that nature supported the charged offense. Typically, this issue can be resolved with (1) a specific jury instruction telling the jury that it must unanimously agree on which alternatively charged element it is relying on to support its conviction and (2) a specialized verdict form where the jury can indicate which alternatively charged element it agreed upon. Because the instructions contained more than one victim, a *specific* unanimity agreement was necessary, but that did not happen in this case. Consequently, the jury only received a general unanimity instruction stating that its verdict must be unanimous.

[¶ 17] A general unanimity instruction, like the one given in this case, "will be inadequate to protect the defendant's constitutional right to a unanimous verdict where there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts." *Holley*, 942 F.2d at 925–26 (internal quotation marks omitted). The same problem occurs when different jurors conclude that a different victim supports a defendant's conviction on a single charge. While it would have been possible to remedy this error with (1) an instruction to the jury that it must agree on which victim it was relying on to support the conviction and (2) a special verdict form allowing the jury to identify whether it felt the charges were supportable as to each individual victim, no such things were used here.

[¶ 18] Failing to determine which victim or victims the jury convicted on, Appellant's convictions can only stand if there is sufficient evidence to support a conviction on every count for every potential victim. *See State v.*

Gill, 13 P.3d 646, 652 (Wash. Ct. App. 2000) ("Although failure to instruct a jury on unanimity is presumed prejudicial, it will be found harmless if a rational trier of fact could find that each alternative means presented to the jury occurred beyond a reasonable doubt."). Without instruction on unanimity, if there is insufficient evidence to support a conviction on even one of the alleged victims charged in the information, none of the charges can stand—even if there is sufficient evidence to support a conviction for the other alleged victim(s) in the information. *See Martinez v. Garcia*, 379 F.3d 1034, 1039 (9th Cir. 2004) ("[T]he [Supreme] Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." (quoting *Mills v. Maryland*, 486 U.S. 367, 376 (1988)).

[¶ 19] Having determined that Appellant's convictions may only stand if the evidence is sufficient to support a conviction as to each victim, we now address Appellant's sufficiency of the evidence claims.

II. Sufficiency of the Evidence

[¶ 20] We focus our review of these claims in relation to Ariful Islam. Because Mr. Islam was named as a victim in both informations, the easiest way to resolve this case is by focusing on whether the evidence—reviewed in the light most favorable to the prosecution—is sufficient to support the charges against Appellant relating to his actions against Mr. Islam. If there is insufficient evidence to support a conviction via Mr. Islam, the convictions in both criminal cases fail. We address each of the charges in turn.

A. Count One: Labor Trafficking in the First Degree (17 PNC § 2002(a)(6))

[¶ 21] Appellant's first charge was a violation of 17 PNC § 2002(a)(6). To be convicted for violating this statute, a defendant must (1) intentionally or knowingly provide or obtain another person for labor or services (2) by making false statements, misstatements or omissions to induce the person to engage or continue engaging in labor or services, (3) knowing such statements to be false. *See* 17 PNC § 2002(a)(6); Jury Instruction 17.

[¶ 22] Mr. Islam testified that he was presented with an employment contract by Appellant's father to serve as an electrician for Galad Construction. However, he repeatedly testified that Appellant's father informed him that he would not actually be working at Galad Construction and, instead; a different job would be found for him upon his arrival in Palau. Although the prosecution relied on this contract as the misstatement intended to induce Mr. Islam to come to Palau, it is clear that Mr. Islam was aware that no such job would be waiting for him. Additionally, the statements were made by Appellant's father—rather than Appellant—and there is no evidence that any similar statements or promises were made by Appellant. Therefore, the second element of this charge is not met.

[¶ 23] Furthermore, it is doubtful that the third element of this charge was met. The jury could have reasonably believed that Appellant knew that, despite the employment contract, Mr. Islam would not be employed by Galad Construction. However, as Mr. Islam was aware that he would not be employed pursuant to the employment contract, the only other potential misstatements that could support this charge are the purported promises to provide Mr. Islam with an alternative job after his arrival in Palau. The evidence shows that Mr. Islam knew that no such job was lined up, and that such statements did not provide a guarantee of a specific job. Moreover, there is no evidence that either Appellant or his father were aware such promises were false at the time they were made.

[¶ 24] Finally, the statute requires that the misstatements made by Appellant be made for the purpose of providing or obtaining the labor or services of another individual. Although Mr. Islam was told that a job would be found for him upon his arrival in Palau, the evidence does not support a conclusion that any purported misstatements were intended specifically in an attempt to obtain labor or services from Mr. Islam. Instead, the evidence shows that Mr. Islam arrived in Palau and did not obtain employment because no such labor or service opportunities existed. Such evidence does not support the conclusion that any misstatements were made for the purpose of providing or obtaining Mr. Islam's labor or services.

B. Count Two: Labor Trafficking in the First Degree (17 PNC § 2002(a)(10))

[¶ 25] Appellant's second charge was a violation of 17 PNC § 2002(a)(10). To be convicted for violating this statute, a defendant must (1) intentionally or knowingly provide or obtain another person for labor or services (2) using any scheme, plan, or pattern intended to cause the person (3) to believe that if they did not perform the labor or services then the person or a friend or a member of the person's family would suffer serious harm, serious financial loss, or physical restraint. *See* 17 PNC § 2002(a)(10); Jury Instruction 18.

[¶ 26] A review of Mr. Islam's testimony shows no evidence that Appellant threatened or otherwise indicated that Mr. Islam (or his friends or family) would suffer any serious harm, serious financial loss, or physical restraint if he did not provide labor or services. Indeed, Mr. Islam's complaint was not that he was being threatened or forced to provide labor, but that he was promised employment that he never received.[7] Such evidence is insufficient to meet the third element of this charge.

C. Count Three: Labor Trafficking in the Second Degree (17 PNC § 2003(a)(2))

[¶ 27] Appellant's third charge was a violation of 17 PNC § 2003(a)(2). A defendant violates this statute by (1) benefitting financially or by receiving something of value (2) for participating in a venture (3) with knowing or reckless disregard of the fact that another person had engaged in labor trafficking in the first degree. *See* 17 PNC § 2003(a)(2); Jury Instruction 19.

[7] Interestingly, this is true for all of the alleged victims. Each of the four named victims testified that their main complaint is that they were promised they would be able to get a job in Palau and when they arrived, they were unable to obtain work. Despite signing work contracts, none of the men ever worked for the companies they signed employment contracts with. Given this, there is likely sufficient evidence in the transcript to support a conclusion that neither party intended the employment contracts to be honored. If proven, this could be sufficient to support a potential criminal charge for People Smuggling. *See* 17 PNC §§ 2102(g), 2103 (criminalizing "arranging or assisting a person's illegal entry into . . . the Republic of Palau, either knowing or being reckless as to the fact that the person's entry is illegal"). However, instead of any kind of people smuggling charge, the Republic brought labor trafficking charges, all of which require some element of forced labor, exploitation, or labor obtained through deception.

[¶ 28] Although the prosecution did not explicitly identify who they deemed to be "another person [who] had engaged in labor trafficking," as required by the third element of the statute, it is reasonable to assume that the alleged individual is Appellant's father. Therefore, Appellant cannot be convicted for violating this statute unless he benefitted (financially or otherwise) through his father's labor trafficking. For the reasons discussed above, it is questionable whether Mr. Islam was a victim of labor trafficking at all. However, even assuming without deciding that Appellant's father trafficked Mr. Islam, there is no evidence that Appellant benefited financially or received anything of value as a result. Mr. Islam testified that he had paid Appellant's father $3,000 to arrange for his plane ticket and employment in Palau. However, there is no evidence that Appellant received any portion of that money, or any other kind of payment, directly or indirectly, from Mr. Islam. Indeed, Mr. Islam testified that he never paid Appellant any money, that he stayed with Appellant during his first month in Palau, and that Appellant loaned him $900. While there is evidence that Appellant's father potentially financially benefitted from Mr. Islam, with no more evidence than a familial relationship between Appellant and his father, it cannot be assumed that Appellant also benefitted. Without some kind of benefit to Appellant, the first element of this charge is not met.

D. Count Four: People Trafficking (17 PNC § 2106) and Count Five: Exploiting a Trafficked Person (17 PNC § 2108)

[¶ 29] Appellant was charged in the fourth count with a violation of 17 PNC § 2106 and in the fifth count with a violation of 17 PNC § 2108. A defendant violates 17 PNC § 2106 by (1) knowingly or recklessly recruiting, transporting, harboring, or receiving any person (2) for the purpose of exploitation, and (3) did so by threat, use of force, abduction, fraud, deception, abuse of power, or giving or receiving payments or benefits to achieve the consent of a person having control over another person. *See* 17 PNC § 2016; Jury Instruction 20. A defendant violates 17 PNC § 2108 by (1) knowingly or recklessly engaging in, participating in, or profiting from (2) the exploitation of a trafficked person. *See* 17 PNC § 2108; Jury Instruction 21

[¶ 30] Counts Four and Five against Appellant both require the exploitation of another individual as an element of the offense. Exploitation is defined by statute as "sexual servitude, exploitation of another person by and through prostitution, forced labor or services, or slavery." 17 PNC § 2102(d). The prosecution relies on the "forced labor or services" piece of this definition. However, as discussed above, there is no evidence in the record that Mr. Islam had been forced to provide any labor or services to Appellant or anyone associated with Appellant. The only evidence even slightly supporting this is Mr. Islam's testimony that he worked for the "Airai Gina farm" for three months, but only received pay for one month. *See* Tr. 163:22–25; 164:5–6. However, Mr. Islam testified that he found this job through a friend and that "Gina" was responsible for paying his salary. *Id.* 164:1–4. There is no testimony connecting Gina to Appellant or in any way indicating that Appellant was involved or profited from any work relating to the Airai Gina farm. Without evidence that Mr. Islam was exploited by Appellant, neither charge can stand.

CONCLUSION

[¶ 31] For the foregoing reasons, we **VACATE** Appellant's convictions and sentence.