IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

HELPME ROBY,
Defendant-Appellant.

Supreme Court Case No.: CRA15-026
Superior Court Case No.: CF0682-13-02

OPINION

Cite as: 2017 Guam 7

Appeal from the Superior Court of Guam
Argued and submitted on May 20, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Helpme Roby appeals his conviction for multiple charges of criminal sexual conduct related to actions involving two minor victims. He was charged alongside four co-defendants, all of whom pleaded guilty to various related charges. On appeal, Roby argues that the court abused its discretion when it admitted several instances of hearsay testimony; that the prosecution committed misconduct by vouching for witnesses and using inflammatory language in statements made, and questions asked, before the jury; and that the court abused its discretion by imposing a longer sentence on him after trial than was imposed on his co-defendants under their plea agreements.[2] Finding no reason to disturb the Superior Court judgment, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] An exact timeline of events is difficult to ascertain because the only direct eyewitnesses were highly intoxicated while the actions underlying this case took place. Nonetheless, the testimony establishes a basic timeline. On December 13, 2013, eleven-year-old A.K.E. was spending time with her cousin R.K.F., age fifteen, at R.K.F.'s house in Santa Ana, Dededo. At around six or seven that evening, the girls headed to R.K.F.'s friend's house nearby to drink beer.

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

[2] Roby also argues that the court erred by failing to preliminarily instruct the jury on several points of law. We decided this exact matter in an opinion issued after briefing and do not further consider it here. *See People v. Cruz*, 2016 Guam 15 ¶¶ 34-36 (finding no error).

[3] At some point that evening, Roby arrived at the party accompanied by Gibson Billias and three brothers—Betewen Henry, Hen Henry, and Oratuch Henry.[3] The girls soon began drinking vodka the men brought. Sometime thereafter, fifteen-year-old J.E.P. joined the party.

[4] Eventually, the group moved to the Henry brothers' house or directly to a nearby bus stop.[4] R.K.F. testified that at some point she looked through a window of the Henry home from the outside and saw Roby having sex with J.E.P. in Oratuch's room. Roby later confessed to Guam Police Department ("GPD") Officer Jerry Santos that he had sex with J.E.P. that evening, but he provided a slightly different timeline.

[5] The party moved into a jungle area behind a Santa Ana bus stop. Hen testified that he had sex with A.K.E. in the jungle and that he saw Roby have sex with her as well. Oratuch also testified that he saw photographs taken on his iPad, all but one of which were later deleted, of Roby having sex with A.K.E. Betewen testified that he saw Roby having sex with one of the girls and specified that a photograph he was shown was of Roby having sex.[5] Roby confessed to Officer Santos that he had sex with A.K.E. in the jungle after several of the other men had sex with her. He claimed that she called out to him and initiated the sexual encounter, but R.K.F. and J.E.P. testified that A.K.E. was silent and unmoving during the portions of the event they witnessed.

[6] In the early morning hours of December 14, 2013, Officer Maile Lizama and her partner responded to a "beyond control" complaint in the area. Tr. at 4-5 (Jury Trial, Nov. 7, 2014).

[3] Hereafter, the court will refer to the brothers by their first names for clarity.

[4] There is conflicting testimony in the record on this point. *Compare* Transcript ("Tr.") at 80-81 (Jury Trial, Nov. 14, 2014) (Henry household), *with* Tr. at 40 (Jury Trial, Nov. 10, 2014) (bus stop).

[5] Betewen could not name the girl pictured, but Oratuch testified that the same picture was of "the younger one." Tr. at 23 (Jury Trial, Nov. 12, 2014).

Proceeding to the bus stop, they heard a girl—later identified as J.E.P.—yelling about missing her deceased father while being held up by a man later identified as Roby. J.E.P. appeared highly intoxicated. Because of her condition and continued thrashing and screaming, the officers cuffed J.E.P. and placed her in their police vehicle. Roby was questioned at the scene and allowed to leave; he did not raise any suspicions because he appeared merely to be aiding J.E.P.

[7] J.E.P. was transported to a nearby precinct. She was given water and allowed to "sleep off what was happening for a little while" before being interviewed by Officer Aida Pierce sometime between seven and nine in the morning. Tr. at 9 (Jury Trial, Nov. 7, 2014); Tr. at 29 (Jury Trial, Nov. 6, 2014). Officer Pierce testified that J.E.P. had some blood in her mouth, that she "just kept crying," and that she eventually reported there was "another girl . . . back in the jungle." Tr. at 24 (Jury Trial, Nov. 6, 2014). She identified several men who had sex with this other girl, A.K.E., including Roby.[6] She told Officer Pierce that "[A.K.E.] didn't appear to know what was happening to her," that she "looked out of it," and that she "was intoxicated." Tr. at 26, 30 (Jury Trial, Nov. 6, 2014). The court overruled several hearsay objections, stating that the statements fell under the exception for, among others, excited utterances.

[8] At some point during the interview, Officer Pierce instructed Officer Santo Tomas to "immediately go back and check the jungle area for this [other] girl." *Id.* at 31. While Officer Santo Tomas was back in the field, Officer Lizama spoke with J.E.P., who told the officer "that she didn't know if she was raped or not, because at some point in the night she had passed out, but that she was having pain to [sic] her vaginal area." Tr. at 10 (Jury Trial, Nov. 7, 2014).

[6] J.E.P. identified Roby through an alternate name, "Omni," during her interview. Tr. at 30 (Jury Trial, Nov. 6, 2014). Officer Pierce stated that the name was pronounced "Omy." *Id.* J.E.P. later identified Roby in court as a man she saw having sex with A.K.E., with the record for that proceeding spelling the name "Omi." Tr. at 86 (Jury Trial, Nov. 13, 2014). The court is satisfied that these are all references to the defendant, and the parties below treated them as such.

After Officer Lizama asked J.E.P. to conduct a self-examination in the restroom, J.E.P. reported that she was bleeding and "shouldn't have . . . her period for the next two weeks." *Id.* During this time, J.E.P. "was shaking" and appeared "scared," "very emotional," and "distraught." *Id.* at 11.

[9] Officer Santo Tomas approached the bus stop in his marked GPD truck and saw a "kid, short man, maybe" turn and run back into the jungle. Tr. at 43-44 (Jury Trial, Nov. 6, 2014). In pursuit, Officer Santo Tomas saw two other men run from the area. *Id.* at 44. Proceeding a bit further, he "saw [a] girl laying down in the ponding basin . . . on her side[,] crying [and] moaning." *Id.* at 45. Officer Santo Tomas "asked if she [was] hurt, [and] she said yes. [He] asked . . . if she was raped," and "[s]he nodded yes." *Id.* They spoke a bit while Officer Santo Tomas helped her out of the jungle, and her speech was slurred. *Id.* at 47. "At one point in time she . . . asked [Officer Santo Tomas] for 50 cents . . . for her lunch," which deepened the officer's suspicion that she was drunk. *Id.* at 47. Officer Santo Tomas was able to identify her as A.K.E. *Id.* at 48.

[10] Later that day, Dr. William Weare, a physician working part-time for Healing Hearts Rape Crisis Center, saw both A.K.E. and J.E.P. The court recognized Dr. Weare as an expert without objection from the defense. *Id.* at 73. He testified that A.K.E. told him she was given alcohol and then raped by someone named "Roby" or "Ropy." *Id.* at 79. He also testified that her pubic area had been badly abraded. *Id.* at 91.

[11] Dr. Weare testified to J.E.P.'s substantive statements regarding the incident, including her statement that she found blood in her underwear when she conducted her self-check at the police precinct.

[12] Throughout his testimony, Dr. Weare referenced his two reports, which were both admitted into evidence. The defense objected to admission through Dr. Weare's report of J.E.P.'s statements describing what she saw happen to A.K.E. The court limited the scope of Dr. Weare's testimony related to J.E.P.'s interview—keeping out the identity of the perpetrator of the acts J.E.P. reported regarding A.K.E.—but the defense continued to object to the redacted admission, believing it did not go far enough.

[13] Both victims testified. J.E.P. testified that she drank alcohol and did not remember what happened to her that night. She did, however, testify that she saw several men having sex with A.K.E. She identified Roby as one of the men.[7] Because J.E.P. failed to recall many details about the night that she had earlier relayed to the police, the People moved to have J.E.P.'s written statement admitted into evidence. The trial court allowed the People to read J.E.P.'s statement into evidence under Guam Rule of Evidence 803(5) (recorded recollection), over a defense objection, but did not admit it as an exhibit. The next day, A.K.E. testified that she drank alcohol and had sex with one of the other men, but did not remember anything more.

[14] Betewen, Hen, and Billias entered plea agreements for several criminal sexual misconduct charges and were sentenced to fifteen years of incarceration. Oratuch pleaded guilty to misdemeanor destruction of evidence and was sentenced to a suspended term of one year of incarceration.

[15] A jury found Roby guilty of five counts of First Degree Criminal Sexual Conduct, two counts of Second Degree Criminal Sexual Conduct, and four counts of Third Degree Criminal

[7] This was done by identifying him as "Omi," and then completing an in-court identification of Roby. Tr. at 86 (Jury Trial, Nov. 13, 2014).

Sexual Conduct. Roby was sentenced to a total of seventy years of incarceration. He timely appealed.

II. JURISDICTION

[16] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-43 (2017)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[17] "The trial court's decision to admit evidence under a hearsay exception is reviewed for an abuse of discretion." *People v. Jesus*, 2009 Guam 2 ¶ 18 (citing *People v. Cepeda*, 69 F.3d 369, 371 (9th Cir. 1995); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997)). Reversal is required only where improper admission of evidence was not harmless. *See People v. Perez*, 2015 Guam 10 ¶ 34. "Guam has codified the harmless error doctrine in Rule 130.50(a) of the Guam Rules of Criminal Procedure and in Rule 103(a) of the Guam Rules of Evidence." *Jesus*, 2009 Guam 2 ¶ 53 (citations omitted). In this jurisdiction, unlike the federal system, we will affirm the judgment of the Superior Court if "it is more probable than not that the [non-constitutional] error did not materially affect the verdict." *People v. Diego*, 2016 Guam 5 ¶ 9 (quoting *Jesus*, 2009 Guam 2 ¶ 54). *Compare id.*, *with Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (holding non-constitutional error harmless if it can be said "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error"). *See also United States v. Hitt*, 981 F.2d 422, 425 n.2 (9th Cir. 1992) ("A 55% likelihood that the error was harmless qualifies as 'more probable than not,' but it's hardly a 'fair assurance' of harmlessness. *Kotteakos* defines 'fair assurance' as absence

of a 'grave doubt,' and a 45% chance that the defendant would have been acquitted but for the error certainly seems like a 'grave doubt.'" (citation omitted)).

[18] "Where a party fails to object to the trial court's admission of evidence, we review the issue for plain error." *Ramiro v. White*, 2016 Guam 6 ¶ 17 (citing *E.C. Dev., Ltd. v. Gen. Conference Corp. of Seventh-Day Adventist*, 2005 Guam 9 ¶ 55). "On plain error review, we will not reverse unless '(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights;[8] and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *People v. Meseral*, 2014 Guam 13 ¶ 16 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11).

[19] When the defense objects to potentially inflammatory comments by the prosecution, we determine whether "[t]he comment[s] . . . taint[ed] the underlying fairness of the proceedings," and we apply harmless error review. *People v. Moses*, 2007 Guam 5 ¶ 7 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 18). "Where defense counsel does not object to the conduct, however, this court reviews such conduct for plain error." *Meseral*, 2014 Guam 13 ¶ 14 (citing *People v. Ueki*, 1999 Guam 4 ¶ 17).

[20] We review the Superior Court's imposition of a sentence for abuse of discretion. *People v. Camacho*, 2009 Guam 6 ¶ 14 (citation omitted); *People v. Diaz*, 2007 Guam 3 ¶ 10 (citation omitted).

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[8] The third prong of the plain error standard is akin to the harmless error standard, but it shifts the burden of persuasion from the government to the defendant. *People v. Perry*, 2009 Guam 4 ¶ 34 (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

IV. ANALYSIS

[21] Roby argues that the court abused its discretion when it admitted several instances of hearsay testimony, that the prosecution committed misconduct by vouching for witnesses and using inflammatory language, and that the court abused its discretion by imposing the sentence it did. We treat each of these arguments in turn.

A. Admission of Hearsay Evidence

[22] Roby contends that the "court abused its discretion in admitting over the Defendant's objection the extensive hearsay and multiple hearsay statements of the alleged victims through numerous police witnesses and through Dr. Weare." Appellant's Br. at 14 (Nov. 3, 2015). Although Roby's counsel cites basic authority to explain hearsay as a concept and to establish that police officers are not exempt from these fundamental requirements, he fails completely to offer any argument regarding any particular instance of hearsay and cites no further case law. Instead, counsel offers the court an exhaustive, bullet point list summarizing various parties' testimony. *Id.* at 17-20. Several of these lists are taken verbatim from counsel's statement of the facts. *Compare id.* at 7 (Officer Aida Pierce), *with id.* at 17-18 (Officer Aida Pierce). Many of these points do not relate to hearsay testimony at all. *Id.* at 15-20. Counsel makes no attempt to differentiate between hearsay and nonhearsay statements or to explain why the trial court abused its discretion by explicitly applying the various exceptions to hearsay that it did. In fact, the majority of the statements counsel obliquely references went without objection below, but counsel does not at any point argue that any particular error meets the four prongs of our plain error standard.

[23] This is not an acceptable mode of argument before this court, and we would be well within our authority to refuse to entertain this portion of the brief. *See, e.g.*, *Millies v. LandAmerica Transnation*, 372 P.3d 111, 118 n.5 (Wash. 2016) (en banc) (declining to consider an issue that the appellant supported with insufficient argument); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', [sic] really nothing more than an assertion, does not preserve a claim.").

[24] Instead, we will treat these arguments in passing. The statements J.E.P. and A.K.E. made to officers were properly admitted under Guam Rule of Evidence 803(2). *See* 6 GCA § 803(2) ("Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). To fall under this exception, we require "an event or condition startling enough to cause nervous excitement," that "the statement relates to the startling event," and that the statement is "made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent." *Jesus*, 2009 Guam 2 ¶ 36 (collecting cases). The first two requirements are easily met here—rape and the witnessing thereof are sufficiently startling events and the statements admitted related to rape, witnessing rape, and accompanying physical trauma. In analyzing the third requirement, "[c]ourts look at various external factors as indicia of the declarant's state of mind at the time of the statements and no one factor is dispositive." *Id.* ¶ 38 (citations omitted).

[25] A delay of several hours or more between the event and the statement does not necessarily prevent admission. *See id.* ¶¶ 41-42. "Often, a witness' description of the declarant's emotional state is sufficiently weighty in determining whether the declarant's state of

mind falls with[in] the excited utterance exception." *Id.* ¶ 44 (citations omitted). During the relevant period, J.E.P. "was shaking" and appeared "scared," "very emotional," and "distraught." Tr. at 11 (Jury Trial, Nov. 7, 2014). Officer Santo Tomas found young A.K.E. "laying down in the ponding basin . . . on her side[,] crying[and] moaning" when she disclosed she had been raped. Tr. at 45 (Jury Trial, Nov. 6, 2014). In light of these characterizations and the lack of contrary argument from Roby, we cannot say that the trial court abused its discretion by admitting the officers' testimony.

[26] In light of the above and the other properly introduced evidence—including Roby's confession and the many witness identifications—the court is convinced that any other hearsay statements that were introduced, if in error at all, were harmless because "it is more probable than not that the [non-constitutional] error did not materially affect the verdict." *Diego*, 2016 Guam 5 ¶ 9 (quoting *Jesus*, 2009 Guam 2 ¶ 54) (internal quotation marks omitted).

[27] The court does, however, reiterate the guidance it gave recently regarding the admission of hearsay under Guam Rule of Evidence 803(4), an exception to the prohibition against hearsay for statements that are (1) "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" where this information is (2) "reasonably pertinent to diagnosis or treatment." 6 GCA § 803(4). "As is typical of evidentiary matters, 'the burden of proving that the statement fits squarely within a hearsay exception' rests with the proponent of the hearsay exception, here, the government." *United States v. Arnold*, 486 F.3d 177, 206 (6th Cir. 2007) (quoting *United States v. Kendrick*, 853 F.2d 492, 496 n.3 (6th Cir. 1988)).

[28] The trial court must examine hearsay under this exception

> "piece-by-piece, making individual decisions on each [statement]," and it must "carefully parse each statement . . . to determine whether [it] is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant."

People v. Camacho, 2016 Guam 37 ¶ 30 (alterations in original) (citations omitted).

[29] The court ordered part of Dr. Weare's report redacted, though under a Confrontation Clause rationale. Tr. at 45 (Jury Trial, Nov. 13, 2014). The defense objected to the admission of the entire page of the report as hearsay. *Id.* at 3, 45-46. The page in question contains a multitude of statements that, at the least, would require the People to establish through Dr. Weare's testimony the proper predicates under Guam Rule of Evidence 803(4).[9] No aspect of a medical report or testimony is presumptively admissible if it is hearsay. The proponent bears the burden of establishing both prongs of the Rule 803(4) exception for each hearsay statement.

[30] The court was right to redact that portion of the report that it did, but further redaction is necessary where the proponent of hearsay evidence fails to establish both prongs of Rule 803(4) after an opposing party establishes that statements are hearsay. That said, the statements for which the People failed to provide justification in this instance were either unlikely to have factored into a jury decision—for instance, that J.E.P. rides the bus—or were cumulative of properly introduced testimony—for instance, the identity of those present at the scene.[10]

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[9] This evidence ranges from meaningful—for instance, establishing the identities of the people at the scene—to the mundane—for instance, establishing that J.E.P. went to the scene to find her cellphone or that she rides the bus to school. J.E.P.'s Examination Report, Ex. 61, at 231 (Dec. 14, 2013).

[10] We do not suggest that the identities of those present could never be properly admitted under Rule 803(4). The People simply failed to establish that the statement was (1) "made for purposes of medical diagnosis or treatment and describ[ed] medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" and in what way the identities were (2) "reasonably pertinent to diagnosis or treatment." 6 GCA § 803(4).

B. Prosecutorial Misconduct

[31] Roby alleges two forms of prosecutorial misconduct and claims that the conduct requires reversal when viewed "individually and/or cumulatively." Appellant's Br. at 24. First, Roby argues that the People "engaged in a strategy to inflame the passions and prejudices of the jury" when they: (1) expressed in the opening statement that the case was about "Roby[] taking what he wants from A.K.E. and J.E.P."; (2) explained in the opening statement that Roby took them for "sexual gratification and sexual intercourse" and "put[] his penis inside them when they're intoxicated on alcohol, when they can barely remember what happened to them"; (3) dubbed this a "gang rape" case in opening statement; (4) described the acts variously as rape, sexual assault, and sexual abuse in posing questions to witnesses and attempted to elicit the same on several occasions. Appellant's Br. at 20, 22-23.

[32] Statements one and two, above, were not overly inflammatory and found record support. We focus on three and four.

[33] The People argue:

> Those words express the common, everyday understanding of those concepts. The Prosecutor was presenting . . . before twelve . . . members of society from all walks of life . . . . [I]t is not "prosecutorial misconduct" to use common, vernacular terms when presenting and arguing the case.

Appellee's Br. at 24 (Dec. 17, 2015). Neither party provides the court adequate legal support for their assertions. However, the parties agree that these statements did not draw defense objection and are thus subject to plain error review.

[34] We agree with the People's uncited proposition that, generally, the use of common, vernacular terms is not error. *See Ohio v. Geboy*, 764 N.E.2d 451, 460-61 (Ohio Ct. App. 2001) ("[A]ppellant complains that the prosecutor engaged in misconduct by frequently using such

words as 'incest,' 'abuse,' and 'molestation,' particularly when questioning the witnesses. . . . [W]e do not agree that the use of these generic, everyday terms to describe the alleged conduct between appellant and his daughter [were] improper or prejudicial. Nor do we find that these terms were unsupported by the evidence presented."). In fact, defense counsel also used the term "rape[]," *see, e.g.*, Tr. at 64 (Jury Trial, Nov. 6, 2014); Tr. at 50 (Jury Trial, Nov. 7, 2014), and "gang rape," Tr. at 32 (Jury Trial, Nov. 12, 2014); Tr. at 14 (Jury Trial, Nov. 17, 2014).

[35] However, we caution that context and frequency of use are important. *See, e.g.*, *Hawai'i v. Shabazz*, 48 P.3d 605, 625 (Haw. Ct. App. 2002) ("The prosecutor's repeated references to Complainant as a 'young local woman,' when juxtaposed with his identification of the Defendants as 'African-American males,' and coupled with his description of the incident as a 'gang rape,' threatened to disinter some of our most vicious passions and prejudices."). Our holding above is not to be read to mean that these terms or terms like them cannot ever contribute to a finding of prosecutorial misconduct. The People must use caution when employing vernacular that also shares legal meaning or is generally inflammatory and should avoid such terms where reasonably feasible. Terms such as "gang rape" evoke in the average listener grave disapprobation and risk unmooring jurors from their dispassionate task. But because the term was not frequently employed, was blunted by reciprocal defense use, and found support in the record, we do not find that its use here constituted error. *See, e.g.*, *Moses*, 2007 Guam 5 ¶ 30 ("[T]he inquiry is whether the allegedly improper behavior, considered in the context of the entire trial affected the jury's ability to judge the evidence fairly." (quoting *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986)).

[36] Roby also argues that the People improperly vouched for the credibility of government witnesses when, during oral argument, the People stated:

> [The Defense] would have you believe that these co-defendants got up here and I guess basically lied. That's not the deal. That's not the deal. [The] Judge . . . and this court of law requires every single person to take an oath and to promise to tell the truth. You can't cut a plea deal to say I'll promise to say this. No, you cut a plea deal and you say I promise to tell the truth. You can't cut a plea deal and tell people what they're going to say under oath. That's perjury.
>
> People get up here and they testify, they swear to tell the truth and that's what they have to do. And if they don't, they're in trouble. That's it. There's no nefarious thing going on behind the scenes where at some point, you know, the prosecutor can decide how someone is going to testify. The individuals you heard from accepted responsibility. They got up and testified and they took an oath and you can consider that.

Tr. at 52 (Jury Trial, Nov. 17, 2014).

[37] This is error under the reasoning of *People v. Mendiola*, 2010 Guam 5 ¶¶ 15-23, and, although a closer question, this error is plain. In *Mendiola*, we held not only that clear-cut statements about witness veracity were error, *id.* ¶ 9 ("The People and the evidence have been open and honest as have been our witnesses."), but also that less direct forms of vouching were impermissible, *id.* ("There's absolutely no legitimate reason for this child . . . to make it up.").

[38] In closing, the People stated, "[The Defense] would have you believe that these co-defendants got up here and I guess basically lied. That's not the deal. That's not the deal." Tr. at 52 (Jury Trial, Nov. 17, 2014). The People then went on to elaborate why the witnesses were to be trusted, which included the fact that they were sworn to tell the truth. While the People are right that the witnesses "took an oath" and that the jurors could "consider that," *id.*, the *overall* context makes clear the People were telling the jurors that they should believe the witnesses were honest and that they should rely on the court and the prosecutor to ensure that this is the case.

[39] However, "[m]ere vouching is insufficient to warrant a new trial. Once a clear error has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case)." *Mendiola*, 2010 Guam 5 ¶ 24 (citing *Evaristo*, 1999 Guam 22 ¶ 26). Roby's counsel offers no such argument, and the court is otherwise convinced that Roby was not prejudiced by the vouching.

[40] In making this determination, we can look to any number of non-exhaustive factors, including "(1) the nature and seriousness of the misconduct; (2) the context in which it occurred; (3) whether the trial judge gave any curative instructions and the likely effect of such instructions; and (4) the strength of the evidence against the defendant." *Id.* ¶ 25. Here, the vouching was not nearly as egregious and repeated as in *Mendiola*, and was thus less serious. *See id.* ¶ 9 (listing eighteen instances where the People discussed credibility in Mendiola's case). The context in which the vouching occurred did not act to amplify its harm. No curative instruction was given, and the regular instruction that "[y]ou decide the weight of evidence, determine the credibility of witnesses and resolve such conflicts as there may be in the testimony," Tr. at 57 (Jury Trial, Nov. 17, 2014), did not act to rectify the vouching, since jurors might still decide to rely on the impermissible vouching when making that determination. But the strength of the evidence against Roby is considerable. This case is unlike *Mendiola*, where the vouching was about the minor victim on whose testimony the case rose and fell. 2010 Guam 5 ¶ 32 ("[T]he only evidence that tended to prove Mendiola's guilt was the testimony of K.M. and her family members (who simply reiterated what they were told by K.M. about the alleged incident six months after it allegedly occurred)."). As such, we are convinced that the vouching by the People here was harmless.

C. Sentencing Disparity

[41] Roby argues that the court abused his discretion in sentencing him to imprisonment for seventy years while his co-defendants received fifteen years for similar conduct. Appellant's Br. at 24. Further, he contends that there was no explanation on the record for this disparate treatment and that such an explanation is required. *Id.*

[42] Roby asks this court to consider the federal courts' approach to reviewing sentencing. *Id.* at 24-25. The Ninth Circuit has identified certain procedural errors regarding sentencing that, if significant, require reversal. *United States v. Ringgold*, 571 F.3d 948, 950 (9th Cir. 2009). That court "first consider[s] whether the district court committed significant procedural error, [and] then . . . consider[s] the substantive reasonableness of the sentence." *Id.* (quoting *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (internal quotation marks omitted)). Procedural errors include miscalculation of the applicable sentencing guidelines range, not allowing both parties to present arguments regarding sentencing recommendations, not considering all mitigating and aggravating factors, and not providing an explanation for the imposed sentence. *See Gall v. United States*, 552 U.S. 38, 53 (2007); *Carty*, 520 F.3d at 993; *Ringgold*, 571 F.3d at 950.

[43] Some federal courts have applied plain error analysis when determining whether a procedural error that drew no objection should be considered reversible error. *See, e.g.*, *United States v. Mendoza*, 543 F.3d 1186, 1191 (10th Cir. 2008); *United States v. Lynn*, 592 F.3d 572, 576-77 (4th Cir. 2010). However, finding no error in the first instance, we do not need to resolve the applicability of plain error review.

[44] In the past, we have held that "[d]isparate sentences between those of equal culpability, for instance when one defendant plea bargains for a lesser punishment while the other goes to trial, are not per se indicative that the harsher sentence is an impermissible punishment for exercising the right to trial." *Diaz*, 2007 Guam 3 ¶ 67 (quoting *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985)). We have also stated, at least for purposes of an ineffective assistance of counsel claim, that a "judge's consideration of unspecified aggravating factors does not render the sentence an illegal one," and that, therefore, a defense attorney was not ineffective for failing to enquire about the aggravating factors. *Moses*, 2007 Guam 5 ¶ 55. We have further acknowledged that "Guam has only adopted factors to be considered in imposing or withholding probation" and, on this basis, have held that a court need not consider a specific factor where it has "considered the sentencing memoranda provided by the parties and the presentence investigation report, as well as the defendant's allocution and his history and characteristics in general." *People v. Damian*, 2016 Guam 8 ¶ 24. We have even explicitly held that courts are "not required to take . . . other defendants' sentences into consideration when [imposing a] sentenc[e]." *Diaz*, 2007 Guam 3 ¶ 68. However, the facts of *Diaz* are distinct in that the defendant argued that the court should look to defendants in separate cases when making the determination that his longer sentence was indicative of punishment for insisting on a jury trial. *Id.* ¶ 59. In that case, we also found it noteworthy that "the trial court articulated numerous reasons for imposing the sentence," and that "[t]he transcript of the sentencing hearing is replete with information regarding the factors the trial judge considered in sentencing Diaz." *Id.* ¶ 68.

[45] The sentencing record before us is more barebones. After hearing argument from both sides, the trial court remarked only: "The Court then accepts and adopts the pre-sentence

investigation report as it's [sic] findings of fact and with respect to the conclusions of law, the Court accepts and adopts the Government's arguments contained at Page 2 and 3, with respect to the merger of the counts." Tr. at 7 (Sentencing, Mar. 17, 2015).

[46] Although we have "recognize[d] that . . . presentence investigation report[s] [are] not . . . public record[s]," *People v. Castro*, 2013 Guam 20 ¶ 63 n.8, Guam law allows a "reviewing court" to view the report "where relevant to an issue on which an appeal has been taken," 9 GCA § 80.14(a) (2005). This court has reviewed the pre-sentence investigation report in this case and is satisfied that it contains findings of factors that distinguish Roby from his co-defendants. The most consequential difference was Roby's continued denial of fault and lack of remorse for his actions in light of his co-defendants' acceptance and remorse. In reviewing a prior claim of disparate sentencing, we recognized a defendant's "fail[ure] to accept responsibility for his actions" was pertinent. *Diaz*, 2007 Guam 3 ¶ 68. As such, we cannot say the trial court abused its discretion in sentencing Roby within the statutory range for the offenses committed, even where the sentence departs from those of his co-defendants. However, mindful that this is already common practice, we encourage the trial court going forward to set forth on the record those factors it deems most pertinent to the sentence it imposes.

V. CONCLUSION

[47] The trial court did not abuse its discretion when it allowed officers to testify to statements J.E.P. and A.K.E. made to them in the hours following the traumatic events at issue here and other statements, if improperly admitted, were harmless. Further, the prosecution did not commit misconduct when it relied on several vernacular terms for the actions at issue in this case, and although it improperly vouched for the credibility of the co-defendant witnesses, the

vouching was harmless. Finally, the trial court did not abuse its discretion by imposing on Roby a longer sentence within the guidelines where the trial court adopted a presentence investigation report containing factors that distinguished Roby's case from those of his co-defendants. Accordingly, we **AFFIRM** the Superior Court judgment.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice