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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Plaintiff,

vs.

ANTONIO TENORIO BENAVENTE, et al.

Defendants.

CRIMINAL CASE NO. 02-0042(E)

**ORDER DENYING
DEFENDANTS'
MOTION TO DISMISS**

**I.
INTRODUCTION**

This matter came before the court on June 18, 2002 at 9:00 a.m. for a hearing on the defendants' Motion to Dismiss. The Commonwealth was represented by Assistant Attorney General Clyde Lemons, Jr. Antonio Tenorio Benavente and Annie Salas Benavente were represented by Brien Sers Nicholas. The remaining defendants in this action were represented by Perry B. Inos and Pedro Atalig. The court granted the Commonwealth's Motion to Dismiss charges pertaining to all defendants except Antonio Tenorio Benavente and Annie Salas Benavente. All other motions to dismiss were withdrawn in response to this action. Thus, this Motion to Dismiss only pertains to Antonio Tenorio Benavente and Annie Salas

1 Benavente (or the defendants). This matter is set for trial on January 13, 2002 at 9 a.m.

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3 **II.**
FACTUAL BACKGROUND

4 Defendant Anthony Tenorio Benavente is charged with four counts including involuntary
5 manslaughter, aggravated assault and battery, unlawful possession of a firearm and unlawful carrying of a
6 firearm. Defendant Annie Salas Benavente is charged with one count of unlawful possession of a firearm.¹
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8 Pursuant to Rules 12(b)(1) and (2) of the Commonwealth Rules of Criminal Procedure, the
9 defendants move to dismiss some of the charges or, in the alternative, order the Commonwealth to elect
10 charges because they violate the rule against multiplicity and the Double Jeopardy Clause.
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12 **III.**
DISCUSSION

13 A. Multiplicity

14 "Multiplicity consists of charging the same defendant with the same offense in several different
15 counts." *United States v. Bartemio*, 547 F.2d 341, 345 (7th Cir. 1974), *cert. denied*, 419 U.S. 994, 95
16 S. Ct. 305, 42 L. Ed.2d 266 (1974). Courts have found that when an indictment is multiplicitous, "it may
17 prejudice the jury against the defendant by creating the impression of more criminal activity on his part than
18 in fact may have been present." *United States v. Carter*, 576 F.2d 1061, 1064 (3rd Cir.1978); *see also*
19 *United States v. Gullett*, 713 F.2d 1203, 1211-12 (6th Cir.1983), *cert. denied*, 464 U.S. 1069, 104
20 S. Ct. 973, 79 L. Ed.2d 211 (1984). The traditional test of multiplicity "determines whether each count
21 'requires proof of a fact which the other does not.' " *United States v. Kennedy*, 726 F.2d 546, 547-48
22 (9th Cir. 1984), *cert. denied*, 469 U.S. 965, 105 S. Ct. 365, 83 L. Ed.2d 301 (1984) (quoting *United*
23 *States v. Glanton*, 707 F.2d 1238 (11th Cir.1983)). "If one element is required to prove the offense in
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25 ¹Based on the Amended Information filed February 11, 2002; a Stipulated Motion to Dismiss Counts VIII, IX
26 and X filed on May 30, 2002; the Commonwealth's Motion to Dismiss filed on June 6, 2002 and arguments during the
27 June 18, 2002 hearing, the court ordered counsel to file their response to the following findings of the remaining
charges. Counsel agreed these charges represent an accurate summary of the remaining charges.

1 one count which is not required to prove the offense in the second count, there is no multiplicity." *United*
2 *States v. Briscoe*, 742 F.2d 842, 845 (5th Cir.1984).

3 1. Rule 12(b)

4 The defendants rely on Rule 12(b) of the Commonwealth Rules of Criminal Procedure to challenge
5 the information as multiplicitous. Rule 12(b) requires that certain objections be raised before trial or they
6 are deemed waived. *See* Com. R. Crim. P. 12(b).

7 a. Weapons Charges

8 Annie Salas Benavente is charged with one weapons charge. Clearly, there is no issue of
9 multiplicity regarding this individual charge.

10 Anthony Tenorio Benavente is charged with two weapons violations: 6 CMC §2204(a) and 6
11 CMC §2222(d). There is no issue of multiplicity regarding these charges. Section 2204(a) addresses a
12 person's eligibility to possess, use or carry a firearm without an identification card. Section 2222(d)
13 addresses carrying a dangerous device while under the influence of alcohol or drug. These charges are not
14 multiplicitous because, although the charges may arise from the same conduct, they are charging different
15 offenses. Each charge contains different elements and each charge requires different elements of proof.
16 A charge under Section 2204(a) requires the Commonwealth to prove that the defendant acquired or
17 possessed a firearm, dangerous device or ammunition without an identification card. 6 CMC §2204(a).
18 A charge under Section 2222(d) requires the Commonwealth to prove that the defendant carried a gun or
19 dangerous device while under the influence of alcohol or drug. 6 CMC §2222(d). These are different
20 offenses and not multiplicitous.

21 b. Involuntary Manslaughter and Aggravated Assault and Battery

22 Defendant Anthony Tenorio Benavente is also charged with involuntary manslaughter and
23 aggravated assault and battery. Although these charges, like the weapons charges, satisfy the traditional
24 test for multiplicity, they also present a more unique situation. The defendant asserts that the charges are
25 multiplicitous because both charges arise from one act by the defendant.

26 Under the Commonwealth Code, involuntary manslaughter is the unlawful killing of a human being
27

1 by another human being without malice aforethought.

2 (b) ...Involuntary manslaughter is an unlawful and unintentional
3 killing done either:

4 (1) In the commission of an unlawful act not amounting
5 to a felony;

6 (2) In the commission of a lawful act which might
7 produce death in an unlawful manner; or

8 (3) In the commission of a lawful act in a criminally
9 negligent manner, provided that this subsection shall not apply to
10 acts committed in the driving of a vehicle.

11 6 CMC §1102. A person commits aggravated assault and battery if “he or she causes serious bodily
12 injury, purposely, knowingly or recklessly.” 6 CMC §1203.

13 These charges are not multiplicitous under traditional multiplicity tests because involuntary
14 manslaughter and aggravated assault and battery have entirely different elements. Involuntary manslaughter
15 requires the Commonwealth to show that the defendant acted unintentionally resulting in the killing of a
16 human being. Aggravated assault and battery requires the Commonwealth to show that the defendant
17 acted intentionally to cause serious bodily injury. These charges clearly have different *mens rea* elements.
18 And the respective *actus reas* elements of each charge cannot be reconciled to support a conviction of one
19 based on a conviction of the other. Neither crime, once proven, proves the other charge. Nor does the
20 proof of a fact in one charge prove a fact in the other charge. Nor is either charge a lesser included offense
21 of the other. Thus, these charges satisfy the ‘additional element’ test and are not multiplicitous.

22 However, the purpose of the rule against multiplicity, which serves to protect a defendant from
23 prejudice, bears significantly on the charges of involuntary manslaughter and felony assault. Clearly, the
24 defendant cannot be convicted of both involuntary manslaughter and aggravated assault and battery if the
25 same unbroken conduct by the defendant provides the basis for both charges. Under the Commonwealth
26 Code, aggravated assault and battery is an unlawful felony and, if proven, cannot provide any basis for a
27 conviction of involuntary manslaughter.

28 The court, however, must consider the defendant’s claim of prejudice in context with the
Commonwealth’s broad discretion to select charges. The United States Supreme Court has recognized
“the Government’s broad discretion to conduct criminal prosecutions, including its power to select the

1 charges to be brought in a particular case.” *Ball v. United States*, 470 U.S. 856, 859, 105 S. Ct. 1668,
2 1670, 84 L. Ed.2d 740, 745 (1985).

3 The court must also consider the defendant’s claim of prejudice within the current procedural
4 context. There is no summary judgment procedure in criminal proceedings and the United States Supreme
5 Court has repeatedly upheld prosecutions under a multiplicitous indictment. *See, e.g., Ball v. United*
6 *States* at 865, 105 S. Ct. at 1673-1674, 84 L. Ed.2d at 748 (holding that a defendant could properly be
7 indicted for two counts even when he could stand convicted of only one); *United States v. Universal*
8 *C.I.T. Credit Corp.*, 344 U.S. 218, 224, 73 S. Ct. 227, 231, 97 L. Ed. 260, 265 (1952)(finding that a
9 prosecutor could draft an indictment charging a defendant with a single offense in multiple counts).

10 In *United States v. Universal C.I.T. Credit Corp.*, the Court explained that a prosecutor could
11 charge a single offense in multiple counts of an indictment:

12 A draftsman of an indictment may charge crime in a variety of forms to
13 avoid fatal variance of the evidence. He may cast the indictment in several
14 counts whether the body of facts upon which the indictment is based gives
15 rise to only one criminal offense or to more than one. To be sure, the
16 defendant may call upon the prosecutor to elect or, by asking for a bill of
17 particulars, to render the various counts more specific. In any event, by an
18 indictment of multiple counts the prosecutor gives the necessary notice and
19 does not do the less so because at the conclusion of the Government's
20 case the defendant may insist that all the counts are merely variants of a
21 single offense.

22 *Id.* at 225, 73 S. Ct. at 231, 97 L. Ed. at 266.

23 The court has carefully considered the defendant’s specific claims of prejudice.² The defendant
24 claims that if the Commonwealth proceeds with both charges it would give the jury the impression that the
25 defendant committed more than one offense when he did not. The defendant also claims that if aggravated
26 assault and battery and involuntary manslaughter are both charged, the prosecution would be allowed to
27 introduce evidence at trial that shows the seriousness of the injuries suffered which are totally irrelevant to
28 the charge of involuntary manslaughter.

² The court is not persuaded by the defendant’s claim of prejudice because it will affect his ability to negotiate with the prosecution. This Court has considered the defendant’s claim of prejudice only as it applies to a jury’s potential perception that the defendant committed two crimes if, in fact and law, he committed only one.

1 The court has recognized the clear distinctions between these two charges. Because the elements
2 of proof for each charge are so different, the court must ultimately yield to the Commonwealth's discretion
3 to charge the defendant. The conduct may be related, but the charges are unrelated.

4 Therefore, the court finds it is premature to order dismissal of one of the charges or to order the
5 Commonwealth to elect between the two charges. A judge has a duty to address the multiplicitous nature
6 of the indictment only if and when the jury convicted the defendant of both offenses. *Ball v. United States*
7 at 865, 105 S. Ct. at 1673, 84 L. Ed.2d at 748. It could be that a jury could find the defendant acted
8 intentionally, supporting a conviction of aggravated assault and battery. It could be that the jury could find
9 that the defendant acted unintentionally, supporting a conviction of involuntary manslaughter. Or a jury
10 could find that the defendant committed no crime. It is too early to determine whether these charges are
11 multiplicitous.³

12 c. Multiplicitous counts do not violate double jeopardy.

13 Multiplicitous counts do not violate the double jeopardy clause. "While the Double Jeopardy
14 Clause may protect a defendant against cumulative punishments for convictions on the same offense, the
15 Clause does not prohibit the State from prosecuting respondent for such multiple offense in a single
16 prosecution." *Ohio v. Johnson*, 467 U.S. 493, 500, 104 S. Ct. 2536, 2541, 81 L. Ed.2d 425, 434
17 (1984). As the Supreme Court explained in *Ball*, to prosecute under a multiplicitous indictment up to and
18 including the jury's verdict does not constitute double jeopardy. *Ball v. United States* at 860-61, 105 S.
19 Ct. at 1671, 84 L. Ed.2d at 745. The violation occurs only when a defendant is convicted and sentenced
20 for two counts that are essentially the same offense. *Id.* Until the close of the government's case, it is
21 impossible to know whether there is sufficient evidence to submit multiplicitous counts to the jury. Even
22 then, the possibility of harm is contingent. Until the jury has rendered a verdict, it is impossible to know
23 whether the jury will convict on two or more counts that are the same offense under law. See, e.g., *United*
24 *States v. Burns*, 990 F.2d 1426, 1439 (4th Cir. 1993) (finding an acquittal of one of two multiplicitous

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26 ³ This Court recognizes that it has already denied the defendants' Motion for a Bill of Particulars. However,
27 this can be reconciled with this current Order because even if the motion for a bill of particulars was granted under
the facts of this case, it would still be premature to preclude the Commonwealth from charging within its discretion.

1 counts to render multiplicity claim moot), cert. denied, 113 S. Ct. 2949 (1993); *United States v. Wecker*,
2 620 F. Supp. 1002, 1008 (D. Del. 1985) (denying motion to dismiss pursuant to Rule 12 because defenses
3 were "contingent upon certain assumptions of fact").⁴

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5 **IV.**
CONCLUSION

6 The court finds the defendants' pre-trial motion to remedy any effect of the alleged multiplicitous
7 charges is premature. Therefore, the defendants' Motion to Dismiss is **DENIED**.

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11 **SO ORDERED** this 2nd day of October 2002.

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13 /s/ _____

14 David A. Wiseman
15 Associate Judge

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24 ⁴Finally, the court expresses its concern that Rule 12 of the Commonwealth Rules of Criminal Procedure may
25 not be the appropriate tool to raise objections to charges that might violate the rule against multiplicity. As
26 discussed, an information that contains multiplicitous counts is not a 'defect' in the information. Furthermore,
27 resolution of multiplicitous counts are not generally capable of determination without trial on the general issue. And
28 finally, the double jeopardy clause does not apply to a multiplicitous information. Furthermore, Rule 7 and Rule 12 of
the Commonwealth Rules of Criminal Procedure present conflicting conclusions regarding multiplicitous charges in
criminal proceedings.