IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RIKAT ROTEN
(aka Roten Richard aka Ruten Rikat),
Defendant-Appellant.

Supreme Court Case No. CRA10-009
Superior Court Case No. CF0151-10

OPINION

Cite as: 2012 Guam 3

Appeal from the Superior Court of Guam
Argued and submitted March 7, 2011
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] After a jury trial, Defendant-Appellant Rikat Roten was found guilty of five counts of First Degree Criminal Sexual Conduct and three counts of Second Degree Criminal Sexual Conduct, all first-degree felonies and was sentenced to thirty years in prison. Roten now appeals his convictions, alleging errors during his trial. The People of Guam ("People") oppose the appeal. For the reasons set forth below, we find that although the trial court committed errors in Roten's trial, they were harmless and, therefore, the convictions are affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Roten was indicted for five counts of First Degree Criminal Sexual Conduct and three counts of Second Degree Criminal Sexual Conduct. Appellant's Excerpts of Record ("ER"), tab 1 (Indictment, Mar. 5, 2010).

[3] Trial commenced on June 11, 2010 with the testimony of Guam Police Department Officer Reynold Alcantara ("Alcantara"). Transcript ("Tr.") at 17 (Jury Trial, June 11, 2010). Alcantara testified that during his fourteen-year service as a police officer, he investigated approximately 150 sexual assault cases, and conducted approximately sixty to seventy interviews with victims alleging sexual assault. *Id.* at 17-18. As the Prosecutor began to delve into the specifics of Alcantara's involvement with the Roten case, Roten's counsel objected on the basis of hearsay. *Id.* at 19. The People responded that there was an applicable exception to the hearsay rule, the "law enforcement exception." *Id.* at 20. The Prosecutor stated: "I do think the Officer can talk about his thoughts and impressions . . . of the investigation that he performed. He's not talking about statements that were made to him." *Id.* Roten's objection was overruled,

and examination continued, with Roten's counsel continuing to object on the basis of hearsay. *Id.* at 21. After inquiry from the trial court, the Prosecutor stated that "we're not offering [Alcantara's testimony] for the truth of the matter asserted. We're offering it to show this Officer's—the results of the investigation that he performed and the information he learned during that investigation." *Id.* at 23.

[4] Although some of Roten's objections were sustained, the following colloquy was entered into evidence over Roten's objection:

> [Ms. Raines]: Officer Alcantara, the results of your investigation, did they reveal to you that a sexual assault had occurred?
>
> [Mr. Alcantara]: Yes, ma'am.
>
> [Ms. Raines]: Did the results of your investigation reveal to you that sexual assault had occurred on three occasions?
>
> [Mr. Alcantara]: Yes, ma'am.

Id. at 26.

[5] After continued objections from Roten's counsel, the trial court called a recess, during which the attorneys discussed Alcantara's testimony with the trial court. *Id.* at 30-34. The trial court ruled that:

> This is what an officer can testify to, an officer has very limited testimony, they can testify to the fact of how they began their investigation; who, what, where, when and how . . . . They can testify as to their conclusions which you have asked the Officer and [Roten's counsel] did not object to . . . . But, not to anything with regard to the details of the crime because that all comes from the victim.

Id. at 32.

[6] After returning from recess, the Prosecutor began to inquire concerning Alcantara's previous experience regarding delayed reporting of crimes by sexual assault victims. *Id.* at 35-36. Roten objected on the grounds of improper expert testimony. *Id.* at 36. The objection was

overruled. *Id.* After discussion of delayed reporting in general, the Prosecutor inquired: "[Q:] Now, is that situation similar to the investigation that was performed in this case? [A:] Yes, ma'am." *Id.* at 37. Later, over Roten's objection, Alcantara testified to his conclusion that Roten did penetrate the victim orally and with his penis. *Id.* at 39-40. Cross-examination revealed that the extent of Alcantara's investigation was a single interview with the victim. *Id.* at 43.

[7] The second witness in the case was the victim. An interpreter was provided to assist the victim because she had some difficulty with the English language. *Id.* at 48. The victim testified that she was in her mid-20s, both at the time of the incidents alleged and at trial. *Id.* at 51. The victim testified that Roten was her step-father.[1] *Id.* at 52. The victim testified about three distinct incidents of sexual assault; the first took place in the family's home in Astumbo. *Id.* at 59. The victim indicated that she told Roten to stop and that she attempted to push him away from her. *Id.* at 57. The victim later testified that after the first incident Roten admonished her not to tell anyone about the incident. *Id.* at 58. The second incident took place on Tanguisson Beach; again, the victim testified that she verbally communicated her non-consent, and that Roten held her feet as he assaulted her. *Id.* at 63-64. The victim testified that several other family members were at the family home when she and Roten returned from Tanguisson. *Id.* at 64-65. The third incident took place in a new family home in Yigo; yet again, the victim testified that she admonished Roten verbally and that he held her legs open during the assault. *Id.* at 74-75.

[1] Later testimony indicated that Roten and the victim's mother were never married, but had been living together as boyfriend and girlfriend for some time. *See* Transcripts ("Tr.") at 8-9 (Jury Trial, June 14, 2010).

[8] The People's third witness was Joseph Rotenis, who identified himself as the nephew of Roten. *Id.* at 154. Rotenis testified that he remembered the day when the second incident was alleged to have taken place and that the victim appeared variously, hung over, mad, or upset upon her return to the house. *See id.* at 148, 154.

[9] The People's fourth witness was Investigator Anthony Blas of the Attorney General's Office. Transcripts ("Tr.") at 5-6 (Jury Trial, June 14, 2010). Investigator Blas testified that he had, with the assistance of the victim, located and photographed the places where the three alleged assaults took place. *Id.* at 9-22. Investigator Blas also testified about his interview of Roten. *Id.* at 22. Investigator Blas testified that during the interview Roten admitted that he twice had sexual contact with the victim corresponding to the first two alleged assaults, but that Roten asserted that those incidents of sexual contact with the victim were consensual. *Id.* at 28. Lengthy portions of an audio recording of the interview were played back to the jury. *See id.* at 31-46. On the tape, Roten admits to sexual contact with the victim in situations that correspond to the first two incidents described by the victim, but denies any force or coercion was used. *Id.* at 37, 39. After Investigator Blas' testimony concluded, the People rested. *Id.* at 57. Roten rested without presenting any evidence. *Id.* at 75.

[10] During closing arguments, the Prosecutor stated the following:

> Officer Alcantara also told us that based on his 14 years as a police officer, that his experience has been, that it is common for victims to not report these types of crimes right away. He told us that, based on his experience, they usually don't report them right away because the victim is afraid or the victim feels threatened, and that is what [the victim] told us.

Transcripts ("Tr.") at 14 (Jury Trial, June 15, 2010). Roten's counsel did not make a contemporaneous objection to the excerpted portion of the Prosecutor's closing argument. *Id.*

[11] Roten was found guilty of all counts and sentenced to thirty years in confinement. Record on Appeal ("RA"), tab 81 (Judgment, July 30, 2010). This appeal follows.

II. JURISDICTION

[12] The Supreme Court of Guam has jurisdiction over this appeal of a criminal conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-89 (2012)); 7 GCA §§ 3107(a), 3107(b), and 3108(a) (2005); and 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[13] Evidentiary rulings of the trial court are reviewed for abuse of discretion and will not be reversed absent prejudice affecting the verdict. *See People v. Muritok*, 2003 Guam 21 ¶ 32 (citing *People v. Fisher*, 2001 Guam 2 ¶ 7). Specifically, a trial court's decision concerning the admission of evidence over a hearsay objection is reviewed under an abuse of discretion standard. *See People v. Hayes*, No. CR-92-00140A, 1993 WL 469357, at *2 (D. Guam App. Div. 1993).[2] "This court has defined an abuse of discretion as that 'exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'" *People v. Evaristo*, 1999 Guam 22 ¶ 6 (quoting *People v. Quinata*, 1999 Guam 6 ¶ 17). Admission of conduct amounting to "vouching" by a government counsel, if not objected to at trial, is reviewed under the plain error standard. *See People v. Moses*, 2007 Guam 5 ¶ 8.

IV. ANALYSIS

[14] Roten's asserted points of error primarily concern the testimony of Officer Alcantara, who testified on behalf of the People. *See* Appellant's Br. at 11-12 (Dec. 1, 2010). At trial, Roten objected to several portions of Alcantara's testimony as hearsay. Tr. at 19 (Jury Trial,

[2] The Supreme Court of Guam considers the opinions of the Guam Appellate Division as "persuasive authority when [this court] consider[s] an issue." *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4.

June 11, 2010). Roten also objected to another particular portion of Alcantara's testimony as improper expert opinion. *Id.* at 36. On appeal, Roten alleges that (1) Alcantara's testimony concerning his "conclusions" about the case was impermissible "vouching"; (2) Alcantara's testimony concerning delayed reporting was impermissible "vouching"; and, raised for the first time on appeal, (3) that the Prosecutor conducting the case also improperly commented on the victim's credibility in her closing argument. *See* Appellant's Br. at 14-18. We address each asserted error in turn.

A. Officer Alcantara's Testimony Was Hearsay Not Within Any Valid Exception

[15] Roten asserts that the trial court erred in allowing Alcantara to present hearsay testimony to the jury. *See* Appellant's Br. at 12-14. Specifically, Roten claims that "the trial court allowed Officer Alcantara to testify about the victim's statements regarding (1) the number of times Roten had sex with the victim, (2) that Roten had performed oral sex on the victim, (3) that Roten had inserted his penis into the victim's vagina." *Id.* at 13. The People counter that Alcantara's testimony was not hearsay because it was not offered for the truth of the matter asserted. *See* Appellee's Br. at 5-6 (Jan. 3, 2011). The People also argue that the testimony "was limited by the trial court to specifically avoid hearsay." *Id.* at 6. Finally, the People argue that 6 GCA § 803(8) is not applicable in this case. *Id.* at 11.

1. Hearsay Defined in Guam

[16] "Hearsay" is defined by Rule 801 of the Guam Rule of Evidence ("GRE"), which reads in relevant part:

> (a) Statement. A "statement" is
>
> (1) an oral or written assertion or
>
> (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Guam R. Evid. 801. Generally, if a statement is "hearsay," it is inadmissible at trial unless it falls into a known exception. *See* Guam R. Evid. 802; *J.J. Moving Servs., Inc., v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 32. Generally, Guam courts view federal case law concerning the Federal Rules of Evidence ("FRE") as persuasive, given the similarities between the GRE and the FRE.[3] *See, e.g.*, *People v. Jesus*, 2009 Guam 2 ¶ 32 n.8 ("The Guam Rules of Evidence are essentially identical to its like-numbered counterparts in the Federal Rules of Evidence. Therefore, interpretations of the Federal Rules of Evidence from other jurisdictions are persuasive authority.").

2. Officer Alcantara's Testimony Was Offered for the Truth of the Matter Asserted

[17] The People argue that Alcantara's testimony was not hearsay at all, contending that it was "not offered for the 'truth of the matter asserted.'" Appellee's Br. at 5. Rather, the People assert that it was offered to show the results of the investigation that Officer Alcantara performed and the information he learned during that investigation. *Id.* We disagree with the People's argument here.

[18] It is axiomatic that out-of-court statements that are presented for some purpose *other* than to prove "the truth of the matter asserted" may be admissible for that distinct and limited purpose. *See, e.g.*, *United States v. Carter*, 491 F.2d 625, 628 (5th Cir. 1974) (discussing policy reasons for admissibility of statements offered for distinct purposes). Traditionally, courts

[3] Additionally, this opinion will cite authority from other U.S. state court jurisdictions, considering that evidentiary approaches used in various states are generally comparable, even in those states that have not adopted the FRE.

additionally examine whether the statements are both "relevant" and "not unduly prejudicial" when proffered under an alternative basis for admission. *See, e.g.*, *United States v. Mancillas*, 580 F.2d 1301, 1309 (7th Cir. 1978) ("A statement that is relevant, See [FRE] 401, merely because it was made, and that is not unduly prejudicial, See [FRE] 403, may be admitted even though the declarant cannot be cross-examined."). Here, the People do not explain in any detail the distinct basis for which they seek to admit these statements from Alcantara and present no argument responsive to these standards. Nevertheless, we examine whether Alcantara's statements are admissible "to show . . . the results of the investigation that he performed and the information he learned during that investigation." Appellee's Br. at 5 (quoting Tr. at 23 (Jury Trial, June 11, 2010)).

[19] It is generally true that "in some instances, information possessed by investigating agents is received at trial not for the truth of the matter, but as 'background' to explain the investigation, or to show an agent's state of mind so that the jury will understand the reasons for the agent's subsequent actions." *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994) (citations omitted). However, this "background" usage of testimony is not without limits:

> A police officer . . . may reconstruct the steps taken in a criminal investigation, may testify about his contact with [a witness], and may describe the events leading up to a defendant's arrest, but the officer's testimony must be limited to the fact that he spoke to [a witness] without disclosing the substance of that conversation. *There is a clear distinction between an [officer] testifying about the fact that he spoke to [a witness] without disclosing the contents of the conversation and the agent testifying about the specific contents of the conversation which is inadmissible hearsay.*

United States v. Williams, 133 F.3d 1048, 1052 (7th Cir. 1998) (emphasis added) (internal citations omitted).

[20] Cross-examination revealed that Alcantara came to his conclusions concerning this case solely on the basis of a single interview with the victim. *See* Tr. at 41-43 (Jury Trial, June 11,

2010). From this, it can be assumed that when Alcantara testified concerning his conclusions, he was doing so not on the basis of any personal knowledge of what occurred between Roten and the victim, but rather on the basis of what the victim told him. Such statements are precisely the type of hearsay that is prohibited by *Williams*—testimony concerning the specific contents of Alcantara's conversation with the victim. *See, e.g.*, *United States v. Baker*, 432 F.3d 1189, 1206 (11th Cir. 2005) ("[Officer's] statement . . . has no probative value other than to establish [facts]. [Officer's] statements about what his investigation 'revealed' are similarly hearsay; even though they do not explicitly paraphrase the words of others, the only conceivable explanation for how [Officer] discovered this information is through listening to the statements of others."). *See generally Williams*, 133 F.3d at 1052. Alcantara's statements reiterating what the victim told him were not proper "background" testimony concerning his investigation of the case.

3. Was Officer Alcantara's Testimony Limited to Avoid Hearsay?

[21] The People also assert that an instruction concerning hearsay issued by the trial court properly limited the scope of Alcantara's testimony. The People emphasize the following statement:

> They can testify as to their conclusions which you have asked the Officer and Mr. Sablan did not object to. They can testify as to their impressions of the scenes, impressions of the victims, impressions of other surroundings involving the crime, their personal impressions or conclusions. But, not to anything with regard to the details of the crime because that all comes from the victim.

Appellee's Br. at 9 (citing Tr. at 32 (Jury Trial, June 11, 2010)). Based on this statement, the People argue that "[t]he Trial Court allowed Officer Alcantara to testify to his '*conclusions which you have asked and Mr. Sablan did not object to* . . . and impressions of the scene, impressions of the victim.' Officer Alcantara remained within those parameters." *Id.* at 11 (emphasis added). However, this is a mischaracterization of the record.

[22] It is clear that Roten's trial counsel objected pervasively to the testimony of Alcantara on the basis of hearsay. *See* Tr. at 22-26, 28, 39 (Jury Trial, June 11, 2010). Although the People attempt to emphasize the trial court's statement characterizing Roten's objections at trial, the record unambiguously shows that Roten's trial counsel did, in fact, offer objections to the introduction of the testimony at issue in this appeal. Furthermore, while it seems uncontested that any testimony concerning Alcantara's impressions of the victim during his interview with her were proper,[4] what Roten objects to herein are not the Officer's "impressions" of the scene or of the victim but rather the "conclusions," which Alcantara reached solely on the basis of the statements of the victim. *See id.* at 41-43. While the trial court's statement reproduced above is legally proper, it is clear that this guidance was not uniformly applied when testimony was actually being brought forward to the jury.

4. Applicability of GRE 803(8) to the Case

[23] Roten argues that there is no applicable "law enforcement exception"[5] under the GRE, highlighting the text of GRE 803(8) concerning public records and reports. *See* Appellant's Br. at 13-14. In response, the People argue that "Officer Reynold T. Alcantara testified in court to 'matters observed.'" Appellee's Br. at 11. The People mischaracterize this portion of the record, given that the sum total of Alcantara's investigation was a single interview with the victim and he testified about conclusions reached based solely on this interview. We find that the People's argument is without merit.

[4] *See* Tr. at 40 (Jury Trial, June 11, 2010). Actual observations of witness demeanor by Alcantara are based on personal knowledge and are clearly not any form of hearsay.

[5] The phrase "law enforcement exception" was used during trial in a colloquy following Roten's first objections to Officer Alcantara's testimony. *See* Tr. at 20-21 (Jury Trial, June 11, 2010).

5. Summary

[24] Therefore, Alcantara's testimony reiterating the victim's statements was impermissible hearsay, and the trial court abused its discretion by allowing the testimony to be brought forward to the jury. We next address Roten's second asserted error.

B. Alcantara Was Qualified to Testify as an Expert

[25] During his testimony, Alcantara opined that delayed reporting of sexual assault was "common." Tr. at 35-37 (Jury Trial, June 11, 2010). Roten argues that Alcantara's statements concerning delayed reporting of sexual assaults were improper "vouching" for the victim's credibility. *See* Appellant's Br. at 16-18. Roten also argues that the testimony was improper expert witness testimony under GRE 702. *See id.* at 18-20. The People counter that these statements by Alcantara were proper lay opinion testimony. *See* Appellee's Br. at 12-17. We must consider two distinct questions: first, whether Alcantara was properly qualified to deliver *any* opinion testimony and, second, whether the opinion testimony that he gave *in this case* was proper.

1. Standards for Opinion Testimony

[26] Under the GRE, both experts and lay witnesses may present opinion testimony. *See* Guam R. Evid. 701; Guam R. Evid. 702. These rules read as follows:

> **Rule 701. Opinions Testimony by Lay Witnesses.** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> **Rule 702. Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the

> product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Guam R. Evid. 701; Guam R. Evid. 702. The standard applied to lay persons differs from that applied to experts providing opinion testimony to finders of fact. *See, e.g.*, *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992) ("The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life and an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.").

2. Alcantara's Testimony Was Expert Testimony

[27] At trial, Alcantara testified that he had worked as a police officer for fourteen years, that he had investigated approximately 150 sexual assault cases, and that he had conducted approximately sixty to seventy interviews with victims alleging sexual assault. Tr. at 17-18 (Jury Trial, June 11, 2010). As this level of experience with victims of sexual assault is clearly beyond that of ordinary lay persons, it is accurate to characterize Alcantara's testimony as testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," even though the source of his knowledge was his own previous experiences. *See* Guam R. Evid. 701(c). This contradicts the People's argument that Alcantara provided proper lay opinion testimony.

[28] However, even if Alcantara's testimony concerning delayed reporting is considered expert testimony, we cannot say that it was improper. *See, e.g.*, *State v. McGlown*, No. L-07-1163, 2009 WL 1263173, at *4-6 (Ohio Ct. App. May 8, 2009) (finding that officers testifying on delayed reporting were qualified as experts on account of their "specialized knowledge"). It is well established that under FRE 702, "[a]ll you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury." *United States v. Williams*, 81 F.3d 1434,

1441 (7th Cir. 1996) (citations omitted). Under this standard, Alcantara's prior experiences with other victims of sexual assault would constitute the "specialized knowledge" required by GRE 702, as established on the record by his colloquy with the Prosecutor. *See* Tr. at 35 (Jury Trial, June 11, 2010) ("Q: And during the time in the 14 years, you also told us that you performed investigations into 150 sexual assaults, I think you said? A: Yes ma'am."). This contradicts Roten's assertion that "[t]he trial court had no rational basis to qualify Officer Alcantara as an expert on rape trauma." *See* Appellant's Br. at 19-20 (citing *Ueda v. Bank of Guam*, 2005 Guam 23 ¶ 26).

[29] Roten appears to assert that the trial court erred in failing to make findings on the record concerning the "data" or "methodology" employed by Alcantara in developing his opinions on delayed reporting. *See* Appellant's Br. at 19. Nevertheless, not all experts present scientific evidence, and courts need not pass on the issue of whether testimony is "real science or junk (courtroom) science." *See Williams*, 81 F.3d at 1441-42. Under Rule 703 of the Guam Rules of Evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Guam R. Evid. 703. Alcantara's previous experiences with victims of sexual assault constitute the "facts" that Alcantara relied upon in delivering his opinion; these facts were established by previous testimony. Alternatively, Rule 705 states: "The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise." Guam R. Evid. 705. We have previously stated that "[t]rial courts have considerable discretion to admit or exclude evidence under Rule 702 and we will

only reverse if the trial court abused its discretion." *See In re N.A.*, 2001 Guam 7 ¶ 45. Under this standard, we disagree that *this* error asserted by Roten (i.e., the contention that Alcantara was unqualified to testify as an expert) was an abuse of the trial court's discretion. Rather, this aspect of Alcantara's testimony was proper. However, regardless of whether Officer Alcantara qualified to testify as an expert witness, we must still determine whether the trial court improperly admitted his opinion testimony based on other grounds for error.

C. Alcantara's Opinion Testimony Was Improper to the Extent that It Reflected on the Victim's Credibility

1. Standards for Whether Testimony Will Assist the Trier of Fact

[30] Simply because an expert is qualified to deliver opinion testimony, it does not automatically follow that admission of opinion testimony is proper. We have previously stated that "[a]nalysis of a Rule 702 issue encompasses a two-part test: (1) whether the witness is qualified via knowledge, skill, experience, training, or education and (2) *whether the witness' testimony will assist the trier of fact.*" *Id.* ¶ 44 (emphasis added) (citing *Coleman v. Parkline Corp.*, 844 F.2d 863, 865 (D.C. Cir. 1988)). In *In re N.A.*, we said that "[a] court's determination that the evidence would not aid the fact-finder in interpreting the evidence implicates the second prong of the above test." *Id.* Elsewhere in the *In re N.A.* opinion, we stated that:

> Expert testimony should not be permitted under Rule 702 if it concerns a subject improper for expert testimony, for example, one that invades the province of the jury. *See United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985). It is improper for an expert to testify as to the credibility of a witness. *See id.* (holding that the trial court abused its discretion where it admitted the testimony of three expert witnesses who testified that the three child victims were able to distinguish truth from fantasy which had the effect of improperly "bolstering the children's story and to usurp the fact-finding function"). "An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story." *See Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir. 1992) (citation omitted). It is the fact-finder who has the duty of judging credibility after assessing a victim's statements and the circumstances surrounding the making of those statements.

> Accordingly, an expert's opinions regarding the reliability of a witness' statements usurp the province of the fact-finder.

Id. ¶¶ 34-35. In this case, Roten complains of a "bolstering"[6] effect that Alcantara's testimony might have had on the credibility of the victim, who also testified at trial. *See* Appellant's Br. at 16-18.

[31] Courts have held that testimony of one witness which "bolsters" the credibility of another witness or witnesses, even if it does not contain explicit discussion of credibility, is inappropriate. *See, e.g.*, *People v. Vitug*, No. 90-00081A, 1991 WL 336914, at *3 (D. Guam App. Div. 1991) (noting that a witness may not bolster another witness's credibility); *see also United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 2007); *United States v. Sine*, 493 F.3d 1021, 1034-35 (9th Cir. 2007).[7] In considering the "bolstering" effect of a doctor's testimony on the credibility of other government witnesses, the *Binder* court stated:

> Binder claims that while none of the experts was allowed to testify specifically as to the complaining witnesses' credibility, the effect of the expert testimony was to 'improperly buttress' that credibility. We agree. There was no physical evidence to support or contradict the children's allegations, and there were no witnesses to

[6] Roten phrases these arguments in terms of "vouching" rather than as "bolstering" in his briefing. Appellant's Br. at 16-18. This is technically incorrect, as under Guam law "[v]ouching occurs when the government places the 'prestige of the government behind the witnesses through *personal assurances* of their veracity' and is improper." *People v. Moses*, 2007 Guam 5 ¶ 16 (emphasis added) (citing *People v. Ueki*, 1999 Guam 4 ¶ 19). Vouching, under these standards, concerns improper actions by *the government attorney* concerning the credibility or truthfulness of a witness, not improper actions or testimony of a *government witness* (even a law enforcement witness) concerning the credibility or truthfulness of another witness. *See Ueki*, 1999 Guam 4 ¶¶ 19-22 (discussing prosecutorial misconduct). While the vouching standards found in *Moses* are germane to Roten's allegations concerning the Prosecutor's allegedly improper statement made during closing argument, they do not apply to this asserted point of error. Further, although commentary by one witness concerning another witness may be inappropriate, it does not evoke the "vouching" doctrine as Roten asserts.

[7] Notably, the *Sine* case applies this holding of *Binder* (which concerned expert witness testimony) to a legal challenge involving lay witness opinion testimony. *See Sine*, 493 F.3d at 1034-35; *Reynolds v. State*, 878 P.2d 198, 204-05 (Idaho Ct. App. 1994) ("[O]ur holding today does not mean that lay witnesses should be permitted to testify as to matters of credibility. Such testimony is and should be inadmissible."); *Commonwealth v. Montanino*, 567 N.E.2d 1212, 1214 (Mass. 1991) (citing Massachusetts rule that neither lay nor expert witnesses may testify as to credibility of other witnesses), *overruled on other grounds by Commonwealth v. King*, 834 N.E.2d 875 (Mass. 2005); *State v. Hallett*, 796 P.2d 701, 707-08 (Utah Ct. App. 1990).

> the alleged offenses. Binder maintained his innocence and that the children invented the story because they were angry at him. The verdict necessarily turned on the credibility of Binder and the children. . . . The effect of the expert witnesses' testimony was to bolster the children's story and to usurp the jury's fact-finding function. It is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience. This is an area in which jurors did not need additional assistance.

Binder, 769 F.2d at 602. This disapproval of "bolstering" testimony includes opinion testimony of expert witnesses concerning whether a certain crime actually occurred. *See United States v. Whitted*, 11 F.3d 782, 785-86 (8th Cir. 1993) ("[A witness's] opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible. A [witness] also cannot pass judgment on the alleged victim's truthfulness . . . because it is the jury's function to decide credibility. . . . The [witness]'s testimony invaded the jury's exclusive province to decide witness credibility.") (internal citations omitted).[8] Finally, courts have also specifically considered the "bolstering" effect of testimony by law enforcement witnesses under similar circumstances. *See, e.g.*, *United States v. Garcia-Ortiz*, 528 F.3d 74, 79-80 (1st Cir. 2008) (finding error where law enforcement officer's testimony improperly bolstered testimony of another witness).

[32] Returning to the question of whether the proffered evidence would assist the trier of fact, opinion testimony of law enforcement officers based on relatively short (or single) interactions with witnesses has been excluded for being "unhelpful"; juries are viewed as capable of making such evaluations based on their observations of the defendant at trial. *Compare United States v. Dotson*, 799 F.2d 189, 192-93 (5th Cir. 1986)[9] (noting that opinion testimony of "meaningless

[8] A later section of *Whitted* cites to *State v. Castore*, 435 A.2d 321 (R.I. 1981), which is one of the cases cited by Roten in his arguments. *See* Appellant's Br. at 14.

[9] Although the *Dotson* case concerns *lay* opinion testimony under FRE 701 rather than *expert* opinion testimony under FRE 702, the "helpfulness" requirement found under the FRE is similar to the "useful in assisting

assertions" may be excluded for lack of helpfulness), *and Garcia-Ortiz*, 528 F.3d at 80 ("The Government admits that Gómez was no more familiar with the defendant than the jury . . . . As a lay witness, Gómez improperly testified about a non-technical subject which was not beyond the purview of the jury. The jury was perfectly capable of drawing its own independent conclusion based on the evidence presented." (internal citations omitted)), *with United States v. Zepeda-Lopez*, 478 F.3d 1213, 1221-22 (10th Cir. 2007) (finding admission of lay opinion testimony was not in error where testifying agent had reviewed surveillance recordings of defendant at length). In this case, Alcantara testified that his entire investigation of the case amounted to a single interview with the victim. Tr. at 43 (Jury Trial, June 11, 2010).

2. Application of Standards to Alcantara's Testimony

[33] Here, there are three distinct incidents of allegedly improper opinion testimony we must consider. First, Alcantara testified to his "conclusions" concerning what had occurred between Roten and the victim in the case. *See id.* at 26 ("Q: Officer Alcantara, the results of your investigation, did they reveal to you that a sexual assault had occurred? A: Yes, ma'am. Q: Did the results of your investigation reveal to you that sexual assault had occurred on three separate occasions? A: Yes, ma'am."). Second, Alcantara testified that delayed reporting of sexual assault was "common." *See id.* at 35 ("Q: In your experience, is it common that victims don't always report sexual assaults right away? A: Yes, ma'am."). Finally, Alcantara testified that what had occurred in this case was consistent with the phenomenon of delayed reporting. *Id.* at 37.

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the trier of fact" standard found in our *In re N.A.* decision. *Compare Dotson*, 799 F.2d at 192-93, *with In re N.A.*, 2001 Guam 7 ¶ 44.

[34] Testimony amounting to general discussion of delayed reporting of sexual assault is considered proper. *When victims in general* first report crimes is a relevant factual issue, and evidence presented on the issue may properly assist the finder of fact in rendering a proper verdict. *See United States v. Antone*, 981 F.2d 1059, 1062 (9th Cir. 1992) (finding no error under *Binder* test when the witness in *Antone* testified generally about delayed reporting and when testimony did not "bolster" the credibility of any witness in particular). This is because general discussion of delayed reporting does not speak as directly to credibility as *what a specific victim* reports and how a particular story might change over time. Alcantara's testimony that delayed reporting of sexual assault was "common" was proper.

[35] However, the rest of the testimony offered by Alcantara was improper. Alcantara's conclusion that three separate sexual assaults had taken place was an opinion that a crime had occurred[10] and, therefore, an implicit commentary that he believed the victim's version of events as she related them to him. Admission of similar testimony has been found to be erroneous in federal cases. *See Garcia-Ortiz*, 528 F.3d at 79-80; *Whitted*, 11 F.3d at 785-86; *Dotson*, 799 F.2d at 192-93. Similarly, testimony implying that the decision of the victim in this case to delay reporting the alleged assaults for several weeks was consistent with the phenomenon of delayed reporting in general was improper, as it "bolstered" the victim's credibility in the eyes of the jury. *See* Tr. at 37 (Jury Trial, June 11, 2010) ("Q: Now, is that situation similar to the investigation that was performed in this case? A: Yes, ma'am.").

[10] It is important to note that Alcantara testified that three *sexual assaults* had taken place; while Roten's counsel appeared to concede at trial that his client had engaged in sexual conduct with the victim, the phrase sexual assault implies that the conduct at issue was the product of force or coercion, an allegation which Roten contested. *See* Tr. at 18-23 (Jury Trial, June 15, 2010).

3. Summary

[36] Thus, we find that the trial court abused its discretion in admitting Alcantara's testimony concerning both his "conclusions" about what occurred between Roten and the victim, as well as his opinion that the victim's actions were consistent with the phenomenon of delayed reporting. We also find that the trial court erred in determining that this proffered testimony was proper opinion under GRE 702.

D. The Prosecutor's Comment During Closing Argument Was Not "Vouching"

[37] Under Guam law, "[v]ouching occurs when the government places the 'prestige of the government behind the witnesses through personal assurances of their veracity' and is improper." *See Moses*, 2007 Guam 5 ¶ 16 (citing *Ueki*, 1999 Guam 4 ¶ 19). Although not originally objected to and raised at trial, Roten now cites the following as improper vouching by the Prosecutor conducting his case:

> And Officer Alcantara told us that based on his 14 years as a police officer, that his experience has been, that *it is common for victims to not report these types of crimes right away.* He told us that, based on experience, they usually don't report them right away because the victim is afraid or the victim feels threatened, *and that is what* [the victim] *told us.*

Appellant's Br. at 18 (citing Tr. at 14 (Jury Trial, June 15, 2010)). Because defense counsel did not object to this comment during the Prosecutor's closing argument, this argument is considered one raised for the first time on appeal. Typically, we have discretion to review or disregard an argument raised for the first time on appeal. *See People v. Leslie*, 2011 Guam 23 ¶ 28. "Our exercise of discretion to review a newly raised issue is 'reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or to clarify significant issues of law.'" *Id.* (quoting *Cho v. Fujita Kanko Guam, Inc.*, 2009 Guam 21 ¶ 40). Here, we elect to

exercise our discretion in addressing this issue of law to further clarify what constitutes a prosecutor's "vouching" in the context of closing arguments.

[38] We have previously considered allegations of vouching by government attorneys by utilizing a four-factor test originally adapted from *United States v. Williams*, 989 F.2d 1061 (9th Cir. 1993):

> The court considers the following 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.

Evaristo, 1999 Guam 22 ¶ 32 (citing *People v. Ueki*, 1999 Guam 4 ¶ 24 (citing *Williams*, 989 F.2d at 1072)). In this case, it is apparent that the Prosecutor's statement does not constitute improper "vouching." The Prosecutor's statement does not intimate any knowledge outside of the record of the case, nor does it suggest any personal opinion about the veracity of the victim. *See id.* ¶ 33 ("[V]ouching, if it occurred at all, was done indirectly. The prosecutor did not personally give support to any witness's testimony, nor did she intimate that she had extra record knowledge supporting any witness' veracity."); *see also United States v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998) ("It follows that where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching."). Although we have previously recognized the dangers of vouching, the Prosecutor's statements in closing argument, as in *Evaristo*, are (at most) indirect vouching, and they are more properly characterized as a summary of testimony previously admitted at trial, along with a proposed inference that the jury could properly consider in determining the case. *See United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) ("[W]e have recognized

that prosecutors must have reasonable latitude to fashion closing arguments, and this can argue reasonable inferences based on the evidence . . . .").

[39] Thus, we find no error in the Prosecutor's statement made during closing argument.

E. Application of the Harmless Error Standard

[40] In summation, we find that the trial court abused its discretion by: (1) admitting Alcantara's testimony over Roten's hearsay objections; (2) admitting Alcantara's testimony concerning his "conclusions" about the case; and (3) admitting Alcantara's testimony that in his opinion the victim's actions in this case were consistent with delayed reporting. *See supra* Part IV.A; *see also supra* Part IV.C. All of these errors were pursuant to the GRE and were originally raised at trial. Next, we must determine whether these errors were harmless.

[41] Previous Guam cases indicate that where the trial court has abused its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *See People v. Jesus*, 2009 Guam 2 ¶¶ 53-55; *see also United States v. Williams*, 133 F.3d at 1051 (applying similar standards under FRE). Under this standard, "[a] non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict." *Jesus*, 2009 Guam 2 ¶ 54 (citing *Moses*, 2007 Guam 5 ¶ 18). That is, "[t]he test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted). A harmless error inquiry typically involves analysis of numerous factors, including: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such

evidence was cumulative of other properly admitted evidence. *See United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

1. Admission of Hearsay Was Harmless

[42] Although the trial court erred in admitting Alcantara's testimony over Roten's hearsay objections, the error was harmless. The policy that underlies the general hearsay rule is avoiding admission of out-of-court statements not susceptible to the rigors of cross-examination. *See United States v. Williamson*, 450 F.2d 585, 591 (5th Cir. 1971) ("[T]he general rule against the admission of hearsay testimony is . . . grounded upon the absence of an opportunity to cross-examine . . . and to confront . . . . If hearsay is to be excluded mainly for those reasons, its introduction—despite its technical inadmissibility—is not necessarily prejudicial if the defendant is afforded the opportunity to challenge in court the person whose statements have been related."). In this case, the person whose statement was being introduced as hearsay (i.e., the victim) did indeed testify at trial and was subject to a lengthy cross-examination by Roten's trial counsel. Tr. at 45-143 (Jury Trial, June 11, 2010); *see, e.g.*, *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 928-29 (Mo. Ct. App. 1994) (relying on precedent that admission of witness hearsay testimony amounts to harmless error when that statement adds nothing substantial and when said witness is available for cross-examination).

[43] Additionally, the substance of Alcantara's testimony was essentially identical to that provided by the victim; the victim's testimony discussed three separate incidents of sexual assault, and Alcantara testified that the victim reported three discrete incidents of sexual assault. Tr. at 25 (Jury Trial, June 11, 2010) (Alcantara's testimony); *id.* at 56-59 (victim's testimony of first and second incidents); *id.* at 73 (victim's testimony of third incident). Erroneous admission of duplicative or cumulative testimony is less prejudicial than admission of unique testimony.

See, e.g., *Jesus*, 2009 Guam 2 ¶ 55 (finding admission of hearsay evidence was merely cumulative, thus amounting to harmless error); *see also United States v. Trujillo*, 376 F.3d 593, 612 (6th Cir. 2004) (finding admission of hearsay was harmless error in part because hearsay was duplicative of other significant admissible evidence); *Williamson*, 450 F.2d at 591 (finding admission of materially identical testimony did not result in prejudicial error dictating reversal). Addressing the third and fourth *Garcia* factors cited by the People, the admission of hearsay by the trial court was relatively unimportant as well as cumulative, thus rending the erroneous admission harmless.

2. Admission of Improper Opinion Testimony Was Harmless

[44] We also find that admission of the improper opinion testimony was harmless.

[45] Alcantara opined on the victim's credibility only implicitly; instead of stating affirmatively that the victim was telling the truth, he testified that he came to the conclusion that a sexual assault had occurred. What occurred here was not equivalent to direct commentary of one witness on another witness's credibility. *See, e.g.*, *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (involving pediatrician's opinion testimony that he "'could see no reason why [the child abuse victim] would not be telling the truth'"); *Binder*, 769 F.2d at 602 (involving expert witnesses who bolstered the credibility of the complaining child witnesses by testifying the children "were able to distinguish reality from fantasy and truth from falsehood"); *United States v. Rosario-Diaz*, 202 F.3d 54, 65 (1st Cir. 2000) (noting FBI agent witness may not properly testify as to whether another witness's statements were "lies"). We also note that the unique difficulties of dealing with minor victims of sexual abuse were not present here. *See, e.g.*, *Binder*, 769 F.2d at 602; *Antone*, 981 F.2d at 1062.

[46] Even in cases where trial courts err by allowing law enforcement witnesses to "bolster" the testimony of other witnesses, such errors may be rendered harmless by other factors. *See, e.g.*, *Vitug*, 1991 WL 336914, at *3 (finding that, contrary to defendant's objection that police officer witness improperly bolstered sexual abuse victims' credibility, "any error in admitting the [police officer's] testimony was so subtle as to be harmless"); *see also Rosario-Diaz*, 202 F.3d at 65-66 (discussing cross-examination, jury instructions, and other probative evidence); *United States v. Torres-Galindo*, 206 F.3d 136, 140-42 (1st Cir. 2000) (same); *United States v. Mazza*, 792 F.2d 1210, 1216-22 (1st Cir. 1986) (same); *Muritok*, 2003 Guam 21 ¶ 26 (discussing extent of improper testimony as part of harmless error analysis). Here, the victim testified at great length and in great detail while Alcantara's testimony was brief.

[47] An officer's bolstering testimony may be considered harmful rather than harmless error when such testimony tends to reinforce a victim's identification testimony, when the identity of the perpetrator is at issue. *See, e.g.*, *People v. Townsend*, 250 N.E.2d 169, 173-74 (Ill. App. Ct. 1969) (holding officer's bolstering testimony was harmful because it might have bolstered another witness's testimony regarding the defendant's identification, when the prosecution's case rested on the perpetrator's identity); *People v. Grubbs*, 492 N.Y.S.2d 377, 378-79 (N.Y. App. Div. 1985) (holding harmful error occurred when admitting officer's testimony to bolster victim's in-court identification of the defendant as the perpetrator). In contrast, the primary purpose of Alcantara's testimony here was not to bolster testimony identifying Roten as the perpetrator, but rather to explain the lack of scientific evidence and the brief police investigation. Alcantara even admitted that his involvement with the case was minimal. Tr. at 43 (Jury Trial, June 11, 2010). Further, the jury could evaluate Roten's admission of two instances of his sexual contact with the victim. Investigator Blas, who played a much greater role in the investigation of

the case, provided an audio tape of an interview with Roten. The jury heard the tape. On it, Roten confessed to sexual contact with the victim on two occasions and denied he used force or coercion. Tr. at 5-57 (Jury Trial, June 14, 2010). He also denied a third contact. *Id.*

[48] A jury may adequately evaluate the victim's credibility during a lengthy cross-examination of the victim's testimony. *See, e.g.*, *Roussopoulos v. McGinnis*, No. 00-CV-1826, 2002 WL 31641605, at *8 (E.D.N.Y. Nov. 18, 2002) (noting that where the victim's cross-examination took up more than 120 pages of the trial transcript, there is no doubt the defense counsel had extensive opportunity to cross-examine the victim witness and undermine his credibility). Here, the jury had ample opportunity to evaluate the victim's credibility through direct and cross-examinations. *See* Tr. at 45-143 (Jury Trial, June 11, 2010). The jury similarly had the opportunity to evaluate the credibility of the other witnesses who testified in the case. After closing arguments, the court delivered the following instruction to the jury:

> You have had an opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and the importance of his or her testimony.

Tr. at 39 (Jury Trial, June 15, 2010). Later, the trial court delivered the following instructions concerning law enforcement witnesses:

> You have heard the testimony of law enforcement officials. The fact that a witness may be employed by a law enforcement agency does not mean that his testimony is deserving or more or less consideration or greater or less weight than that of an ordinary witness.
>
> At the same time, it is quite legitimate for Defense Counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give that testimony whatever weight, if any, you find it deserves.

Id. at 43-44. These instructions served to emphasize the jury's proper role as the sole finders of fact and arbiters of credibility in evaluating the case.

[49] Law enforcement officers may testify as experts, if qualified, on the phenomenon of delayed reporting. *See, e.g.*, *People v. Dobek*, 732 N.W.2d 546, 562-63 (Mich. Ct. App. 2007). Testimony about whether a certain victim's actions are consistent with general responses to sexual assault trauma is appropriate. *See, e.g.*, *In re Nicole V.*, 518 N.E.2d 914, 916-19 (N.Y. 1987); *see also United States v. Peel*, 29 M.J. 235, 241 (C.M.A. 1989). Although the trial court erred in allowing Alcantara to explicitly connect his testimony about delayed reporting in general to his impression of the facts of the case, this error consisted of only a single question and response. Tr. at 37 (Jury Trial, June 11, 2010) ("Q: Now, is that situation similar to the investigation that was performed in this case? A: Yes, ma'am."). That single, brief exchange is not enough to convince us that the jury's verdict should be overturned. *See, e.g.*, *Carrie v. State*, 679 S.E.2d 30, 39 (Ga. Ct. App. 2009) (holding that psychologist's expert testimony improperly bolstered victim's credibility, but consisted of only a single response among a six-day trial plus several witness testimonies and, thus, did not affect verdict); *cf. Grandstaff v. State*, 171 P.3d 1176, 1202 (Alaska Ct. App. 2007) (concluding that an officer's bolstering testimony was harmless error in consideration of the length of criminal trial and the volume of evidence presented). Touching upon *Garcia*'s first and third factors, the improperly admitted testimony was not so overwhelmingly important as to outweigh the strength of the People's case. Thus, the error was harmless.

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V. CONCLUSION

[50] The trial court erred in allowing Alcantara's testimony to be admitted over Roten's hearsay objections, and erred further in allowing improper opinion testimony to be presented. However, we find that the trial court's errors were harmless. Accordingly, the judgment is **AFFIRMED**.

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice