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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JOSELITO CASTRO,
Defendant-Appellant.

SUPREME COURT NO. 04-0029-GA
SUPERIOR COURT NO. 03-0407E

Cite as: 2008 MP 18

Decided August 22, 2008

Joseph L.G. Taijeron, Jr., Assistant Attorney General, Commonwealth Attorney General's Office, for Plaintiff-Appellee.
Malik K. Edwards, Assistant Public Defender, Commonwealth Public Defender's Office, for Defendant-Appellant.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

MANGLONA, J.:

¶ 1 Defendant Joselito Castro appeals his convictions for sexual assault, sexual abuse of a minor, assault and battery, and disturbing the peace, arguing (1) the trial court erred in denying his request for a bill of particulars, (2) the trial court erred in refusing to provide the jury with a specific unanimity instruction, and (3) his convictions subjected him to double jeopardy. We hold that the trial court did not err in denying Castro's request for a bill of particulars, as the charging documents and discovery materials sufficiently apprised him of both the charges and underlying facts supporting the charges. We further hold that the trial court did not err in refusing to provide a specific unanimity instruction because Castro's sexual contact constituted a continuous act. Finally, because Castro argued double jeopardy for the first time at oral argument, we decline to consider his claim. Accordingly, Castro's convictions are AFFIRMED.

I

¶ 2 On December 19, 2003, a nine-year-old girl identified as A.B. ("the girl"), went with her aunt to visit her uncle at work. Upon arriving, the girl's aunt began looking for someone to drop off the girl at a friend's house. Castro, a forty-year-old man, volunteered to do so. The girl then got in Castro's car, which has tinted windows, and sat in the back passenger seat.

¶ 3 Before leaving the parking lot, Castro stopped his car near the gate, and began kissing the girl, first on the cheek and then on the lips. He also touched the girl's breast. Castro then began driving toward Chalan Kanoa. Shortly thereafter, Castro stopped at a restaurant parking lot and again kissed the girl and fondled her breast. After another short period of driving, Castro stopped the car in front of a house and kissed and touched the girl a third time. Castro eventually drove to the friend's house, where he repeated his advances on the girl two more times, which included kissing her twice and touching her breast once. In all, Castro kissed the girl on the mouth five times and touched her breast four times before dropping her off at her friend's house. The entire ordeal – from the time Castro picked up the girl to the time he dropped her off at her friend's house – took no more than one hour.

¶ 4 The prosecution charged Castro with one count of second-degree sexual assault, in violation of 6 CMC § 1302(a)(1); one count of second-degree sexual abuse of a minor, in violation of 6 CMC § 1307(a)(2); one count of assault and battery, in violation of 6 CMC § 1202(a); and one count of disturbing the peace, in violation of 6 CMC § 3101(a).

¶ 5 In charging Castro with second-degree sexual assault, the prosecution alleged the following:

> On or about December 19, 2003 . . . Castro, engaged in sexual contact with a juvenile known by the initials of A.B., without her consent, in violation of 6 CMC § 1302 (a)(1) . . . .

Appellant's Excerpts of Record ("ER") at 12. In charging Castro with second-degree sexual abuse of a minor, the prosecution alleged the following:

> On or about December 19, 2003 . . . Castro, being 16 years of age or older, engaged in sexual contact with a juvenile known by the initials A.B., who was under 13 years of age at the time, in violation of 6 CMC § 1307 (a)(2) . . . .

ER at 12. In charging Castro with assault and battery, the prosecution alleged the following:

> On or about December 19, 2003 . . . Castro, had sexual contact with another, A.B., without her consent, to wit: touching A.B.'s breast, in violation of 6 CMC § 1202 (a) . . . .

ER at 13. In charging Castro with disturbing the peace, the prosecution alleged the following:

> On or about December 19, 2003 . . . Castro, did unlawfully commit an act with unreasonably annoyed or disturbed the peace of another person, to wit: A.B., depriving that other person of her right to peace and quiet, in violation of 6 CMC § 3101(a) . . . .

ER at 13.

¶ 6 In a pre-trial motion, Castro requested a bill of particulars to supplement the prosecution's formal criminal charges. Castro argued that the charges did not provide him with adequate notice of the criminal behavior he allegedly engaged in and asserted that the Information was unclear as to what acts supported the charges. Specifically, Castro wanted to know if his criminal charges stemmed from one or multiple acts. The trial court denied the motion, finding that the Information was sufficient on its face. Thereafter, Castro's case proceeded to trial.

¶ 7 During trial, the girl testified that on December 19, 2003, while Castro gave her a ride to her friend's house, Castro kissed her five times, and touched her breast four times. At the close of testimony, Castro requested that the trial court provide the jury with a specific unanimity instruction. Castro argued that the jury must unanimously agree as to at least one of the alleged instances of sexual contact, but must not mix non-unanimous findings about several instances to come up with a general guilty verdict. The trial court, however, denied Castro's request and instead provided the jury with a general unanimity instruction.

¶ 8 The jury found Castro guilty of second-degree sexual assault and second-degree sexual abuse of a minor. Additionally, the trial court found him guilty of assault and battery and disturbing the peace. The trial court sentenced Castro to seven years imprisonment with all but three years suspended for each of his sexual abuse convictions, one year imprisonment for his assault and battery conviction, and six months imprisonment for his disturbing the peace conviction. The trial court allowed Castro to serve his sentences concurrently.

¶ 9 Castro appeals his convictions on two grounds. First, he argues that the trial court erred in denying his request for a bill of particulars. Second, Castro argues the trial court erred in denying his request for a specific unanimity jury instruction.

II

Bill of Particulars

¶ 10 Castro claims the trial court violated his due process rights in denying his request for a bill of particulars, claiming the Information was unclear as to what specific acts supported the charges levied against him. A trial court's decision to deny a motion seeking a bill of particulars is a matter within the discretion of the trial court, and its decision "will not be disturbed in the absence of a showing of prejudice or an abuse of discretion." *Downing v. United States*, 348 F.2d 594, 599 (5th Cir. 1965); *see also United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978).

¶ 11 A bill of particulars is a "formal, detailed statement of the claims or charges brought by a plaintiff or prosecutor . . . ." *United States v. Urban*, 404 F.3d 754, 771 (2005) (citing Black's Law Dictionary 177 (8th ed. 2004)). It is a written demand for the specifics of why an action at law was brought against a defendant. *Id.* Rule 7(f) of the Commonwealth Rules of Criminal Procedure allows the trial court to direct the prosecution to file a bill of particulars to supplement an Information. "The Court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before the arraignment or within ten (10) days after arraignment or at such later time as the court may permit." Com. R. Crim. P. 7(f).[1]

¶ 12 The purpose of a bill of particulars is "to inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against the second prosecution for an inadequately described offense." *United States v. Addonizio*, 451 F.2d 49, 63-64 (1971). A bill of particulars is not meant to duplicate an indictment or Information. Rather, a bill of particulars is only necessary when an Information is deficient or otherwise insufficient. Thus, the sufficiency of the Information is not a question of whether it could have been more definite and certain, but whether it contains the elements of the offense intended to be charged. *United States v. Debrow*, 346 U.S. 374, 376 (1953).

¶ 13 Generality, vagueness, or indefiniteness in an Information may entitle a defendant to a bill of particulars clarifying the charges. *Michener v. United States*, 170 F.2d 973, 975 (8th Cir. 1948). On the other hand, when an Information provides a defendant with sufficient details to defend himself or herself, or to avoid a second prosecution for the same offense, a trial court is

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[1] Rule 7(f) does not articulate the circumstances under which a motion for a bill of particulars should be granted. However, the Commonwealth Rules of Criminal Procedure closely parallel their federal counterparts. Therefore, judicial interpretations of the federal rules are instructive. *Commonwealth v. Ramangmau*, 4 NMI 227, 233 n.3 (1995).

justified in denying a motion for a bill of particulars. *Taylor v. United States*, 19 F.2d 813, 816 (8th Cir. 1927). Likewise, a defendant is not entitled to a bill of particulars for the sole purpose of procuring a disclosure of the prosecution's evidence, *id.*, or conclusions of law and theories. *Rose v. United States*, 149 F.2d 755, 758 (9th Cir. 1945); *see also Downing*, 348 F.2d at 599 (stating that a bill of particulars cannot be used "for the purpose of obtaining a detailed disclosure of the Government's evidence in advance of trial"). Thus, "[t]he proper test in deciding whether a bill of particulars should be required of the government is whether the bill of particulars is necessary for the defense, not whether it would aid the defendant in his preparation." *United States v. Trippe*, 171 F. Supp. 2d 230, 240 (S.D.N.Y. 2001); *see also United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989) (stating that a bill of particulars is only warranted when an indictment or Information "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial").

¶ 14 We must determine whether a bill of particulars was necessary for Castro's defense. As a starting point, we look to the sufficiency of the Information, noting that when the Information "contains the official citation of the statute under which the defendant is charged and the evidence constitutes precise proof of the charges in the [Information], denial of a motion for a bill of particulars is not an abuse of discretion." *United States v. Bales*, 813 F.2d 1289, 1294 (4th Cir. 1987) (citing *Downing*, 348 F.2d at 599). Castro was charged with four criminal offenses: second-degree sexual assault, second-degree sexual abuse of a minor, assault and battery, and disturbing the peace. In charging him with these offenses, the prosecution provided Castro with the precise citations to the Commonwealth Code for each offense. The Information contained the language of the statutes he allegedly violated. It also included the date Castro allegedly engaged in his criminal behavior, as well as the initials of the victim. Furthermore, it alleged Castro touched the girl's breast. Finally, the prosecution supplemented the Information by providing Castro with thirty pages of discovery materials, which also stated that Castro touched the girl's breast. ER at 23. We therefore find that the prosecution provided Castro with the elements of the offenses with which he was charged, as well as the underlying facts supporting those charges. Thus, the trial court did not abuse its discretion in denying Castro's request for a bill of particulars, as Castro had enough information to adequately prepare his defense.

Specific Unanimity Jury Instruction

¶ 15 At the close of testimony, Castro requested that the trial court provide the jury with a specific unanimity instruction. Castro asserted that because the jury heard testimony that he touched the girl's breast four times, the jury must unanimously determine which specific touch constituted the alleged sexual contact. For example, Castro argued there was a danger that while

some jurors might believe he inappropriately touched the girl in the parking lot at work, others might believe he touched her in the restaurant parking lot, others might believe he touched her in front of a house after leaving the restaurant, and others might believe he touched her near her friend's house. Castro argued that the jury must unanimously agree as to at least one of those acts, but it may not mix non-unanimous findings about several instances to come up with a general guilty verdict. The trial court, however, denied Castro's request and instead provided the jury with a general unanimity instruction. In reviewing the sufficiency of a jury instruction, this Court must "consider whether the instructions as a whole were misleading or inadequate to guide the jury's determination." *Commonwealth v. Demapan*, 2008 MP 16 ¶ 12 (quoting *Commonwealth v. Esteves*, 3 NMI 447, 454 (1993)). Whether the trial court erred in denying Castro's request for a specific unanimity instruction is reviewed for abuse of discretion. *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999).

¶ 16 Courts acknowledge that the United States Constitution requires something beyond a simple unanimous finding by the jury that the accused committed a crime. *See, e.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 449-50 n.5 (1990) (Blackmun, J., concurring) ("[U]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual element underlying a specified offense."). On the other hand, courts refuse to impose a requirement that the jury agree unanimously as to the minute details surrounding the commission of a crime. *See, e.g.*, *id.* (Blackmun, J., concurring) ("This [unanimity] rule does not require that each bit of evidence be unanimously credited or entirely discarded . . . .").

¶ 17 A standard jury instruction, referred to as a general unanimity instruction, merely directs the jury to decide unanimously the basic question of the defendant's guilt or innocence. The court instructs the jury that the prosecution bears the burden of proving each element of the offense charged. However, the court does not instruct the jury to consider separately and agree unanimously as to which underlying material fact, or facts, satisfies each element. In contrast, a specific unanimity instruction directs the jury to agree unanimously as to each particular material fact that establishes the elements of the offense charged. *Commonwealth v. Manila*, 2005 MP 17 ¶ 32; *see also Commonwealth v. Keevan*, 511 N.E.2d 534, 540 (Mass. 1987) ("A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged."). Fundamental fairness dictates that the trial court should specify that all jurors must agree on all underlying material facts that constitute the given criminal

offense. *See, e.g.*, *United States v. Beros*, 833 F.2d 455, 461 (3rd Cir. 1987) (holding that the jury must agree unanimously on the "specific act or acts which constitutes . . . [an] offense").

¶ 18 In *Manila*, we stated that "'[w]hen the facts show two or more criminal acts which could constitute the crime charged, the jury must unanimously agree on the same act to convict the defendant.'" 2005 MP 17 ¶ 32 (quoting *Washington v. Fiallo-Lopez*, 899 P.2d 1294, 1298 (Wash. Ct. App. 1995)). Accordingly, the prosecution "must elect the specific criminal act on which it is relying for conviction, or the trial court must instruct the jury that all the jurors must agree that the same underlying criminal act was proven beyond a reasonable doubt." *Id.* (quoting *Fiallo-Lopez*, 899 P.2d at 1298). However, in *Manila*, we stated that there is at least one notable exception to the specific unanimity requirement. *Id.* "[I]f the evidence shows the defendant was engaged in a 'continuing course of conduct,'" then a specific unanimity instruction is not required. *Id*. (quoting *Fiallo-Lopez*, 899 P.2d at 1298). A continuing course of conduct is described as a series of actions intended to secure the same objective. *See Fiallo-Lopez* at 1299; *State v. Giwosky*, 326 N.W.2d 232, 235 (Wis. 1982).

¶ 19 The United States Supreme Court holds that a crime involves "a continuing course of conduct [when] it is committed over a period of time, like kidnapping, harboring a fugitive, or failing to provide support for a minor." *Richardson v. United States*, 526 U.S. 813, 832 (1999). In those instances, "the jury need not agree unanimously on individual acts that occur during the ongoing crime." *Id*. A number of state courts adopt the continuing course of conduct exception, particularly in dealing with crimes involving repeated conduct where the details of specific instances may be difficult to prove. *See, e.g.*, *People v. Adames*, 54 Cal. App. 4th 198, 207 (1997) (continuous sexual abuse of a child); *People v. Reynolds*, 294 Ill. App. 3d 58, 70-71 (1997) (sexual assault and aggravated sexual abuse of a minor); *State v. Doogan*, 82 Wash. App. 185, 191-92 (1996) (advancing prostitution and profiting from prostitution); *State v. Molitor*, 565 N.W.2d 248, 250 (Wis. App. 1997) (repeated sexual intercourse with underage partner).

¶ 20 The continuing course of conduct exception can apply to multiple acts, so long as the acts constitute one continuous event. For example, in *State v. Molitor*, the Wisconsin Court of Appeals applied the continuing course of conduct exception after a defendant engaged in sexual intercourse with a fifteen-year-old girl "on more than three occasions" during a two-month period of time. 565 N.W.2d at 250. The victim testified at a preliminary hearing that she had an ongoing sexual relationship with the defendant, and that she had intercourse with him almost daily during the period in question. *Id*.

¶ 21 On appeal, the defendant attacked the constitutionality of the state statute under which he was convicted, which states that "the jury must unanimously agree that at least 3 violations

occurred within the time period . . . *but need not agree on which acts constitute the requisite number*." *Id*. at 251 (emphasis added). The court rejected the defendant's claim, and concluded that when the charged behavior constitutes "one continuous course of conduct," the requirement of jury unanimity is satisfied regardless of whether there is agreement among jurors as to "which act" constituted the crime charged. *Id*. at 251 (quoting *State v. Giwosky*, 326 N.W.2d 232, 235 (Wis. 1982)). The court stated that while the course of conduct exception often applies to "short continuous incident[s] that cannot be factually separated," *id*. (quoting *Giwosky* at 238), the duration of the course of conduct is not "legally significant." *Id*. (quoting *State v. Lomagro*, 335 N.W.2d 583, 590 (Wis. 1983)). Rather, the unanimity requirement is met where multiple acts constitute "one continuous, unlawful event." *Id*. (quoting *Lomagro*, 335 N.W.2d at 590).

¶ 22 In the present case, we find that the trial court did not err in refusing to provide a specific unanimity instruction, as Castro's actions constituted a continuing course of conduct. The jury unanimously agreed that Castro invited the girl into his car and touched her breast during the half-hour to hour-long car ride. Whether Castro made sexual contact with the girl in the parking lot at work, in the restaurant parking lot, or at any other point during the brief car ride is immaterial. Castro engaged in a series of actions – all occurring on the same day, in the same place, within a brief period of time – intended to secure the same objective, which was to have sexual contact with the girl. These actions were so closely connected that they formed one continuous, unlawful event. Therefore, we find that no specific unanimity instruction was required.

Double Jeopardy

¶ 23 At oral argument, Castro argued, for the first time, that his conviction violated the Double Jeopardy Clauses of the United States and Commonwealth Constitutions. Castro claimed that if his sexual contact with the girl fell under the continuing course of conduct exception, then his four convictions were based on one continuous, unlawful event, amounting to multiple convictions for a single act.

¶ 24 The Commonwealth Rules of Appellate Procedure clearly state that the "brief of the appellant *shall contain* . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied upon." NMI R. App. P. 28 (emphasis added). Although we may hear issues raised for the first time on appeal, *Limon v. Camacho*, 1996 MP 18 ¶ 39, we have no obligation to do so, *see Bolalin v. Guam Publications, Inc.*, 4 NMI 176, 192 (1994), particularly when the issue is raised only at oral argument. *Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 165 n.30 (1994) (stating that issues not raised at trial or in an appellant's brief are waived); *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 85, 92 (1992) (stating that the Court will "consider an issue as waived or

abandoned if it is not argued," unless the issue implicates the Court's jurisdiction or the "public confidence in the integrity" of the judicial process); *Roberto v. De Leon Guerrero*, 4 NMI 295, 298 (1995) (stating that the Court need not address arguments in the absence of cited authority in appellant's briefs); *see, e.g., United States v. Wilson*, 962 F.2d 621, 626 (7th Cir. 1992) (stating that while multiple convictions for a continuous act may constitute double jeopardy, a defendant waived the issue when he raised it for the first time at oral argument); *State v. Killinger*, 890 P.2d 323, 326-27 (Idaho 1995) (refusing to address defendant's double jeopardy claim when it was raised only at oral argument); *State v. Andazola*, 82 P.3d 77, 84 (N.M. App. 2003) (refusing to consider defendant's double jeopardy claim when it was raised for the first time in his reply brief); *Mitchell v. State*, 818 P.2d 1163, 1165 (Alaska App. 1991) (declining to reach the merits of defendant's double jeopardy claim because it was argued for the first time at oral argument).

¶ 25 Castro not only failed to argue his double jeopardy claim at trial, but he also failed to argue double jeopardy in his appellate brief. Other than one vague reference to double jeopardy in his motion requesting a bill of particulars, Castro raised his double jeopardy argument only at oral argument. Had Castro argued double jeopardy in his appellate brief, rather than waiting until oral argument to raise it, we may be inclined to consider the merits of his claim. Instead, Castro failed to make a single reference to double jeopardy in his brief. We therefore find that he waived his double jeopardy argument by failing to preserve it for appeal.

¶ 26 In so holding, we refuse to "reward quick-thinking counsel by entertaining grounds brought to [the court's] attention for the first time at oral arguments." *Vaughn v. Lawrenceburg Power Sy.*, 269 F.3d 703, 714 (6th Cir. 2001). It would have been "far better for [Castro's] argument to have been raised in [his] brief," which would have, among other things, allowed the prosecution to respond in its reply brief. *Id.* We do not endorse litigation by ambush and find that appellants should not be allowed to hide issues or deny the opposing party the right to respond. *See, e.g., Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (stating that appellant waived an argument by "failing to raise it either in the district court or in his brief on appeal, mentioning it for the first time at oral argument"); *Cavalier v. Caddo Parish School Bd.*, 403 F.3d 246 (5th Cir. 2005) (stating that evidence and arguments not in the record or "suggested for the first time at oral argument" were not properly before the court); *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990) (stating that issues raised for the first time at oral argument are deemed waived); *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) ("A point raised for the first time at oral argument, when the appellant is in no position to reply, comes too late."); *Reithmiller v. Blue Cross & Blue Shield of Michigan*, 824 F.2d 510, 511 n.2 (6th Cir. 1987) (stating that issues that are not briefed are not preserved for appeal); *United States v. White*, 454

F.2d 435, 439 (7th Cir. 1972) (declining to address issue of voluntariness of an informer's consent when it was not raised at trial or in appellant's briefs). Therefore, because Castro failed to argue double jeopardy at trial or brief the issue on appeal, we decline to address the issue.

IV

¶ 27 For the foregoing reasons, we hold that the trial court did not err in denying Castro's request for a bill of particulars, as the Information, combined with the thirty pages of discovery materials, sufficiency apprised him of both the charges levied against him, as well as the underlying facts supporting the charges. We further hold that because Castro's sexual contact constituted a continuous act, the trial court did not err in refusing to provide a specific unanimity instruction. Furthermore, because Castro argued double jeopardy for the first time at oral argument, we decline to consider the issue. Accordingly, Castro's convictions for sexual assault, sexual abuse of a minor, assault and battery, and disturbing the peace are AFFIRMED.

Concurred:
Demapan, C.J., Castro, J.