Filed
Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JASON DUENAS ASPRER,
Defendant-Appellant.

Supreme Court Case No.: CRA17-012
Superior Court Case No.: CF0753-15

OPINION

Cite as: 2019 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted on May 16, 2018
Hagåtña, Guam

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

MARAMAN, C.J.:

[1] Defendant-Appellant Jason Duenas Asprer appeals a final judgment convicting him of four counts of Criminal Sexual Conduct ("CSC"), Delivery of a Schedule II Controlled Substance, Possession of a Schedule II Controlled Substance with Intent to Deliver, and Child Abuse. Asprer argues that he was prejudiced by the trial court's admission of prior consistent statements and evidence of his alleged romantic relationships with two witnesses.

[2] For the reasons stated herein, we affirm the convictions for Delivery of a Schedule II Controlled Substance, Possession of a Schedule II Controlled Substance, and Child Abuse. We vacate the convictions for First Degree CSC, Third Degree CSC, and Fourth Degree CSC.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In December 2015, Guam Police Department ("GPD") Officer Angel Santos interviewed seventeen-year-old C.R.H. regarding a CSC complaint. The following day, criminal investigators from the Office of the Attorney General ("OAG") and GPD officers executed a search warrant on Asprer's bedroom. Various drug paraphernalia found in the room tested positive for methamphetamine. Subsequently, the OAG filed a magistrate's complaint charging Asprer with First Degree CSC and other charges, and Asprer was indicted by a grand jury several days later.

[4] At trial, C.R.H. testified that while at home on the night in question, he had borrowed his cousin's cell phone and had received a message on that phone from Asprer asking C.R.H. to come outside. C.R.H. got into Asprer's car and was driven to Asprer's house. C.R.H. knew where Asprer lived because C.R.H.'s mother's boyfriend lived nearby. Once at Asprer's house,

Asprer told C.R.H. to wait outside. Asprer returned with a ladder, which he hung on the balcony, and told C.R.H. to climb up. From the balcony, C.R.H. went into the house through a sliding door. C.R.H. then went down a hallway and into Asprer's bedroom. Once in the room, Asprer put an object that "felt like glass" to C.R.H.'s mouth and instructed him to "pull," or inhale. Transcript ("Tr.") at 34-35 (Jury Trial, Mar. 1, 2017). After he inhaled, C.R.H. "felt a big rush," which he described as a "[t]ingling" in his body. *Id.* at 35. Asprer then pulled down C.R.H.'s pants. C.R.H. had not requested Asprer do so. Asprer used his mouth to touch C.R.H.'s penis. C.R.H. told him to stop, which Asprer did. Asprer, while standing behind C.R.H., then took C.R.H.'s hand and attempted to make C.R.H. touch Asprer's penis. C.R.H. pulled away before there was contact. Asprer then drove C.R.H. back to his home. C.R.H. testified that he felt scared while this was taking place in Asprer's room. At home, he could not sleep, and he took a shower because he "felt disgusted." *Id.* at 36-37. The following day, he told his cousin, David Santiago, about what had happened with Asprer.

[5] Defense counsel cross-examined C.R.H. as to multiple inconsistencies between C.R.H.'s testimony and his reports to law enforcement. These inconsistencies included the use of a ladder, of a BMW, of a sliding door, and of text messages. Defense counsel re-called OAG Investigator Jerome Lorenzo and GPD Officer Santos in Asprer's own case-in-chief. Both testified that when they had interviewed C.R.H., he had not mentioned text messages from Asprer, a BMW, a ladder, or a sliding door.

[6] During their case-in-chief, the People questioned Asprer's brother, John Asprer ("John"), as to Asprer's relationship with Zachary Ibanez and Kevin Nauta. John testified that he believed Asprer had been in romantic relationships with Ibanez and Nauta. Both Ibanez and Nauta later denied having been in a romantic relationship with Asprer.

[7] Ibanez testified as an alibi witness. He testified that he and Asprer were making crab traps at the back of Asprer's house a little after midnight when C.R.H. showed up. C.R.H. asked to use Asprer's iPad and Asprer said that he could. Ibanez did not see C.R.H. again until around 3:00 a.m., when Ibanez asked Asprer to drive him home. Asprer told Ibanez to get the keys and to call C.R.H. to come so he could take C.R.H. home. Ibanez rode home with Asprer, who first dropped off C.R.H. On cross-examination, Ibanez testified that he had not come forward earlier to provide an alibi—even though he knew of Asprer's arrest—because police had not asked, he could not contact Asprer, and he was trying to maintain a job.

[8] Asprer faced the following charges: (1) First Degree CSC, (2) Delivery of a Schedule II Controlled Substance, (3) Possession of a Schedule II Controlled Substance with Intent to Deliver, (4) Third Degree CSC, (5) two counts of Fourth Degree CSC, (6) Child Abuse, and (7) Unlawful Restraint. After the People's case-in-chief, Asprer moved for a judgment of acquittal on all the charges except the sixth. The trial court denied the motion as to all charges except the seventh, which the court dismissed. The jury found Asprer guilty of all remaining charges except the first count of Charge Five, where the jury found Asprer guilty of attempted Fourth Degree CSC instead.

[9] The trial court sentenced Asprer to fifteen years' incarceration. Asprer timely filed a Notice of Appeal.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-65 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[11] "Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent prejudice affecting the verdict." *People v. Hall*, 2004 Guam 12 ¶ 34. An "abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made regarding admission of evidence." *Id.* (quoting *People v. Santos*, 2003 Guam 1 ¶ 29 n.6). "A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict." *People v. Jesus*, 2009 Guam 2 ¶ 54.

IV. ANALYSIS

A. The Trial Court Did Not Err in Permitting the People to Introduce Prior Consistent Statements

[12] Asprer argues that the trial court improperly permitted the People to introduce prior consistent statements. Appellant's Br. at 14-16 (Dec. 14, 2017). He contends that the trial court erred in allowing the following exchange between the People and Officer Santos:

> Q: Okay. When you interviewed [C.R.H.], did he indicate that Mr. Asprer had displayed to him a pipe?
>
> A: Yes, sir.
>
> Q: And did he indicate to you that Mr. Asprer had lit something in the pipe –
>
> [Objection and side bar discussion]
>
> Q: All right. So returning again to the report, [C.R.H.] testified to you that Mr. Asprer had provided to him a glass pipe?
>
> A: Yes, sir.
>
> Q: And did he indicate during his statement to you that Mr. Asprer had lit something in that pipe and directed him to inhale it?
>
> A: Yes, sir.
>
> Q: And did he testify to you that he felt funny after he had inhaled this substance?

A: As I indicated in my report, sir.

Q: But do you recollect it?

A: Yes, sir.

Q: Later, during the same interview, did [C.R.H.] state to you that Mr. Asprer had performed on him, oral sex, or fellatio?

[Objection and side bar discussion]

Q: Sir, later in that interview, did [C.R.H.] state to you that Mr. Asprer had performed what he termed, "a blowjob" on him?

A: Yes, sir.

Q: And that he described that as Mr. Asprer placing [C.R.H.'s] penis in his mouth and performing oral sex upon him?

A: Yes, sir.

Q: Also, later in the interview, did [C.R.H.] state that as he had been involved with this, sort of, interaction with Mr. Asprer, that Mr. Asprer had grabbed him on his right wrist, from behind him?

A: Yes, sir.

Tr. at 14-19 (Jury Trial, Mar. 2, 2017).

[13] Generally, an out-of-court statement offered in evidence to prove the truth of the matter asserted is inadmissible hearsay. Guam R. Evid. 801, 802. Under Guam Rule of Evidence ("GRE") 801, however, prior consistent statements may, under certain instances, not fall within the definition of hearsay. *See* Guam R. Evid. 801(d)(1)(B). In *People v. Hall*, 2004 Guam 12, we held that for a statement to be admitted as a prior consistent statement under GRE 801(d)(1)(B), four requirements must be met:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

2004 Guam 12 ¶ 36 (citing *United States v. Beltran*, 165 F.3d 1266, 1269-70 (9th Cir. 1999)). At issue here are the second and third elements.

[14] The second element is met because defense counsel impeached C.R.H. by eliciting from Officer Santos and Investigator Lorenzo testimony that C.R.H. had not reported certain details to them he later testified to at trial. *See* Tr. at 122-24 (Jury Trial, Feb. 28, 2017); Tr. at 8-10 (Jury Trial, Mar. 2, 2017). At the very least, this is an implicit charge of recent fabrication.

[15] The third element is met under our decision in *People v. Camaddu*, 2015 Guam 2. In *Camaddu*, the defense impeached the victim by asking a detective about inconsistencies between what the victim testified to at trial and what the victim previously reported to the detective. 2015 Guam 2 ¶ 56. The People then asked the detective about other statements that the victim had made to the detective that were consistent with what the victim had testified to at trial. *Id.* ¶ 61. In our discussion, we highlighted the following language from Wharton's Criminal Evidence: "To be admissible, a prior consistent statement must also respond to the specific point on which the witness had been impeached." *Id.* ¶ 62 (emphasis omitted) (quoting 2 Wharton's Criminal Evidence § 9:39 (15th ed. 1997)). Ultimately, we held that "the trial court was within its discretion to rule that the People could ask [the detective] about the various details [the victim] told her that *were* consistent with what [the victim] testified to at trial." *Id.* ¶ 64.

[16] Asprer contends that under *Camaddu*, it was improper for the People to elicit statements that did not address the specific details on which C.R.H. had been impeached: his receipt of a text message from Asprer, the vehicle Asprer used to transport him, using a ladder to gain access to a second-floor balcony, and his entry into Asprer's home through a sliding door on the second floor. Appellant's Br. at 15. We disagree. In applying the prior consistent statement rule of *Hall*, the facts here are indistinguishable from those in *Camaddu*. As in *Camaddu*, the trial court

here was within its discretion to rule that the People could ask Officer Santos about various details C.R.H. told him that were consistent with what C.R.H. testified at trial. *Compare Camaddu*, 2015 Guam 2 ¶¶ 56-59, *with* Tr. at 122-24 (Jury Trial, Feb. 28, 2017), *and* Tr. at 8-10, 14-19 (Jury Trial, Mar. 2, 2017). Because the challenged testimony was offered to rebut an implied charge against C.R.H. of recent fabrication and was consistent with C.R.H.'s challenged in-court testimony, the trial court did not abuse its discretion in admitting it. *See Camaddu*, 2015 Guam 2 ¶ 64.

B. The Trial Court Erred in Admitting Statements Regarding Asprer's Alleged Homosexuality

[17] Asprer also challenges the following line of questioning by the People:

> Q: Okay. So let me ask you this. You indicated that Mr. Nauta was sort of staying with the defendant as a friend for quite some time, and before that Mr. Ibanez was also staying with him as a friend for quite some time. What did you believe the manner of their relationships with each other was?
>
> [Objection]
>
> Q: Okay. Let's ask this question again. What do you know about the relationship between the defendant, Mr. Asprer, and this person, Zachary Ibanez? What did you believe the nature of that relationship was?
>
> A: They were sometimes in a relationship.
>
> Q: And so you are saying that this was perhaps a romantic relationship?
>
> A: Yes.
>
> [Objection]
>
> Q: Okay. So what specifically have you observed that led you to form that impression?
>
> A: Living in the same room, always together. I mean that's what made me believe that there was a relationship between the two.
>
> Q: Okay. So let me ask you about Mr. Kevin Nauta and the defendant. What did you believe the nature of that relationship was?
>
> A: Pretty much the same as Mr. Ibanez.

Q: Okay. And what was that belief, again, based on?

A: Their demeanor, them being together.

Q: Okay. All right. Do you know where the defendant is staying currently?

A: At - - I'm not sure the number, the residence number. It's right behind our current residence.

Q: Okay. Do you know if Mr. Nauta is staying with him currently?

A: That is correct.

[Objection]

Tr. at 38-40 (Jury Trial, Feb. 27, 2017). When defense counsel first objected to this line of questioning, the prosecutor told the judge at sidebar that "what [he] may bring forward here is the fact that Mr. Asprer may be a practicing homosexual." *Id.* at 39. When defense counsel objected to the final question, in part based on prejudice, *see id.* at 42, the prosecutor told the judge at sidebar that the fact "that persons might have a relationship with another person suggests that they might have a motive to fabricate or defend that sort of person if they're called to testify as a witness," *id.* at 41.

[18] "Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent prejudice affecting the verdict." *Hall*, 2004 Guam 12 ¶ 34. We first consider whether the trial court abused its discretion in allowing the challenged line of questioning and then, if so, consider whether that error was harmless.

1. The trial court abused its discretion in allowing the challenged line of questioning

[19] Under GRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Guam R. Evid. 403. While a party may impeach a witness by showing bias, *United States v. Abel*, 469 U.S. 45, 51 (1984), the challenged testimony here had no probative value because neither Ibanez nor Nauta had yet

testified. Nauta was not on the witness list at the time of the challenged line of questioning. *See* Tr. at 41 (Jury Trial, Feb. 27, 2017). It is a basic tenet of criminal law that a witness must first testify to something before being impeached. *See, e.g.*, *Bryant v. United States*, 120 F.2d 483, 484-85 (5th Cir. 1941) ("[A] witness may not be impeached before he has testified."); *Conkling v. Conkling*, 185 N.W.2d 777, 782 (Iowa 1971) ("The proper time for impeaching the credit of a witness is after he has been examined, and evidence is not admissible to impeach a person who has not yet been introduced, sworn, or examined as a witness." (quoting 98 C.J.S. *Witnesses* § 481 at 364); *McDuffie v. State*, 854 S.W.2d 195, 221 (Tex. Ct. App. 1993) ("A witness must testify to some fact before he can be impeached."); *see also People v. Pearson*, 261 N.E.2d 519, 525 (Ill. App. Ct. 1970). As neither Ibanez nor Nauta had yet to testify, there was no need at that point in the trial to show they were allegedly biased.

[20] Given that the evidence had no probative value, any risk of unfair prejudice would militate for a finding that the trial court abused its discretion in admitting the evidence. Legally, evidence of homosexuality has historically been treated as highly prejudicial. *See, e.g.*, *United States v. Bautista*, 145 F.3d 1140, 1152 (10th Cir. 1998) ("[T]estimony of [the victim's] homosexuality was irrelevant and potentially highly prejudicial."). While evidence of homosexuality may not be as prejudicial as in the past, we find that the risk of unfair prejudice to Asprer substantially outweighed the probative value of the evidence; indeed, the evidence had no probative value. Therefore, the trial court abused its discretion in allowing this line of questioning.

2. The admission of the challenged testimony affected the CSC verdicts, but did not affect the other verdicts

[21] As the trial court abused its discretion in admitting this evidence, we next consider whether the error was harmless. *See People v. Pugh*, 2018 Guam 14 ¶ 26. A non-constitutional

error is harmless if "it is more probable than not that the error did not materially affect the verdict. This standard requires that the prosecution show a 'fair assurance' that the verdict was not substantially swayed by error."[1] *Id.* (quoting *Jesus*, 2009 Guam 2 ¶ 54). The factors to consider in making this determination include: "(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." *People v. Roten*, 2012 Guam 3 ¶ 41 (citing *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005)).[2]

[22] The People have not shown a fair assurance that the verdict was not substantially swayed by error. The prosecution's case was not strong overall. Properly admitted evidence of Asprer's

[1] We note that this differs from the harmless error standard applied to constitutional errors, which "is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Torres*, 2014 Guam 8 ¶ 34 (quoting *People v. Perry*, 2009 Guam 4 ¶ 34); *see also People v. Diego*, 2016 Guam 5 ¶ 11 ("When reviewing a constitutional violation, . . . the standard of review is harmless error, with a higher burden of proof than for non-constitutional errors.").

[2] It appears there is an inconsistency in our caselaw about the harmless error standard when reviewing non-constitutional errors. While in *People v. Jesus*, 2009 Guam 2, we stated that the "more probable than not" standard "requires that the prosecution show a 'fair assurance' that the verdict was not substantially swayed by error," 2009 Guam 2 ¶ 54, in *People v. Roby*, 2017 Guam 7 ¶ 17, we characterized the "more probable than not" standard as being distinct from the "fair assurance" standard, citing to the Ninth Circuit's discussion of the conflict in *United States v. Hitt*, 981 F.2d 422, 425 n.2 (9th Cir. 1992). We stated this court uses the "more probable than not" standard rather than the "fair assurance" standard, without mentioning the language in *Jesus* pertaining to the "fair assurance" test. *Roby*, 2017 Guam 7 ¶ 17. However, a year later, we returned to the standard in *Jesus* and stated that the "more probable than not" standard requires a showing of a fair assurance that the verdict was not substantially swayed by error. *People v. Pugh*, 2018 Guam 14 ¶ 26.

Upon further review, the Ninth Circuit later determined that the conflict suggested in *Hitt* did not actually exist. In *United States v. Brooke*, 4 F.3d 1480 (9th Cir. 1993), the court explained that because the "fair assurance" standard came from the U.S. Supreme Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), the court was bound by that standard, and any different phrase used to describe it, such as "more probable than not," bears the same meaning as "fair assurance." *See Brooke*, 4 F.3d at 1488. Since then, the Ninth Circuit has characterized "more probable than not" as another way of stating the "fair assurance" standard. *See, e.g.*, *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019) ("A non-constitutional error requires reversal unless there is a 'fair assurance' of harmlessness, or stated another way, unless 'it is more probable than not that the error did not materially affect the verdict.'"); *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997).

We agree with the Ninth Circuit's analysis post-*Hitt* and clarify that—notwithstanding our language in *Roby* to the contrary—our harmless error standard for reviewing non-constitutional error is that set forth in *People v. Jesus*, 2009 Guam 2 ¶ 54.

guilt was not overwhelming regarding his CSC charges.[3] The evidence against Asprer on these charges consisted of C.R.H.'s testimony, the testimony of C.R.H.'s family regarding his demeanor, and C.R.H.'s disclosure to David Santiago about what happened. While "[t]he testimony of a victim need not be corroborated" in cases of CSC, 9 GCA § 25.40 (2005), and is *sufficient* to support a conviction, *People v. Manila*, 2015 Guam 40 ¶ 43, it is generally not, in and of itself, *overwhelming* evidence of guilt. The improper evidence regarding Asprer's alleged relationship with Ibanez and Nauta was also not important because there was no need to impeach witnesses who had yet to testify. Finally, the erroneously admitted evidence was cumulative as to Ibanez because Ibanez was impeached properly on a separate basis—by the People questioning why Ibanez did not immediately come forward with Asprer's alibi. However, the evidence was not cumulative as to Nauta because Nauta was not impeached properly on a separate basis. Given these factors support finding that it is more probable than not that the error materially affected the verdict, it is insignificant that the prosecution did not highlight or otherwise improperly use the erroneously admitted evidence. Therefore, the People have not shown a fair assurance that the CSC verdicts were not substantially swayed by error, and we reverse Asprer's CSC convictions.

[23] Regarding Asprer's other convictions—Delivery of a Schedule II Controlled Substance, Possession of a Schedule II Controlled Substance, and Child Abuse[4]—the People have met their burden of showing a fair assurance these verdicts were not substantially swayed by error. Properly admitted evidence of Asprer's guilt for these charges was overwhelming. The jury was presented with evidence that Asprer's room contained drugs and drug paraphernalia, including

[3] This case is distinguishable from *People v. Muritok*, 2003 Guam 21—to which the People cite in support of their argument that the error was harmless—because in *Muritok*, there was overwhelming evidence of the defendant's guilt. 2003 Guam 21 ¶ 27.

[4] The People charged Asprer with Child Abuse for "subject[ing] a child to cruel mistreatment . . . in violation of 9 G.C.A. § 31.30(a)(1)." Record on Appeal ("RA"), tab 83 at 3 (Am. Indictment, Mar. 3, 2017).

methamphetamine, a scale, a scooper, and a ledger. The jury also heard from C.R.H., a minor, about how Asprer forced him to take a "pull" of something through a glass object and the resulting physical effects. Tr. at 34-35 (Jury Trial, Mar. 1, 2017). This testimony was corroborated by testimony from David Santiago and Officer Santos. Given that other, properly admitted evidence of Asprer's guilt on these charges was overwhelming, "it is more likely than not the erroneous admission did not materially affect the jurors' verdict." *Hall*, 2004 Guam 12 ¶ 38 (quoting *People v. Palisoc*, 2002 Guam 9 ¶ 31). Therefore, although the trial court abused its discretion in admitting the challenged line of questioning, this error was harmless as to Asprer's delivery, possession, and child abuse convictions.

V. CONCLUSION

[24] Based on the foregoing, we **AFFIRM** Asprer's convictions of Delivery of a Schedule II Controlled Substance, Possession of a Schedule II Controlled Substance, and Child Abuse. We **VACATE** Asprer's convictions of First Degree CSC, Third Degree CSC, and Fourth Degree CSC, and we **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice