IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

DALEY UEKI,
Defendant-Appellant.

Supreme Court Case No. CRA97-004
Superior Court Case No. CF0472-96

OPINION

Filed: February 22, 1999

Cite as: 1999 Guam 4

Appeal from the Superior Court of Guam
Argued and Submitted on 20 February 1998
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
David M Moore
Assistant Attorney General
Office of the Attorney General
Prosecution Division
Suite 2-200E, Judicial Center Building
120 West O'Brien Drive
Hagåtña, Guam 96910

Appearing for the Defendant-Appellant:
Richard Parker Arens, Esq.
Cunliffe & Cook, P.C.
Suite 200, 210 Archbishop Flores Street
Hagåtña, Guam 96910

BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS and EDUARDO A. CALVO, Associate Justices.

WEEKS, J.:

[1] Defendant-Appellant Daley Ueki was convicted of First Degree Criminal Sexual Conduct and sentenced to the mandatory minimum sentence of fifteen years imprisonment. On appeal, Ueki seeks reversal of his conviction based upon two separate claims— ineffective assistance of counsel and prejudicial vouching by the prosecutor during the trial. The court finds the record on appeal insufficient to rule on the ineffective assistance of counsel claim. Additionally, although the court finds that the prosecutor's statements at trial constitute impermissible vouching, such error does not affect substantial rights under 8 GCA 130.50(b) (1993). Therefore, after review of the record, the court hereby affirms the trial court conviction.

FACTUAL AND PROCEDURAL BACKGROUND

[2] The Defendant-Appellant, Daley Ueki ("Ueki"), was indicted, along with two other co-defendants, on 28 August 1996 for Conspiracy to Commit First Degree Criminal Sexual Conduct, as a first degree felony, and First Degree Criminal Sexual Conduct, as a first degree felony. The charges arose out of an incident which occurred on or about 18 August 1996 where Ueki was alleged to have engaged in sexual penetration with the victim, at a point in time when she was mentally incapacitated and physically helpless. Ueki was appointed counsel, two of whom withdrew before defense counsel who eventually represented Ueki at trial was finally appointed. Ueki plead not guilty to the above charges and his case proceeded to trial on 6 November 1996. During the trial, the People presented several witnesses, including the victim and Hidemi Blailes ("Blailes") who were key to proving its case against Ueki.

[3] During closing arguments, the People made the following statements: "But what she said on that stand, I submit to you is the truth. She told you the truth on that stand. And if she said things when she was drunk or unconscious or confused, I submit they were wrong. But what she said on here was the truth." The jury returned with a guilty verdict on the second charge of First Degree Criminal Sexual Conduct.[1] At the sentencing hearing, held on 10 January 1997, the trial court sentenced Ueki to fifteen (15) years incarceration, the minimum time under the statute.[2] A judgment was filed on 24 February 1997 and a timely notice of appeal was subsequently filed on 25 February 1997.

ANALYSIS

[4] This court has jurisdiction pursuant to 7 GCA § 3107(b) and 3108 (1994).[3] On appeal Ueki raises

[1] The first charge in the indictment, Conspiracy to Commit First Degree Criminal Sexual Conduct, was dismissed by the trial court on 14 November 1996.

[2] On 26 July 1996, the Governor signed into law P.L. 23-114 which changed the mandatory minimum sentencing for criminal sexual conduct from five (5) to fifteen (15) years incarceration to fifteen (15) years to life without the possibility of parole.

[3] The Defendant-Appellant claimed the court has jurisdiction over this matter pursuant to 8 GCA § 130.20(a)(6) (1993) and 8 GCA 130.60 (1993); however, section 130.20 only refers to specific circumstances under which appeals which may be brought by the Government in criminal cases. Since the appeal was brought by the Defendant-Appellant, the court's jurisdiction is found in other statutory authority.

two issues— that he received ineffective assistance of counsel at the trial court level, and that the People's statements made during closing argument constituted prejudicial vouching. Each issue requires separate analysis and consideration by the court. Therefore, the court addresses each issue in turn.

I.

[5] Ineffective assistance of counsel claims are questions of law which this court reviews *de novo*. *People v. Quintanilla*, 1998 Guam 17, ¶ 8. Although an ineffective assistance of counsel claim may be heard on direct appeal,[4] it is more properly brought as a writ of habeas corpus. *People v. Perez*, 1999 Guam 2, ¶ 33; *United States v. Carr*, 18 F.3d 738, 741 (9th Cir. 1994). Courts will often decline to reach the merits of ineffective assistance of counsel claims because such claims are "more appropriately addressed in a habeas corpus proceeding because it requires an evidentiary inquiry beyond the official record." *Carr*, 18 F.3d at 741; *United States v. Joelson*, 7 F.3d 174, 179 (9th Cir. 1993); *United States v. Cochrane*, 985 F.2d 1027, 1029 (9th Cir. 1993). Consequently, in *Molina*, the court held that an ineffective assistance of counsel claim may be brought on direct appeal if the record is sufficiently complete to make a proper finding.

[6] To determine whether a defendant has received ineffective assistance of counsel, a two-part test is employed. *Quintanilla*, 1998 Guam 17 at ¶ 8. A defendant must first establish that counsel's performance was deficient and then that such deficiency prejudiced his defense. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). To show deficient performance by counsel, a party must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at ¶ 9 (quoting *Strickland* 466 U.S. at 687, 104 S.Ct. at 2064.).

A. Deficient performance

[7] Failure of an attorney to advise a client of sentencing exposure constitutes deficient performance. *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995); *Alvernaz v. Ratelle*, 831 F.Supp. 790, 792 (S.D. Cal. 1993).

> Failing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by *Strickland*. When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court.

Teague, 60 F.3d 1167, 1171 (5th Cir. 1995).

[8] In *Alvernaz*, a defendant was wrongly advised that if convicted at trial he would receive an eight (8) year maximum sentence when in fact he could be facing a life sentence. 831 F.Supp. 790. The court assumed deficient performance based on the failure to properly advise the defendant of his sentencing exposure after conviction. *Id.* at 792.

[9] The parties agree that had defense counsel improperly advised Ueki, such would constitute deficient performance. Ueki contends that defense counsel did not inform him, prior to trial, that he faced a minimum term of fifteen (15) years to life in prison. To support this contention, Ueki refers to the cross-examination testimony of Blailes during which defense counsel inquired as to whether Blailes'

[4] *United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991)

counsel had informed him that he could face incarceration for a minimum term of five (5) years to life for a First Degree Criminal Sexual Conduct conviction.[5]

[10] Although the People agree that counsel's performance would be considered deficient had he improperly advised Ueki of his sentencing exposure, the People argue that we cannot be certain that this is what occurred in this case as the record does not clearly support such a finding.

B. Prejudice to the Defense

[11] As to the second prong of prejudice, "[t]he defendant must demonstrate actual prejudice by showing that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Quintanilla*, 1998 Guam 17 at ¶ 15. (citation omitted).

[12] The record as to the second prong is insufficient to determine whether Ueki suffered the requisite prejudice. The only evidence presented that supports Ueki's claim is that of the cross-examination by defense counsel by Blailes, which alone is inconclusive.

[13] In *Alvernaz*, the Petitioner claimed that he received ineffective assistance of counsel based on counsel's understatement of the possible consequences of going to trial which caused the Petitioner to turn down a plea offer. 831 F.Supp. at 791. The court held that a Petitioner must establish that "(1) Petitioner would have accepted the plea with the advice of competent counsel, and (2) the trial court would have accepted the plea" in order to prove prejudice. *Id.* at 792-93. The Petitioner, in *Alvernaz*, demonstrated that a plea agreement was offered to him, which he would have accepted had he been made aware by counsel of the ramifications of a conviction. *Id.* The *Alvernaz* court had the benefit of a complete record pursuant to a full evidentiary hearing on the issue during which the court heard testimony from defense counsel, the Petitioner and the Petitioner's family members.[6] *Id.* at 791-92. Additionally, the court received multiple declarations from both parties. *Id.* at 792.

[14] However, in this case, no plea agreement was ever offered to Ueki; therefore, he cannot say he passed on an opportunity to his detriment. Ueki submitted an affidavit to support his allegation that defense counsel deficiently advised him. Affidavits and trial statements are probative as to whether a defendant was prejudiced. *Id.* at 790. However, Ueki did not claim in his affidavit that he would have pleaded guilty had he known he could face life imprisonment. Nor did Ueki indicate that he would have pushed for a plea agreement in light of the sentence he faced. Additionally, the record in this case is insufficient as it fails to indicate whether defense counsel's performance was deficient and whether such deficient performance, if any, prejudiced the defendant.

---

[5] Blailes was initially charged with First Degree Criminal Sexual Conduct; however, he pleaded guilty, pursuant to a plea agreement, to Fourth Degree Criminal Sexual Conduct and testified for the People against his co-defendant, Ueki. Presumably, the nature of the cross-examination was to show that Blailes' testimony was tainted in that he made a deal with the People after realizing the grave punishment he himself might be subjected to had he gone to trial.

[6] The Petitioner had filed petitions for a writ of habeas corpus, which were all denied, by the Superior Court in California, the California District Court of Appeals, and the California Supreme Court. *Alvarez*, 831 F.Supp. at 791. After the denial by the California Supreme Court, the Petitioner filed the action in the U.S. District Court, Southern District of California. *Id.* Applying the federal habeas corpus standard, the court conducted a full evidentiary hearing which provided a sufficient record to address the issue of ineffective assistance of counsel. *Id.* at 792.

[15] Although defense counsel, in questioning Blailes, refers to a five (5) year prison term in relation to a First Degree Criminal Sexual Conduct charge, this reference does not demonstrate what counsel did or did not relay to Ueki. During cross-examination of Blailes, defense counsel asked whether Blailes' attorney had said Blailes could be facing five (5) years incarceration; this, by itself, does not reflect defense counsel's own advise to Ueki. Furthermore, defense counsel also questioned Blailes as to whether Blailes' attorney had informed him that he could also face a maximum confinement of life in prison. If Ueki asks this court to consider the cross-examination of Blailes regarding a five (5) year term to be convincing indirect evidence of what defense counsel advised Ueki, then the court must consider defense counsel's questions, as to life imprisonment as the outer boundary of sentencing, to be equally convincing indirect evidence as well.

[16] If we assume defense counsel inquired about a five (5) year minimum incarceration because he did not know the law or was not aware of the change in the law, then the fact that he also mentioned a life maximum sentence becomes puzzling. Ueki, in his affidavit, indicates that defense counsel informed him that the range of sentencing he would be facing was five (5) to twenty (20) years and not fifteen (15) years to life. Yet, during defense counsel's cross-examination of Blailes, Blailes indicated knowledge of a maximum sentence of life imprisonment. Furthermore, the record is without evidence to support a claim of prejudice to Ueki. No plea agreement was offered, and it is speculative that any offers for plea agreements would have been forthcoming or negotiated had Ueki known his sentencing exposure to be other than what counsel had informed him.

II.

[17] Additionally, Ueki argues that the prosecutor, during closing arguments, made statements which constituted impermissible "vouching." No objection to such statements was made at trial; therefore, the plain error standard of review applies. *United States v. Young*, 470 U.S. 1, 14-16, 105 S.Ct. 1038, 1046 (1985); *cf. United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996). The decision to correct the forfeited error rests within the sound discretion of the appellate court; however, in exercising the ability to find plain error, "court[s] should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776 (1993) (citing the case of *Young*, 470 U.S. at 15, 105 S.Ct. at 1046. Such discretion should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Young*, 470 U.S. at 15, 105 S.Ct. at 1046. Pursuant to 8 GCA § 130.50(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, three things must be demonstrated by an appellant when this standard is applicable: (1) there was an error; (2) the error was plain; and (3) substantial rights were affected. *Olano*, 507 U.S. at 732, 113 S.Ct. at 1776.

[18] An "error" occurs when there has been a violation of a legal rule, not waived by a defendant, during court proceedings, despite a failure to make a timely objection. *Id.* at 733-34, 113 S.Ct. at 1777. Section 130.50(b) and case authority interpreting Federal Rule of Criminal Procedure 52(b), from which section 130.50(b) is derived, also requires such error to be "plain." *Id.* at 734, 113 S.Ct. at 1777. Courts have equated the term plain with "clear" or "obvious." *Id.*, 113 S.Ct. at 1777.

[19] The error alleged in this case is improper vouching by the prosecutor. "In trying to bolster a witness's credibility, a prosecutor may not overstep the bounds of propriety and fairness." *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992). Vouching occurs when the government either: (1) suggests that the government is aware of evidence not presented to the jury which would tend to support a

particular witness' testimony; or (2) places the "prestige of the government behind the witnesses through personal assurances of their veracity . . . ." *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991).

> In *Young*, the prosecutor made the following statements to the jury during closing arguments: I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions *since it was asked of me.*

Young, 470 U.S. at 5, 105 S.Ct. at 1041. The statements were made in response to defense counsel's remarks. *Id.* at 17, 105 S.Ct. at 1047. The Court noted that although defense counsel's conduct was an ethical breach, the prosecutor's statement of his belief of what the evidence demonstrated should not have been made since such was an "improper expression of personal opinion . . . ." *Id.*, 105 S.Ct. at 1047.

[20] The Ninth Circuit has addressed the issue of prejudicial vouching in *Kerr* in which that court reviewed the following comments made by the prosecutor:

> I think he (Jim Lunden) was very candid. I don't think it was a pat story, because there are variations. I think he (Al Butler) was candid. I think he was honest. Al Butler was candid with you folks. The question is, were they hoodwinking you when they testified? I think not.

Kerr, 981 F.2d at 1053. The *Kerr* court opined that "[a] prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." *Id.*

[21] In this case, the prosecutor's statements were as follows: "But what she said on that stand, I submit to you is the truth. She told you the truth on that stand. And if she said things when she was drunk or unconscious or confused, I submit they were wrong. But what she said on here was the truth." Transcript at 41 (November 18, 1996).

[22] The People concede that the prosecutor asserted her personal opinion of the victim and her testimony. Clearly, the prosecutor was attempting to bolster the credibility of the victim. The prosecutor's conduct amounts to the same type of "improper expression of personal opinion" that was present in the *Young* case. *Young*, 470 U.S. at 17, 105 S.Ct. at 1047. She presented her beliefs, as a representative of the government, as to the credibility and veracity of the victim's testimony before the jury. This conduct can be misleading to a jury. Accordingly, the court finds that the prosecutor's statements constituted inappropriate vouching which establishes an error that is plain; therefore, satisfying the first two requirements under the plain error standard.

[23] The next question is whether the plain error affected substantial rights. In other words, was the error prejudicial in that it affected the outcome of the proceedings. *Olano*, 507 U.S. at 734, 113 S.Ct. at 1778. In order to make a determination, the comments must be viewed against the entire record to see if plain error occurred. *United States v. Williams*, 989 F.2d 1061, 1071-72 (9th Cir. 1993). The burden lies with the defendant to demonstrate that the error that occurred was prejudicial. *Olano*, 507 U.S. at 734, 113 S.Ct. at 1178.

[24] In *Williams*, the court looked to several factors in determining the effect of the prosecutor's vouching on the outcome of the case: (1) the form of the vouching; (2) the extent of the personal opinion asserted; (3) the extent to which a prosecutor's statements exhibited extra record knowledge supporting a witness' veracity; and (4) the testimony's import viewed in the context of the case as a whole. *Williams*, 989 F.2d at 1072. Although looking to several factors in analyzing the effects of the vouching, the *Williams* court focused on the fourth factor, viewing the record in its entirety. Because of the character of the vouching in this case, this court also focuses on the fourth factor.

[25] Ueki argues that absent such bolstering, the jury would not have given the witness' testimony much weight, pointing out that the witness was severely intoxicated and was not conscious during many of the relevant moments during the incident. Ueki further points out that the case may very well have hinged upon her testimony, given the fact that the only other critical witness admitted to lying under oath.

[26] The People concede that the comments were directed toward a critical prosecution witness. However, the People further claim that there was other direct evidence that linked Ueki to the crime and that the testimony of the vouched witness was not crucial. Specifically, the People point to Ueki's statement upon questioning by the police in which he wrote, "she was asleep, naked, so I fucked her." Ueki, in response, contends that an admission of having sex does not constitute an admission of criminal sexual conduct.

[27] Viewing the record of the trial in its entirety, this court finds that sufficient evidence was presented to the jury to support and uphold the conviction. The People presented several witnesses in its case in chief. The victim testified as to the events which occurred that evening. *See* Transcript at 45-112 (November 13, 1996). Although the victim's story may have changed between the time of the incident and trial, her testimony was extremely emotional and the jury was able to make findings based on such an emotional state. *Id.* at 55-58. Additionally, the victim testified that she did not consent to having intercourse with Ueki. *Id.* at 58-59.

[28] The People called Officer Joseph Guerrero who responded to the victim's 911 call. Officer Guerrero testified that he was familiar with the victim and when he encountered her that morning she was "distraught" whereas he's known her usually to be "happy and, you know, she's in a good mood, but this is the first time I ever seen her like that." *Id.* 116, 120-22. Officer Anthony Camacho and Fireman Peter Martinez testified similarly to Officer Guerrero as to the victim's physical and emotional state. *Id.* at 160-61, 229-231. Likewise, Godofredo Tagamolila, owner of a Laundromat near the crime scene, testified and identified the three suspects in this case. *Id.* at 192-24. The testimony of Officer Jesse J.S. Castro completed the chronology of events from the time the Officers searched for the suspects until the suspects were brought into the police station. *Id.* at 197-205.

[29] Additionally, the People presented as witnesses, Officer Samuel S. Bersamin, criminalist Felisa May Pineda, Dr. Patchara Boonprakong, emergency room nurse Maria Frenaflor Achate, Nurse Joann Canovas from Healing Hearts Crisis Center, and Hidemi Blailes. Ueki's clothing, the victim's stained clothing, the photographs of the crime scene and the surrounding vicinity, Ueki's statement, Blailes' statement, and the victim's information chart from Healing Hearts were all admitted into evidence in support of the People's case and upon which the jury could have found Ueki guilty.

[30] The jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses. Likewise, the victim's state of mind was also corroborated by the Officers' testimony, which the jury could have relied upon to determine the crime was committed. As to Blailes' credibility, despite the manner in which Ueki may have viewed his testimony and veracity, the jury could have equally believed or disbelieved him, as they were so instructed.[7] The jury, in choosing to convict him, was also free to draw inferences and determine the ultimate conclusions as to Ueki's own admission.

[31] The prosecutor's statements were improper; however, the victim's testimony was not the sole piece of evidence against Ueki. Therefore, the court finds "[v]iewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Young*, 470 U.S. at 16, 105 S.Ct. at 1047.

CONCLUSION

[32] The record is insufficient for this court to determine whether Ueki received ineffective assistance of counsel at the trial court level. The court reiterates its position that such matters are more properly raised through a Petition for Writ of Habeas Corpus. Even examining the record as it stands, although Ueki's allegations, if true, would demonstrate deficient performance, no prejudice has been established.

[33] The prosecutor's statements, indicating her personal opinion that a particular witness was telling the truth, constitute vouching. The prosecutor's comments in the instant case were clearly in error, amounting to plain error. The People concede that it was vouching, claiming only minimal effects. However, this plain error did not affect substantial rights or prejudice Ueki, when viewed in light of other evidence and testimony upon which the jury could have relied in rendering its verdict.

[34] The trial court conviction is hereby **AFFIRMED**.

[7] The jury was instructed at the close of trial that:

> A witness who is wilfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

Transcript at 53 (November 18, 1996).