

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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2023 DEC 15 A 9 53

FRANCO GIBBONS,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

SUPREME COURT
OF THE
REPUBLIC OF PALAU

Cite as: 2023 Palau 27
Criminal Appeal No. 23-001
Appeal from Criminal Case No. 22-027

Decided: December 15, 2023

Counsel for Appellant Raynold B. Oilouch
Counsel for Appellee Inia R. Tikomaimaleya,
Assistant Special Prosecutor

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
FRED M. ISAACS, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Supreme Court, Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION¹

PER CURIAM:

[¶ 1] Appellant Franco Gibbons (“Gibbons”) was convicted of Misconduct in Public Office (17 PNC § 3918), Use of Government Property (33 PNC §

¹ Though it does not affect our disposition of the case, this Court pauses to note Appellee’s egregious lack of preparation for oral argument. This deficiency treads close to violating the ABA Model Rules of Professional Conduct, which are binding on attorneys in Palau. *See* ROP Disc. R. 2(h); Model Rules of Pro. Conduct r. 1.1 (A.B.A. 1983) (“A lawyer shall provide competent representation to a client[, which] requires the legal knowledge, skill, thoroughness[,] and preparedness reasonably necessary for the representation.”). Attorneys appearing before this Court must be adequately prepared to present the main issue(s) of the case, clarify the written arguments in the briefs, and answer the Justices’ questions directly and

603), Conflict of Interest (33 PNC § 604), and Tampering with a Government Record (17 PNC § 3914). Gibbons appealed his convictions arguing that the evidence was insufficient, and the trial court committed reversible error.

[¶ 2] We address the Penal Code first, then the Code of Ethics. For the reasons set forth below, we **REVERSE** Gibbons’ convictions on Misconduct in Public Office and Tampering with a Government Record; and **AFFIRM** on Use of Government Property and Conflict of Interest. Finding no error in the sentence imposed, we **AFFIRM** the sentence as to Use of Government Property and Conflict of Interest.

BACKGROUND

[¶ 3] The salient facts are not in dispute. On February 4, 2020, Gibbons, then Governor of Koror, received a personal letter from his Chief of Staff, Joleen Ngoriakl, requesting carpenters to assist the renovation of her family house located in Ngerkesoaol, Koror.² Gibbons approved the request and forwarded Ngoriakl’s letter to the Director of the Division of Public Works (“DPW”) with the handwritten notation “please advise, carpenter assistance when no projects pending.”

[¶ 4] Given Gibbons’ approval, the Director instructed the Operation Manager of the DPW to assign two carpenters to the renovation. The carpenters used a government truck and carpentry tools to perform the renovations during their regular working hours and were paid their regular government salaries for the work. After renovations began, both the Koror State Legislature and Office of the Special Prosecutor received community complaints about the work.

[¶ 5] On June 29, 2022, the Republic of Palau (“ROP”) charged Gibbons and Ngoriakl with the following crimes relating to the above-mentioned renovation:

concisely. Oral argument is not a summary of the briefs, and under no circumstances should attorneys read from a prepared script or their brief. *See Guide for Counsel in Cases to be Argued*, Sup. Ct. of the United States, at 6–7, 9 (Oct. 2023); U.S. Sup. Ct. R. 28 (Jan. 1, 2023).

² Joleen Ngoriakl obtained the lease to the land upon which the house is found from the Koror State Public Lands Authority on March 23, 2020. Her mother, Amon Ngoriakl, lived in the house until her death.

- A. Misconduct in Public Office, 17 PNC § 3918, due to an alleged violation of the Procurement Act, 40 PNC §§ 601 *et seq.* (“Count 1”);
- B. Violations of the Code of Ethics, 33 PNC §§ 603–04, namely Use of Government Property (“Count 3”) and Conflict of Interest (“Count 5”);
- C. Theft of Government Property in the First Degree, 17 PNC § 2615 (“Count 7”); and
- D. Tampering with a Government Record, 17 PNC § 3914 (“Count 9”).

Gibbons’ case proceeded to trial and ran for three days. The trial court found Gibbons guilty of Counts 1, 3, 5, and 9, and sentenced him to six months of probation and restitution payments of \$1,000.00 jointly and severally with Ngoriakl to the Koror State Government. Gibbons submitted a timely Notice of Appeal.

STANDARD OF REVIEW

[¶ 6] “[C]onclusions of law, such as matters of . . . statutory interpretation” are reviewed *de novo*.” *Ellender Ngirameketii v. Republic of Palau*, 2022 Palau 9 ¶ 16; *Tulop v. Republic of Palau*, 2021 Palau 9 ¶ 11. By contrast, “[w]e review the sufficiency of the evidence underlying a criminal conviction for clear error, asking whether 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.” *Xiao v. Republic of Palau*, 2020 Palau 4 ¶ 8; *Wasisang v. Republic of Palau*, 19 ROP 87, 90 (2012). In doing so, “we do not reweigh the evidence,” instead we view the evidence “in the light most favorable to the prosecution.” *Xiao*, 2020 Palau at ¶ 8.

DISCUSSION

[¶ 7] Gibbons raises four issues on appeal. For Count 1, he argues that the trial court committed clear error in finding he committed misconduct under the Procurement Act. For Count 9, Gibbons argues that the evidence was insufficient to show he intentionally concealed Ngoriakl’s request letter and

failed to respond to the Special Prosecutor’s demands for production. Regarding Counts 3 and 5, Gibbons contends that the trial court erroneously interpreted the definition of “public purpose” and scope of conflicts of interest under the Code of Ethics.

I. Misconduct in Public Office – Count One

[¶ 8] Under the Penal Code, a public official commits misconduct in public office when he 1) “does any illegal act[] under the color of office” or 2) “willfully neglects to perform the duties of his . . . office as provided by law.” 17 PNC § 3918. The first clause of the statute entails three elements: 1) status as a public official, 2) an illegal act, and 3) committing such act under the color of office. *Uehara v. Republic of Palau*, 17 ROP 167, 177 (2010); *Kotaro v. Republic of Palau*, 7 ROP Intrm. 57, 60 (1998).

[¶ 9] The trial court found that Gibbons committed an illegal act when he approved the use of government resources to renovate Ngoriakl’s personal residence “in violation of the procurement laws of Palau.” Gibbons argues that the Procurement Act does not apply because the renovations did not require any government procurement of goods or services—the carpenters are existing employees and the tools and truck they used were already acquired by the DPW. Because we find no procurement that would trigger the application of the Procurement Act, and legal insufficiency of the criminal information on this Count, we reverse Gibbons’ conviction.

A. Inapplicability of the Procurement Act and Policies

[¶ 10] The first step in interpreting a statute is to refer to its plain language. *Uehara*, 17 ROP at 172. “[I]f a statute is not susceptible of more than one construction, courts should not be concerned with the consequences resulting from its plain meaning.” *Id.* at 172–73; *Pamintuan*, 16 ROP at 42; *Lin v. Republic of Palau*, 13 ROP 55, 61 (2006). “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *Noah v. Republic of Palau*, 11 ROP 227, 233 (2004). In fact, “statutory provisions must be read in the context of the entire statute rather than in isolation.” *Blailes v. Republic of Palau*, 2020 Palau 9 ¶ 8 n.5.

[¶ 11] The ROP maintains that Gibbons expended public funds in violation of the Act when he paid for the carpenters' salaries, tools, truck, and gasoline. The ROP states that the Act applies to "every expenditure of public funds by the national government or any government agency." 40 PNC § 603(b); *accord* Exec. Order No. 418 app. § 603(b) (Sept. 28, 2018) [hereinafter Procurement Policies]. While looking at the language of section 603 in isolation may support the ROP's construction, this does not cohere when considering the Act in its entirety. The Act's goal is to ensure "the fair and equitable treatment of all persons who deal with the procurement system of the Republic." *Id.* § 601.³ As indicated by its title, the Act provides a framework and specific procedures for government procurement, which is defined as "the acquisition by any means, including purchase, lease or rental, of any goods or services . . . [and] all [related] functions." *Id.* § 606(r); *accord* Procurement Policies § 104 (including "all functions that pertain to the obtaining of construction[] goods or services"). This framework ensures procurement actions are "executed in a manner that provides open and free competition[,] avoids purchasing unnecessary or duplicative items[, and is the] . . . most economical [and] practical." 40 PNC § 613. Therefore, not only was there no government action to acquire new goods or services, the rationale behind the Act itself is inapposite to the facts underlying this case. We find no reason to apply the Procurement Act.

B. Legal Insufficiency of the Charging Document

[¶ 12] Gibbons did not raise, before us or the trial court, the issue of whether the criminal charging document was legally sufficient. Ordinarily, we will not consider issues not properly raised on appeal. *See Xiao*, 2020 Palau at ¶ 20; *Robert v. Cleophas*, 2019 Palau 6 ¶ 15 n.4. However, in a criminal matter, "we will review issues for plain error whether or not they were preserved at trial or identified on appeal." *Xiao*, 2020 Palau at ¶ 20 n.7; *see Scott v. Republic of Palau*, 10 ROP 92, 95 (2003); ROP R. Crim. P. 52(b). "[A]n error is plain if it is clear or obvious and affects the appellant's substantial rights," in other

³ The Koror State government has adopted the Procurement Policies established by Executive Order No. 418. Like the Procurement Act, the Policies seek "to ensure the fair and equitable treatment of all persons who deal with the procurement system of the Republic *or any state government*" and "to provide for public confidence in the procurement procedures." Procurement Policies § 601(b)(1), (4) (emphasis added).

words, the outcome of the trial court proceedings. *Xiao*, 2020 Palau at ¶ 20; *see also Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994) (noting that the Court will consider an issue “to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of the accused is at stake”).

[¶ 13] The Constitution of Palau requires a person accused of a criminal offense “to be informed of the nature of the accusation.” ROP Const. art. IV, § 7. The formal charging document, in this case the information, must contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . . [It] shall state for each count . . . the statute . . . or other provision of law which the defendant is alleged therein to have violated.” ROP R. Crim. P. 7(c)(1). Therefore, a defendant’s constitutional right to notice is violated when the information fails to contain the elements of the alleged offense such that the defendant knows, with reasonable certainty, the nature or character of the offense. *See Xiao*, 2020 Palau at ¶¶ 22, 28 (holding that charging documents must “reflect[] and recite[] the actual crime the defendant stands accused of”); *Republic of Palau v. Kasiano*, 13 ROP 289, 290 (Tr. Div. 2006); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974). The language of the allegedly violated statute may generally describe the offense, “but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Hamling*, 418 U.S. at 117; *see also* 41 Am. Jur. 2d *Indictments & Informations* § 70 (Oct. 2023) (stating that the acts and crime charged must be described specifically and precisely).

[¶ 14] For Count 1 of the information, the Special Prosecutor states,

On or between the dates of March 1, 2020, and July 31, 2020, in the State of Koror, Republic of Palau, Defendant, FRANCO BARRES GIBBONS, committed the offense of Misconduct in Public Office in that Defendant, then Governor for the Koror State Government, Republic of Palau, illegally acted under the color of office, or willfully neglected to perform the duties of his office as provided by law, in

violation of 17 PNC § 3918, *by violating the procurement laws of the Republic of Palau.*

Info., *Republic of Palau v. Gibbons*, Cr. No. 22-027, at 2 (Tr. Div., June 29, 2022) (emphasis added). Because an “illegal act” is an element of misconduct in public office, the information must contain an adequate description of the facts and circumstances that inform Gibbons of how his actions violated the procurement laws. Here, the information does nothing more than track the language of the Penal Code for the general offense of Misconduct in Public Office; it fails to provide Gibbons with any indication of the specific illegal act of procurement relied upon. Moreover, the trial court did not explain how Gibbons’ approval of the renovation amounted to procurement, simply concluding that “[s]uch conduct constitute[d] Misconduct in [Public] Office.” Therefore, Gibbons could not have been reasonably apprised of the accusation leveled against him. As we have emphasized before, “attention to detail in criminal matters is particularly important and it serves to protect defendants” from mounting a defense without fully understanding the nature of the offense. *Xiao*, 2020 Palau at ¶ 28. We reverse Gibbons’ conviction on Count 1.

II. Tampering with a Government Record – Count Nine

[¶ 15] The ROP contends that during the investigation Gibbons intentionally concealed Ngoriakl’s request letter upon which figured Gibbons’ handwritten approval when he failed to respond to subpoenas and the Special Prosecutor’s requests for production. Gibbons argues that 1) he was unaware of the multiple requests because he was not served personally and the investigators did not contact him; 2) he timely produced an unannotated copy of Ngoriakl’s letter when he could not find the annotated letter; and 3) he had an interest to produce the annotated letter because it demonstrates that the renovation work was for a public purpose.

[¶ 16] To obtain a conviction on the charge of Tampering with a Government Record, the ROP must prove that the accused, knowing he lacks the authority to do so, “intentionally destroys, mutilates, conceals, removes, or otherwise impairs the availability of any government records; or . . . refuses to deliver up a government record in the person’s possession *upon proper request of a public servant . . . for examination or other purposes.*” 17 PNC § 3914(a)(4) (emphasis added).

[¶ 17] Investigators from the Office of the Special Prosecutor testified that five written requests were made, yet none were personally served on Gibbons. The requests were received by the Operation Manager of the DPW, Ngoriakl, Koror State’s previous legal counsel, and other state employees. In particular, the requests included two subpoenas *duces tecum* that named Gibbons. “Service of a subpoena shall be made by delivering a copy thereof to the person named.” ROP R. Crim. P. 17(d). Gibbons could have neither concealed nor refused to deliver the annotated letter if he was not properly served with requests for it. As the government failed to comply with the mandatory provision of Rule 17(d), we reverse Gibbons’ conviction on Count 9.

III. Use of Government Property – Count Three

[¶ 18] The Code of Ethics states that “[n]o employee may use . . . state time, equipment, facilities, assets or property for . . . private activities that serve no governmental or public purpose.” 33 PNC § 603. We break this provision into three parts: whether Gibbons was 1) an employee 2) who used government property 3) for a non-public purpose.

[¶ 19] Gibbons first argues that he was not an employee who used government property as the carpenters, Director, and Operation Manager of the DPW were the employees who actually used government resources to perform the renovation. This interpretation is fundamentally flawed. Both parties agree that the Director instructed the Operation Manager to assign the carpenters to the renovation because Gibbons had already approved Ngoriakl’s request. Therefore, but for Gibbons’ approval, the carpenters would not have renovated Ngoriakl’s house using government equipment and resources. Although Gibbons did not personally participate in the renovation work, his act of approval violated section 603. Additionally, there is no question that Gibbons, as the Governor of Koror State, is an employee subject to the Code. *See* 33 PNC § 601 (defining an employee as “[a]ny nominated, appointed, or elected officer or employee of any state government or the national government”).

[¶ 20] Second, we find that Gibbons in fact used “state time, equipment, facilities, assets or property.” *Id.* § 603. Although Ngoriakl personally purchased the lumber and other materials necessary for the renovation, this is immaterial insofar as the carpenters used a DPW truck, gasoline, and carpentry tools during their regular working hours. Further, the carpenters were

compensated by Koror State for the renovation work. The Code’s language clearly encompasses such use of government equipment and labor.

[¶ 21] Third, we look at whether the renovation constituted a “private activit[y] that serve[s] no governmental or public purpose.” *Id.* The Code does not define “public purpose,”⁴ but the Koror Constitution defines “public welfare” as the education, healthcare, and wellbeing of all people, and mandates the government to take “every step reasonable and necessary” to promote it. Koror Const. art X, § 3. This definition follows the U.S. common law where, generally, the objective of a “public purpose” is “to promote public health, safety, morals, security, prosperity, [and] contentment . . . of all inhabitants.” 63 Am. Jur. 2d *Public Funds* § 40 (Oct. 2023).

[¶ 22] We cannot formulate a hard and fast rule to determine what constitutes a public purpose. *See id.* (“[P]ublic purpose’ has a broad, expansive definition[;] . . . there is no exact definition or strict formula for determining what is a public purpose.”). Each case of an expenditure of public funds “must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.” *See, e.g., Allydonn Realty Corp. v. Holyoke Hous. Auth.*, 23 N.E.2d 665, 666 (Mass. 1939); *City of Glendale v. White*, 194 P.2d 435, 439 (Ariz. 1948); *United Cmty. Servs. v. Omaha Nat’l Bank*, 77 N.W.2d 576, 586 (Neb. 1956).

[¶ 23] Gibbons maintains that the renovation of Ngoriakl’s house was part of the state’s public assistance program, and consequently, it fulfilled a governmental or public purpose. He explains that the program has a goal of providing assistance to Koror residents, especially to the old, weak, bedridden, and poor. He specifically points to the fact that Ngoriakl’s mother, who resided in the house, was bedridden with both legs amputated.

[¶ 24] We do not dispute that Koror State can use government property and resources to provide various free services to Koror residents. There is in fact an established procedure to request such services under the public assistance program: residents may fill out an Assistance Request Form that is then

⁴ 40 PNC § 503(g) defines “public purpose” as “the promotion of public health, safety, morals, welfare, security or prosperity of the citizens of the Republic.” While this definition is part of a different section of the Palau National Code, we find it to be broadly applicable.

approved by the Office of the Governor. However, here, Ngoriakl wrote a personal letter requesting assistance directly to Gibbons instead of completing an Assistance Request Form.⁵

[¶ 25] The renovation of Ngoriakl's residence was indisputably extensive. The two carpenters testified that their work mainly consisted of replacing fixtures and windows, tiling floors and walls, and constructing a third bedroom. They worked on the renovation for around two months. Such a long-lasting, large-scale project cannot be justified by a mere incidental public benefit. When using government property, there must be some degree of proportionality between the use and benefit it confers upon the public.

[¶ 26] To illustrate this, we use the other two home renovation requests made and approved under the public assistance program that were testified to below. One project entailed constructing stairs at the entrance of an elderly woman's home to give emergency medical services access. We note that this project only involved building stairs, and thus was of a much smaller scale than a full-house renovation. Moreover, it had an incidental and proportional public purpose of facilitating access for emergency services. The second project was to renovate a public housing unit. The record is not clear on the extent of this renovation, but this project had a clear, direct public purpose as it pertained to repairing public housing. In contrast, the renovation of Ngoriakl's private residence was an extensive project that required a great deal of labor from the DPW with no obvious public benefit or purpose.

[¶ 27] Gibbons contends that Ngoriakl's mother, who lived in the house, required the renovation because she was wheelchair-bound and needed to move home from Belau National Hospital. However, there is not enough evidence on the record that helping Ngoriakl's mother served a public purpose, such as eliminating a long-term public expenditure or freeing up hospital resources. Even if Gibbons provided evidence that the renovation fulfilled a public purpose, the scope and extent of the renovation may still have been

⁵ Ngoriakl's failure to fill out the Assistance Request Form is not in itself dispositive that the renovation served no public purpose because Koror State may dispense services not listed on the Form. During trial, several witnesses testified that the government has supplied gravel, cut down trees, or built stairs and access roads. Some of these services benefited individuals or private residences. However, these projects also provided an incidental public benefit, and are clearly limited in scope.

excessive and disproportionate. Thus, we cannot conclude that the renovations served a valid public purpose.

[¶ 28] Pursuant to the Koror Constitution, Gibbons' prerogative as Governor to execute and expand Koror's public assistance program is balanced against his duty to ensure that public expenditures further a public purpose. *See* Koror Const. art. X, § 3. Therefore, Gibbons' authority to set policies and programs is limited and he does not have unfettered discretion to arbitrarily define what is a valid public purpose. We reject Gibbons' arguments and affirm his conviction on Count 3.

IV. Conflict of Interest – Count Five

[¶ 29] The trial court concluded that Gibbons' approval of Ngoriakl's renovation request was a conflict of interest under the Code of Ethics as Gibbons gave Ngoriakl, his Chief of Staff, preferential treatment. The Code provides that “[n]o [government] employee may use or attempt to use the employee's official position to secure or grant privileges, exemptions, advantages, contracts, or [preferential] treatment, for himself or others.” 33 PNC § 604(d). The provision then lists three examples of impermissible conflicts of interest: 1) seeking other employment by using or attempting to use the employee's position, 2) soliciting or accepting any consideration for performance of the employee's official duties, and 3) soliciting or accepting any gift from any person whose interests may be substantially affected by the performance of the employee's duties. *Id.* Gibbons contends that there was no conflict of interest because the renovation did not fall within any of these examples, and he did not personally receive a benefit from Ngoriakl in return for his approval.

[¶ 30] The plain text of section 604(d) introduces the examples of conflicts of interest with the phrase “including but not limited to.” “[I]f statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce [it] as written.” *Lin*, 13 ROP at 58; *see also Tulop*, 2021 Palau at ¶ 26; 1 PNC § 202. Therefore, limiting the application of section 604(d) to circumstances of personal gain is inconsistent with the text of the statute and broader context of the Code of Ethics as a set of guiding rules and principles for public officials to act in an honest manner that is fair to all stakeholders involved.

[¶ 31] While it is clear that Gibbons did not receive any personal benefit or payment in return from Ngoriakl, he showed a preference towards her request as his Chief of Staff. First, as we noted above, Ngoriakl did not complete an Assistance Request Form under the public assistance program. Second, it appears from the record that home renovation requests were generally not approved under the public assistance program, and certainly not renovation projects of this scope and scale.⁶ Third, as we have discussed, the renovation of Ngoriakl’s personal residence did not serve a public purpose. Together, these facts evidence that Ngoriakl received preferential treatment from Gibbons: she obtained free government labor for a project that did not usually fall under the public assistance program.


[¶ 32] In addition, conflict-of-interest statutes, like section 604(d), “are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer’s undivided and uncompromised allegiance.” *Republic of Palau v. Gibbons*, 10 ROP 209, 213 (Tr. Div. 2003). A former Koror State legislator testified that residents had complained about the state helping the Chief of Staff “build her house.” The carpenters also testified that they knew “something [was] wrong” because the DPW told them to use their personal vehicle instead of the government truck after two weeks of starting the renovation. In other words, the renovation was improper to the public. We affirm Gibbons’ conviction on Count 5.

CONCLUSION

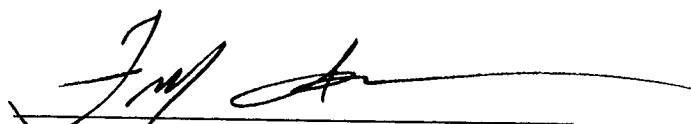
[¶ 33] For the reasons set forth above, we **REVERSE** the trial court’s convictions of Gibbons on Count 1 and Count 9, and **AFFIRM** on Count 3 and Count 5. We **AFFIRM** the sentence imposed.

⁶ On October 19, 2020, an oversight committee hearing was conducted during which legislators asked Gibbons about the renovation of Ngoriakl’s house and, more broadly, “whether the Koror State Government can provide th[is] type of service[, like] renovating or repairing homes for the elderly.” Legislators testified that they were concerned if the same service was to be performed throughout Koror State the government would be overburdened.

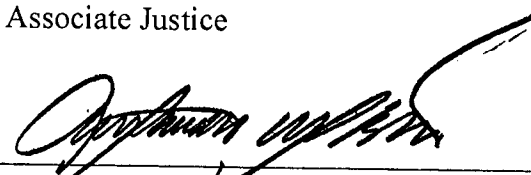
SO ORDERED, this 15th day of December 2023.



OLDIAIS NGIRAIKELAU
Chief Justice, presiding



FRED M. ISAACS
Associate Justice



ALEXANDRO C. CASTRO
Associate Justice