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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

FRANCISCO AGUON PUA,
Defendant-Appellant.

SUPREME COURT NO. 06-0045-GA
SUPERIOR COURT NO. 05-0132D

Cite as: 2009 MP 21

Decided December 31, 2009

Edward C. Arriola, Saipan, Northern Mariana Islands, for Appellant.
Gregory Baka, Assistant Attorney General, Commonwealth Attorney General's Office, for Appellee.
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; JOHN A. MANGLONA, Associate Justice; JESUS C. BORJA, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant Francisco Aguon Pua ("Pua") appeals the trial court's denial of his motion to suppress a pouch that was seized during the execution of a search warrant. Pua also appeals the trial court's denial of his motion to acquit and motion to set aside the jury verdict. The jury found Pua guilty of first degree felony murder and acquitted him of the underlying robbery charge. We affirm the trial court's ruling on Pua's motion to suppress because the seizure of the pouch was justified under the "plain view" exception to Article 1, Section 3 of the Commonwealth Constitution. In addition, we hold that the trial court did not err in denying Pua's motion to acquit because there was sufficient evidence to sustain the charges against him. We also find that the trial court did not err in denying Pua's motion to set aside the verdict as the jury's verdict finding him guilty of first degree felony murder and acquitting of the underlying robbery charge was not inconsistent. Accordingly, we AFFIRM Pua's first degree murder conviction.

I

Factual Background

¶ 2 On May 22, 2002, Hong Kyun Kim ("Kim"), manager of Candi's Poker, discovered the body of cashier Mostofa Faruk Parves ("Parves"), in a pool of blood, with multiple stab wounds. Appellant's Excerpts of Record ("ER") at 1.

¶ 3 Detectives at the scene noticed surveillance cameras installed on the grounds of Tanapag Market, a market adjacent to Candi's Poker. *Id.* at 2. The surveillance tapes, recorded in the early morning of May 22, 2002, revealed a man walking in the direction of Candi's Poker and carrying in his right hand what appeared to be a long knife. *Id.* The man disappeared from the camera's sight and re-appeared on the videotape approximately thirteen minutes later walking away from Candi's Poker towards Tanapag Market. Supp. ER[1] at 180-81. The man wore a light colored t-shirt with logo prints on the front and back, dark colored short pants, and a light colored pair of slippers. ER at 2. That same day, police discovered a knife in the wooded area behind the Market. *Id.*

¶ 4 The next day, several Tanapag residents viewed the surveillance videotape and identified the man as Pua, who was then brought in to the Criminal Investigations Office for questioning. *Id.* Pua told police that he had been fishing the evening of May 22nd and had arrived home between 11:00 p.m. and 11:30 p.m. *Id.* While at the station, police officers noticed a red spot on Pua's right slipper and, with Pua's consent, confiscated the slippers. *Id.*

¶ 5 On May 24, 2002, Detective Sylvan Rangamar ("Rangamar") executed an affidavit for a search warrant of Pua's residence. ER at 1-3. The affidavit listed for seizure a brightly colored t-shirt with logo prints and a pair of dark colored short pants. *Id.* A search warrant was issued that same day which, in

[1] We requested the submission of supplemental excerpts of record. To avoid confusion, facts drawn from this source will be referenced to as "Supp. ER."

addition to the t-shirt and short pants, authorized the search for and seizure of any United States currency, coin wrappers, photos of Pua, hair fibers, and any contraband or instrument relating to the alleged crime. ER at 6. Police executed the search warrant the following morning and seized items including five dark short pants and a light brown and yellow logo printed t-shirt. ER at 7-8. During the execution of the warrant, Officer Jeffrey F. Olopai ("Olopai") also found and seized a waist pouch located in a garbage bin outside of Pua's home. Supp. ER at 191.

¶ 6 Three years later, in May 2005, Detective Juan Santos ("Santos") executed a declaration for Pua's arrest. ER at 9-12. Santos' declaration included his observation from the surveillance tape that Pua was wearing a dark colored pouch around his waist. *Id*. at 10. Santos also stated that samples from the t-shirt, waist pouch, and slippers were sent to an FBI laboratory for forensic examination. *Id*. at 11. The DNA results from the t-shirt and slippers were inconclusive, but DNA from blood detected on the pouch matched Parves' DNA profile. *Id*. Pua was subsequently charged with robbery[2] and murder during the perpetration of a robbery.[3]

¶ 7 Prior to trial, Pua filed a motion to suppress the waist pouch on the ground that its seizure was not within the scope of the search warrant. The trial court denied Pua's motion.

¶ 8 At trial, Kim testified that on May 22, 2002, at approximately 1:00 a.m., he made a partial collection of money from the cash register at Candi's Poker and that Parves was his employee and worked as the cashier. ER at 44, 47, 54-55. Officer Olopai testified that he viewed the surveillance videotape before executing the search warrant and that although he did not see the pouch at the time, he did notice a bulge under the shirt.[4] He also testified that he found the pouch during the execution of the search warrant and observed "some red stains" that "he wasn't sure [were] blood." Supp. ER at 203. Officer Aldan testified that upon arriving at Candi's Poker, he saw the cash register drawer pulled out and empty. *Id.* at 225.

¶ 9 After the Commonwealth rested its case, Pua moved for a judgment of acquittal, arguing that there was no evidence that a robbery was committed. In addition, Pua moved for dismissal of the felony-

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[2] "(a) A person commits the offense of robbery if he or she takes property from the person of another, or from the immediate control of another, by use or threatened use of immediate force or violence. (b) A person convicted under this section may be punished: (1) By imprisonment for not more than 10 years; or (2) If the defendant or an accomplice uses a dangerous weapon to obtain the property or inflicts serious bodily injury, the term of imprisonment may not be more than 20 years." 6 CMC § 1411.

[3] "Murder is the unlawful killing of a human being by another human being with malice aforethought. (a) First Degree Murder. First degree murder is a murder which is: (1) Willful, premeditated, and deliberated; (2) Perpetrated by poison, lying in wait, torture, or bombing; or (3) One that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child." 6 CMC § 1101.

[4] Olopai pointed the pouch out to the jury when they viewed the surveillance videotape, but testified to only noticing a bulge under the shirt when he first viewed the surveillance video, before the search warrant was executed. ER at 182, 299.

murder charge predicated on the robbery charge. The trial court denied both motions. Although Pua was not charged with attempted robbery, the trial court instructed the jury that either robbery or attempted robbery could satisfy the underlying felony requirement of 6 CMC § 1101.[5]

¶ 10 At the conclusion of the trial, the jury acquitted Pua of robbery, but found him guilty of murder under the felony-murder statute. Pua filed a timely motion to set aside the verdict on the ground that the jury returned an inconsistent and repugnant verdict. The trial court denied his motion. Pua now appeals the trial court's denial of his motion to suppress evidence of the seized pouch, motion for judgment of acquittal, and motion to set aside the verdict.[6]

II

Motion to Suppress

¶ 11 Pua argues that the trial court erred in denying the pre-trial motion to suppress the waist pouch because the officers executing the warrant failed to comply with the warrant's limitations and violated Article I, Section 3 of the Commonwealth Constitution. We review a trial court's ruling on a motion to suppress evidence de novo. *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995) (citing *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993)).

¶ 12 Before we can consider the merits of Pua's claim, we must first determine whether the facts we may consider on review include the entire record or only that proof offered at the pre-trial hearing on the motion to suppress. While this Court has previously addressed motions to suppress, we have not fully explored what evidence an appellate court may consider when reviewing a pretrial ruling on such motions.

¶ 13 The United States Supreme Court has stated that if the "evidence given [at] trial was sufficient . . . to sustain the introduction of the [proffered evidence], it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground." *Carroll v. United States*, 267 U.S. 132, 162 (1925). In *Carroll*, the defendant argued that the evidence presented on a motion to suppress was insufficient to establish probable cause to seize liquor. More evidence, however, had been presented at trial. *Id.* The Court held that because "the whole matter was gone into at the trial, [no] right of the defendant's was infringed." *Id.*

¶ 14 Relying on *Carroll*, a majority of federal and state courts have held that an appellate court may consider evidence first produced at trial when reviewing a trial court's denial of a motion to suppress. *See*

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[5] The trial court instructed the jury as follows: "In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: First the defendant unlawfully killed Mostofa Faruk Parves; Second, the defendant killed Mostofa Faruk Parves with malice aforethought; Third, the killing occurred during the perpetration or attempted perpetration of robbery; and Fourth, the killing occurred in Tanapag, Saipan. To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life." ER at 72.

[6] The Commonwealth failed to submit a response brief.

generally State v. Henning, 975 S.W.2d. 290, 297-98 (Tenn. 1998) (analyzing the court split and concluding that a majority of United States jurisdictions rely on *Carroll*); *See, e.g.*, *State v. Washburne*, 574 N.W.2d 261, 263-64 (Iowa 1997) (relying on federal authorities and holding that evidence adduced in later trial testimony may be considered when determining whether the court erred in denying a motion to suppress). "In determining whether a district court erred in admitting evidence claimed to have been seized as the result of an unreasonable search, an appellate court will not ordinarily limit itself to the testimony received at a pretrial motion to suppress, but will also consider pertinent testimony given at the trial." *Rocha v. United States*, 387 F.2d 1019, 1021 (9th Cir. 1967). The reasoning for these decisions is grounded in the exclusionary rule,[7] which is justified only to the extent that it "deter[s] police from violations of constitutional and statutory protections" and prevents "the prosecution [from being] put in a better position than it would have been in if no illegality had transpired." *Nix v. Williams*, 467 U.S. 431, 442-43 (1984). We agree with the majority of federal and state courts and will consider evidence produced at trial in determining whether the trial court erred in denying Pua's motion to suppress.

¶ 15 Pua argues that the pouch was seized in violation of his Fourth Amendment[8] rights and that the trial court improperly denied his motion to suppress. He claims that the trial court confused the declaration of probable cause in support of the arrest warrant dated May 2005 with the affidavit for the search warrant dated May 2002 in concluding that the illegally seized pouch was within the scope of the search warrant.[9] He also asserts that the trial court's reasoning is based on an incorrect application of *Nix v. Williams*, *supra*, the seminal United States Supreme Court case addressing the "inevitable discovery" exception to the exclusionary rule. However, Pua is mistaken because the trial court based its decision on an "inevitable seizure"[10] rule, and only utilized the rationale of police deterrence referenced in *Nix.*

¶ 16 The trial court reasoned that Pua's residence was sufficiently described in the warrant and, under the inevitable seizure doctrine, the seizure of the pouch was justified as "it was conceivable that the clothing described in the warrant could have been found in the trash bin." Order Granting Motion to Suppress Recorded Evidence and Denying Motion to Suppress Physical Evidence ("Order Granting

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[7] Courts ordinarily suppress evidence obtained during an unreasonable search or seizure and offered against the accused. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

[8] The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[9] The affidavit for the search warrant dated May 2002 did not state that a pouch was visible in the surveillance videotape whereas this was stated in the declaration of probable cause dated May 2005.

[10] The trial court noted that Connecticut is the only United States jurisdiction that has examined this doctrine in detail, while a few other states have relied on it with little explanation. Order Granting Motion to Suppress Recorded Evidence and Denying Motion to Suppress Physical Evidence at 9.

Motion to Suppress") at 6. The trial court also stated that even though the pouch was not particularly described in the warrant, and it did not fall within the broad definitions of "contraband" or "instrumentality of the crime," it was nonetheless admissible because it was discovered during the execution of a lawful warrant and its seizure was appropriate and inevitable. *Id.* at 8. It reasoned that all warrantless searches are presumed illegal until an established exception is proven, and then premised its decision on an "inevitable seizure" exception, a variation of the doctrine of "inevitable discovery." *Id.* at 9.

¶ 17 The requirements needed to invoke the "inevitable discovery" exception are articulated in *Nix*, in which the United States Supreme Court held that in order for this exception to be asserted, the government had to prove by a preponderance of the evidence that (1) the illegally seized evidence would have been discovered by lawful means; (2) a systematic and specific search of the illegally seized evidence was ongoing; and (3) the record shows that discovery would have been inevitable. *Nix*, 467 U.S. at 444. The *Nix* Court reasoned that the inevitable discovery doctrine balances society's interest in deterring improper police conduct by putting the police in the same position they would have been in if no police error or misconduct had occurred. *Id.* at 447. In the case at hand, the trial court rejected the Commonwealth's argument that the doctrine of "inevitable discovery" applied to the pouch, and instead relied on the *Nix* rationale holding that excluding the pouch would have no utility in deterring improper police conduct. It explained that "the discovery of the bag in the instant case was inevitable. Technically speaking, its seizure was the product of illegal governmental activity, since the bag was not among the list of items authorized for seizure." Order Granting Motion to Suppress at 10. "No leap of faith on the part of the officer was needed to determine that the bag constituted relevant evidence" and since it was "within the scope of the Declaration of Probable Cause in Support of the Warrant, an amendment to the warrant would have assuredly been allowed had the officers secured the premises and then returned to Court to amend the warrant." *Id.* at 11.

¶ 18 We agree with Pua that the trial court confused the May 2002 affidavit in support of the search warrant executed by Rangamar with the May 2005 declaration of probable cause in support of the arrest warrant executed by Santos. The declaration of probable cause in support of the arrest warrant was the only declaration that mentioned the pouch. However, we deem the error to be inconsequential, as the trial court made only a cursory reference to the declaration and it was not crucial to its analysis. We also agree with the trial court's reasoning that "the premises to be searched were sufficiently described by the warrant and the seizure of the pouch was justified as it was conceivable that the items described in the warrant could have been found in the trash bin." Order Granting Motion to Suppress at 6. A warrant sufficiently describing the premises to be searched will justify a search of property belonging to the person occupying the premises if those effects might contain items described in the warrant. *United States*

v. Gomez-Soto, 723 F.2d 649, 655 (9th Cir. 1984). In the instant case, the officer had a lawful search warrant[11] and it was reasonable for him to look in the garbage bin while searching for the items authorized for seizure. However, we are wary of the trial court's reliance on an "inevitable seizure" rule. While we acknowledge that Connecticut has adopted an "inevitable seizure" variation of the "inevitable discovery" doctrine, we decline to explore this theory when the facts in the instant case implore the invocation of the "plain view"[12] exception to the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).[13]

¶ 19 The Commonwealth Constitution states that "the right of the people to be secure in their persons, house, papers and belongings against unreasonable search and seizure shall not be violated." NMI Const., art I, § 3. It further provides that "no warrants shall issue except upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."[14]

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[11] Pua does not appeal the particularity and validity of the search warrant itself. He only states in his supporting affidavit that the search warrant went beyond the scope of what was requested to be searched and seized.

[12] We note the distinction between the "open view" and "plain view" doctrines. "Plain view" was mentioned at the suppression hearing but appears to have been confused with "open view." This is evidenced by Pua's argument that the pouch "is not in plain view because it was --- it was wrapped up in a, you know, big trash bag and it was placed inside the garbage --- garbage can. It was not exposed to public view." Motion to Suppress Evidence at 21-22. "[T]he hardest conceptual problem attending the plain view doctrine is to grasp that it is not a universal statement of the right of a policeman to seize after seeing something in open view; it is rather a limited statement of the right in one of several instances – following a valid intrusion." *Cauls v. Commonwealth*, 683 S.E.2d 847, 851 (Va. Ct. App. 2009) (internal citation omitted). In the "open view" situation, "the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside [at] that which is knowingly exposed to the public. The object under observation is not within the scope of the constitution." *State v. Meyer*, 78 Haw. 308, 313 (1995) (quoting *State v. Kaaheena*, 59 Haw. 23, 28 (1978)). The plain view doctrine "does not authorize an officer to enter a dwelling without a warrant to seize contraband merely because the contraband is visible from outside the dwelling." *Washington v. Chrisman*, 455 U.S. 1, 11 (1982). "His observation, [however], may provide probable cause for the issuance of a search warrant." *Id.* at 12. *See generally Meyer*, 78 Haw. at 312-15 (1995) (discussing the difference between "open view" and "plain view"). The plain view doctrine is discussed further in ¶ 21 below.

[13] We are aware of *United States v. Greenwood*, 486 U.S. 35 (1988), and the privacy implications of garbage bin searches within the "curtilage" of a home or otherwise. In *Greenwood*, the United States Supreme Court held that a warrant is not required for the search and seizure of garbage because no reasonable expectation of privacy exists in garbage which has been left on the curbside for collection. 486 U.S. at 41. The majority of United States jurisdictions have interpreted their respective state constitutions in accordance with *Greenwood*. Some states, however, have rejected *Greenwood* and preclude warrantless searches and seizures of one's garbage. *See, e.g.*, *State v. Tanaka*, 701 P.2d 1274 (Haw. 1985); *State v. Goss*, 834 A.2d 316 (N.H. 2003); *State v. Hempele*, 576 A.2d 793 (N.J. 1990); *State v. Morris*, 680 A.2d 90 (Vt. 1996); *State v. Boland*, 800 P.2d 1112 (Wash. 1990). This issue has yet to be explored and settled in the Commonwealth and is not argued by counsel. For purposes of this appeal, we are of the view that issues arising from the distinction between Fourth Amendment protection extending to the "curtilage" of a home and the potential privacy interest in garbage are important in the absence of a search warrant. However, the police officers in this case had a valid search warrant that authorized them to search Pua's entire residence, including the trash bins outside, for seizure of the items listed in the warrant.

[14] Article I, Section 3 of the Commonwealth Constitution is modeled after the Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, which, in turn, is made

¶ 20 "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." This mandates a protection against unwarranted intrusion by the State. *Commonwealth v. Taitano*, 3 CR 604, 605 (N. Mar. I 1988). The United States Supreme Court has explained that "a 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. [Whereas] a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment's requirement "that warrants shall particularly describe the things to be seized makes general searches under them impossible . . . ." *Guam v. Camacho*, 2004 Guam 6 ¶ 16 (2004) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). The scope of the search "extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798, 820-21 (1982). Furthermore, the particularity requirement ensures that "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.* The general rule is that searches and seizures "conducted outside the judicial process" – that is, without a warrant – "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (citations omitted).

¶ 21 One of the exceptions to the Fourth Amendment's warrant requirement allows warrantless seizures under the "plain view" doctrine. *Coolidge*, 403 U.S. at 443; *see also Dickerson*, 508 US. at 366; *Horton v. California*, 496 U.S. 128 (1990). The plain view doctrine allows police officers to seize an item without a warrant if: (1) they are lawfully in a position from which they view an object; (2) its incriminating character is immediately apparent; and (3) the officers have a lawful right of access to the object. *Dickerson*, 508 U.S. at 375. It is best understood "not as an independent 'exception' to the [Fourth Amendment's] warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Texas v. Brown*, 460 U.S. 730, 738-39 (1983) (plurality opinion). To lawfully seize an item under the plain view exception to the warrant requirement, the officer must have probable cause to believe that the item in question is evidence of a crime or contraband. *Commonwealth v. Crisostimo*, 3 CR 946, 953 (N. Mar. I. 1989); *see also Arizona v. Hicks*, 480 U.S. 321, 326 (1987). Probable cause exists when "the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" the object is evidence of a crime. *Safford Unified Sch. Dist. #1 v. Redding*, ___ U.S. ___, 129 S. Ct. 2633, 2639, 174 L. Ed. 2d 354, 361 (2009) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citing *Carroll* v. *United States*, 267 U.S. 132, 162 (1925))).

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applicable to the Commonwealth by section 501 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

¶ 22 Officer Olopai was authorized to look inside the garbage bin because he did so while executing a valid search warrant[15] and the scope of the search "[extended] to the entire area in which the object of the search may [have been] found." *Ross*, 456 U.S. at 820. The warrant contained a list of items to be seized. *See supra* ¶ 5. The first *Dickerson* prong is satisfied because the search warrant authorized him to look within the garbage bin for the items authorized for seizure. Accordingly, Olopai was in a lawful position when he discovered the pouch. The second prong of the *Dickerson* test requires the incriminating character of the pouch to be immediately apparent. *Dickerson*, 508 U.S. at 375. A stain discovered on a pouch during the execution of a search warrant in a homicide investigation "warrant[s] a man of reasonable caution in the belief that" the stain might be blood and evidence of the crime. For example, in *State v. Lara*, the New Mexico Court of Appeals held that an officer investigating a battery complaint had probable cause to believe that some stains he found were blood incriminating the suspect. 797 P.2d 296, 303 (N.M. Ct. App. 1990). Here, probable cause to associate the pouch with criminal activity was triggered when Olopai picked it up and saw the red stains on it that "he wasn't sure [were] blood." ER at 203. With regard to the third *Dickerson* prong, Olopai had a "lawful right of access" to the pouch. He testified that when he opened the trash bag which contained the pouch, he was searching for the items authorized for seizure in the search warrant. As previously stated, his search for the items listed in the search warrant permissibly extended to the garbage bin outside of his home. Because all three *Dickerson* prongs were met, the plain view exception validated the warrantless seizure of the pouch.

III

Motion for Judgment of Acquittal

¶ 23 Pua argues that evidence presented at trial failed to establish an essential element of robbery – a showing that money was taken from Candi's Poker or from Parves' person or control. Pua reasons that because the jury acquitted him of robbery, the evidence must have been insufficient to uphold a robbery conviction – the offense which he argues served as the predicate felony for the felony murder charge – and therefore the trial court should have granted his motion for judgment of acquittal under Rule 29(a) of the Commonwealth Rules of Criminal Procedure. Pua further argues that at the time the motion for acquittal was made, there was no attempted robbery charge pending against him and the charge of felony

[15] We are not determining whether warrantless searches of garbage bins are protected under the Commonwealth Constitution. *See supra* note 13. Even if we were to afford constitutional protection to garbage bins – an issue we decline to address in this case – this does not prevent the application of established exceptions to the Fourth Amendment. *See, e.g.*, *State v. Granville*, 142 P.3d 933, 944 (N.M. Ct. App. 2006) (holding that "a search of an individual's garbage must be supported by probable cause and a warrant, unless exigent circumstances exist or another doctrine, such as plain view, negates the individual's expectation of privacy"); *State v. Boland*, 800 P.2d 1112, 1116 (Wash. 1990) (recognizing that "the usual exceptions to the warrant requirement, such as plain view and exigency, also apply to garbage cans").

murder should therefore have been dismissed. Denial of a motion for judgment of acquittal is reviewed de novo. *Ramangmau*, 4 NMI at 237.

¶ 24 In relevant part, Rule 29(a) of the Commonwealth Rules of Criminal Procedure states that, "the court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction of such offense or offenses." A motion for acquittal must be denied if any "rational trier of fact could have found the essential elements of the crime in question beyond a reasonable doubt." *Ramangmau*, 4 NMI at 237. This assessment takes into account "all of the evidence, direct or circumstantial, viewed in the light most favorable to the government." *Id*. Circumstantial evidence is "[evidence] which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present." *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950). Circumstantial evidence may be admitted if it "tend[s] even somewhat remotely to show that a fact in controversy did or did not exist." *Ramangmau*, 4 NMI at 237 (internal citation omitted). Material facts can ordinarily be proven by circumstantial evidence in criminal proceedings. *Commonwealth v. Scragg*, 2000 MP 4 ¶ 15 (citing *Commonwealth v. Oden*, 3 NMI 186, 192 (1992)).

¶ 25 After reviewing the evidence in the light most favorable to the Commonwealth, we find that the evidence at trial was sufficient to support a reasonable inference that the offense of robbery had been committed. The offense of robbery is committed if a person "takes property from the person of another, or from the immediate control of another, by use or threatened use of immediate force or violence." 6 CMC § 1411. Kim testified that Parves was working as the cashier at Candi's Poker the night of his murder and that money was in his control or possession. Parves' body was found near the cashier's booth and Kim also testified that he made a partial collection of the money that was inside the cash register at 1:00 a.m. In addition, Officer Aldan testified that upon arriving at Candi's Poker, the cash register drawer was pulled out and empty. While the absence of direct testimony that money was missing may have been enough to create a reasonable doubt in the jurors' minds, the circumstances and evidence surrounding the murder were sufficient to meet the standard that a reasonable mind could have found that a robbery occurred. There is also sufficient evidence establishing an inference of Pua's presence near the scene of the crime. Surveillance tapes taken from Tanapag Market show a man, later identified as Pua, walking towards Candi's Poker holding a knife. Additionally, DNA samples taken from the pouch matched Parves' DNA profile. The testimony alluding to missing money from the cashier's register, Pua's presence around the scene of the crime and the positive DNA match lead to a finding that a "rational trier of fact could have found the essential elements of the crime in question beyond a reasonable doubt." *Ramangmau*, 4 NMI at 237.

¶ 26 For the purpose of the motion for judgment of acquittal, Pua's argument that attempted robbery was not charged becomes irrelevant in light of our finding that there was sufficient evidence to support a finding of guilt on the charged crime of robbery.

¶ 27 We hold that the trial court did not err in denying Pua's motion for judgment of acquittal.

IV

Motion to Set Aside the Verdict

¶ 28 Pua next claims that the trial court erred by not setting aside the verdict convicting him of first degree felony murder when the jury had already acquitted him of robbery. Specifically, Pua claims that he was neither charged with attempted robbery nor was there legally sufficient evidence presented that he either robbed or attempted to rob Parves. As such, he argues that the verdict was inconsistent and repugnant and should be vacated.

¶ 29 Inconsistent verdicts are generally defined as follows:

> Where an accused is charged with separate and distinct crimes, although of a similar character, in two or more counts, a verdict of acquittal on one or more counts and of conviction on the others is not ordinarily or necessarily inconsistent, at least where each offense requires different evidence or involves factual variations. When an accused is convicted on one count and is acquitted on another count, the test is whether the essential elements in the count wherein accused is acquitted are identical and necessary to proof of conviction on the guilty count.
>
> Hence, where the elements of the two offenses are identical, a verdict of not guilty on one count is inconsistent with a verdict of guilty on the other count. Also, a verdict which acquits [an] accused of a crime which includes acts necessary to the commission of another crime for which he is found guilty is inconsistent.

State v. Beach, 67 P.3d 121, 130-31 (Kan. 2003) (quoting 23A C.J.S., *Criminal Law* § 1407, pp. 347-48). The United States Supreme Court first addressed the issue of inconsistent verdicts in *Dunn v. United States*, 284 U.S. 390 (1932). In *Dunn*, the jury convicted the defendant of maintaining a nuisance for the sale of alcoholic beverages, but acquitted him of the unlawful possession of alcoholic beverages and the unlawful sale of alcoholic beverages. *Id.* at 391-92. The defendant appealed his conviction claiming that the verdicts were inconsistent. In upholding the conviction, the Court stated:

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. [Citation omitted]. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As we stated in *Steckler v. United States*, 7 F.2d 59, 60 (1925):
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> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as

> no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'

284 U.S. at 393.

¶ 30 In *United States v. Powell*, the Supreme Court reaffirmed its ruling in *Dunn*. In *Powell*, the jury found the defendant guilty of facilitation of a conspiracy to possess cocaine with intent to distribute and possessing cocaine with intent to distribute, but acquitted her of conspiracy to possess and possession charges. 469 U.S. 57, 60 (1984). On appeal, the defendant argued that the verdicts were inconsistent, and she therefore was entitled to reversal of the conspiracy facilitation convictions. *Id.* In a unanimous decision, the Supreme Court held that:

> Inconsistent verdicts -- even verdicts that acquit on a predicate offense while convicting on the compound offense -- should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations, the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.

Id. at 65 (citations omitted). The defendant in *Powell* argued that an exception to *Dunn* should be made where the jury acquits a defendant of a predicate felony, but convicts on the compound felony. *Id* at 67. The Court stated that "it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." *Id.* at 65. The Court found as imprudent and unworkable, "a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them" *Id.* at 66. An exception such as the one the defendant suggested, "threaten[ed] to swallow the rule" enunciated in *Dunn*. *Id.* at 68. The Court in *Powell* also noted that there is sufficient protection to the criminal defendant under the traditional review of the sufficiency of the evidence. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citation omitted]. This review should be independent of the jury's determination that evidence on another count was insufficient." *Id.* at 67.

¶ 31 In *Commonwealth v. Esteves*, we adopted the ruling in *Dunn*, as later affirmed by *Powell*. 3 NMI 447 (1993). In *Esteves*, the defendant appealed his jury conviction of assault with a dangerous weapon based on his acquittal for the offense of illegal possession of a handgun and the jury's finding of fact that he was armed with a "firearm" at the time he committed the assault. *Id.* at 452-53. In reaching our decision, this Court explained that "while all handguns are firearms, not all firearms are handguns, and therefore the jury may have convicted the defendant of possessing a firearm, but not a handgun, when he committed the assault." *Id.* at 459. While we were not satisfied that the verdict was necessarily

inconsistent, we nevertheless stated that "a jury should have the freedom to arrive at any verdict it wishes, even if inconsistent or seemingly irrational, so long as there is sufficient evidence to support the guilty verdict." *Id.*

¶ 32 Pua dedicates a substantial part of his brief to arguing the inconsistency and repugnancy of the jury verdict, but makes no express reference to *Dunn*, *Powell*, or *Esteves*. Instead, he points our attention to cases which have carved out exceptions to *Dunn* and *Powell*, and ignores the implication of *Esteves* altogether. It appears that he is asking this Court to find an exception to *Esteves* and declare inconsistent and repugnant any verdict which convicts a defendant of felony murder and acquits him of the underlying charged felony.[16] However, we are not persuaded that the jury verdict in this case is necessarily inconsistent.

¶ 33 As previously stated, the test for determining whether verdicts are inconsistent is "whether the essential elements in the count wherein accused is acquitted are identical and necessary to proof of conviction on the guilty count." *Beach*, 67 P.3d at 130-31 (citation omitted). Pua was charged with robbery and murder in the first degree during the perpetration of a robbery. The jury, however, was instructed on felony murder during the perpetration or attempted perpetration of a robbery. The "acts which constitute the essential elements of the crime of robbery [are] not the only acts which [can] support a finding of guilt of felony murder." *People v. Gibson*, 411 N.Y.S.2d 71, 74 (N.Y. App. Div. 1978). Accordingly, the verdict is neither inconsistent nor repugnant. *People v. Tucker*, 431 N.E.2D 617, 619 (N.Y. App. Div. 1981) (a verdict is repugnant where a defendant is "convicted [of] a crime on which the jury actually found that the defendant did not commit an essential element, whether it be one element or all").

¶ 34 Furthermore, Pua did not have to be separately charged with or convicted of attempted robbery in order for the jury to find him guilty of felony murder.

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[16] Federal courts and a majority of State courts follow *Powell*. *See State v. McClary*, 679 N.W.2d 455, 459 (N.D. 2004) (citing Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 787-89 (1998); 5 LaFave, Israel, and King, *Criminal Procedure* § 24.10(b) (2d ed. 1999); Steven T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y. L. Sch. L. Rev. 713, 732-33 (1979); Annot., *Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information*, 18 A.L.R. 3d 259, §§ 2-3 (1968); Annot., *Inconsistency of Criminal Verdict With Verdict or Another Indictment or Information Tried at Same Time*, 16 A.L.R.3d 866, § 2 (1967)). A few States follow the *Powell* rule with exceptions. *See People v. Dercole*, 72 A.D.2d 318, 333 (N.Y. App. Div. 1980) ("Absent a rational theory for their existence, apparently inconsistent verdicts will be held repugnant when the crimes upon which the verdicts are returned are either identical as to each of their elements or so related that an acquittal on one negatives an essential element of the crimes upon which there was conviction"); *see also, State v. Powell*, 674 So.2d 731, 733 (Fla. 1996) (finding an exception to the general rule allowing inconsistent verdicts where the inconsistent conviction is on a charge that is "legally interlocking" with the acquitted charge for the same defendant); *State v. Peters*, 855 S.W.2d 345, 347-48 (Mo. 1993) (finding an exception to the general rule allowing inconsistent verdicts where there is a guilty verdict on the compound offense but not on the predicate offense); *People v. Tucker*, 431 N.E.2d 617, 618-19, (N.Y. 1981) (holding that a conviction will be reversed where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime as charged for which the guilty verdict was rendered).

a. A Charge of Attempted Robbery is Not Required

¶ 35 Pua raises a constitutional issue by alleging that he was convicted on a charge of felony murder during the perpetration of an attempted robbery when he was never charged with attempted robbery. Pua was charged as follows: "On or about May 22, 2002, on Saipan, Commonwealth of the Northern Mariana Islands, the Defendant, FRANCISCO AGUON PUA, did unlawfully kill Mr. Mostofa Faruk Parves, with malice aforethought, during the perpetration of Robbery, in violation of 6 CMC § 1101(a)(3), and made punishable by 6 CMC § 1101(c)(1)." ER at 13. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

¶ 36 Pursuant to Rule 7(c)(1) of the Commonwealth Rules of Criminal Procedure, an "information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . [and] shall state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." The "sufficiency of an indictment should be judged by practical, and not by technical, considerations. It is nothing but the formal charge upon which an accused is brought to trial." *Hewitt v. United States*, 110 F.2d 1, 6 (8th Cir. 1940) (citations omitted). The test is whether the information "contain[ed] the elements of the offense intended to be charged and [was] sufficient enough to apprise the accused of the nature of the offense so that he may adequately prepare a defense." *Clay v. United States*, 326 F.2d 196, 198 (10th Cir. 1963). Furthermore, "error in the citation or its omission shall not be ground for dismissal of the information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." Com. R. Crim. P. 7(c)(3).

¶ 37 The information was sufficient to place Pua on fair notice of the charge of first degree felony murder against which he was to defend, and referenced the specific Commonwealth first degree murder statute[17] under which he was charged. A conviction for felony murder can be sustained by sufficient evidence of either a perpetration or an attempted perpetration of one of the enumerated felonies. 6 CMC § 1101. In preparing to defend against a charge of felony murder committed during the perpetration of a robbery, Pua must have also prepared to defend against a charge of felony murder committed during the perpetration of an attempted robbery. The information was specific enough to apprise Pua of the nature of the murder charge and place him on adequate notice that an instruction of felony murder during the attempted perpetration of a robbery might be given to the jury. We find that a separate charge of attempted robbery was not required.

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[17] "Murder is the unlawful killing of a human being by another human being with malice aforethought. (a) First Degree Murder. First degree murder is a murder which is: (1) Willful, premeditated, and deliberated; (2) Perpetrated by poison, lying in wait, torture, or bombing; or (3) One that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child." 6 CMC § 1101.

b. A Conviction of an Underlying Felony is Not a Prerequisite to a Felony Murder Conviction

¶ 38 The Commonwealth felony murder statute does not mandate a conviction of a predicate felony. Pua did not have to be convicted of attempted robbery in order for the jury to find him guilty of felony murder, so long as the evidence was sufficient to support such a finding. *See, e.g.*, *United States v. Greene*, 834 F.2d 1067, 1071 (D.C. Cir. 1987) (holding that "while the government must prove beyond a reasonable doubt all the positive elements of the underlying felony, there is no requirement that it indict and convict the defendant on that underlying felony in order to secure a conviction for felony murder"); *State v. Wise*, 697 P.2d 1295, 1300 (Kan. 1985) (holding that an accused need not be prosecuted or convicted of the underlying felony in order to be convicted of felony murder); *People v. Wroblewski*, 489 N.Y.S.2d 797, 802 (N.Y. App. Div. 1985) ("it is settled that a felony murder conviction may stand even if the underlying felony which serves as its predicate is not submitted to the jury"); *Commonwealth v. Hainds*, 292 A.2d 337, 339 (Pa. 1972) ("we have repeatedly held that where murder is alleged to have been committed in the perpetration of a felony, perpetration of the felony need not be set forth in the indictment"); *State v. Dennison*, 774 P.2d 1237, 1239 (Wash. Ct. App. 1989) (holding that a "conviction on the underlying felony is not a jurisdictional prerequisite to prosecution for felony murder"). While the Commonwealth must prove beyond a reasonable doubt all the elements of the underlying felony, a conviction of the underlying felony is not necessary.

¶ 39 In *People v. Gibson*, the defendant and three co-defendants were charged with intentional murder, felony murder during the commission of a robbery, and robbery. *Gibson*, 411 N.Y.S.2d 71 at 73. The jury was instructed that attempted murder could also serve as the predicate felony to support a finding of guilt on the felony murder charge. *Id.* The jury returned a verdict acquitting the defendant of intentional murder and robbery but convicting him of felony murder. *Id.* On appeal, the court found that the only proof in the record reflected that it was a co-defendant who actually seized the wallet from the victim and that the jury "conceivably did not understand or consider that the defendant was criminally liable . . . for the actual robbery committed by others in the group." *Id.* Still, the court held that the verdict was neither inconsistent nor repugnant as "a reasonable view of the evidence before the jury would support a finding that the defendant committed the attempt but not the robbery." *Id.* at 74.

¶ 40 Likewise, that the jury acquitted Pua of the robbery charge does not necessarily preclude a conviction of felony murder supported by sufficient evidence of the acts that constitute an attempt to commit a robbery. *See supra* ¶¶ 24-25. Given the sufficient evidence, it was reasonable for the jury to have believed that Pua attempted to rob Parves, without being convinced beyond a reasonable doubt that money was actually taken from Parves' person or the area within his control.

¶ 41 By acquitting Pua of the robbery charge, yet convicting him of the first degree felony murder charge, the jury must have necessarily believed that Pua attempted to rob Parves. Because Pua did not

have to be separately charged with attempted robbery and a conviction of an underlying felony is not necessary to secure a first degree felony murder conviction,[18] we conclude that the trial court properly denied Pua's motion to set aside the verdict.

V

Conclusion

¶ 42 For the foregoing reasons, we hold that the trial court properly denied Pua's motion to suppress the seized pouch because its seizure was permissible under the plain view exception to Article 1, Section 3 of the Commonwealth Constitution. The trial court properly denied Pua's motion to acquit because the evidence at trial was sufficient to sustain a finding of guilt on the robbery and first degree felony murder charges. We further hold that the trial court properly denied Pua's motion to set aside the verdict acquitting him of robbery and convicting him of first degree felony murder because a robbery acquittal is not necessarily inconsistent with a first degree felony murder conviction. Accordingly, Pua's conviction for first degree felony murder is AFFIRMED.

SO ORDERED this 31st day of December 2009.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
JOHN A. MANGLONA
Associate Justice

Borja, Justice Pro Tem, concurring:

[18] We recognize the potential for this opinion to be considered inconsistent with this Court's recent decision in *Commonwealth v. Cepeda*, 2009 MP 15 (Slip Opinion, Nov. 19, 2009). However, these cases should not be read as inconsistent. In *Cepeda*, this Court vacated the felony murder conviction because the jury was improperly instructed. This basis is distinct from whether sufficient evidence exists to justify a conviction – the issue presented in this case.

¶ 43 I join with the majority in the reasoning and conclusion of all of the issues in its opinion, except on the issue of the motion for judgment of acquittal. In my opinion it is not necessary to address this issue. Specifically, it is not necessary for the majority to state that "After reviewing the evidence in the light most favorable to the Commonwealth, we find that the evidence at trial was sufficient to support a reasonable inference that the offense of robbery had been committed." *Supra* ¶ 25. Pua was acquitted by the jury on the robbery charge, and I do not believe that the majority's finding is necessary to the determination of whether the felony murder conviction should stand. Pua was charged with committing two crimes: robbery and first degree felony murder. These two charges are distinct and independent under the indictment. *See supra* ¶ 29 ("Each count in an indictment is regarded as if it were a separate indictment.") (*quoting Dunn*, 284 U.S. at 393). Therefore, even if Pua's motion for judgment of acquittal had been granted with respect to robbery, the felony murder charge, predicated upon a theory of attempted robbery, would have remained. The case could have then proceeded because the felony murder charge was sufficient to put Pua on notice that an instruction on attempted robbery may have been given at trial. As the majority holds, "The Commonwealth felony murder statute does not mandate a conviction of a predicate felony." *Supra* ¶ 38. *See also*, *supra* ¶¶ 38-41 (summarizing the majority's analysis of its holding). I totally agree with this. Nothing further needs to be said on this issue.

/s/_____
JESUS C. BORJA
Justice Pro Tem