



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**  
Plaintiff-Appellee,

**v.**

**JEROME TAIMANGLO SAN NICOLAS,**  
Defendant-Appellant.

Supreme Court Case No.: CRA19-005  
Superior Court Case No.: CM0157-18

**OPINION**

**Cite as: 2020 Guam 9**

Appeal from the Superior Court of Guam  
Argued and submitted on October 23, 2019  
Hagåtña, Guam

Appearing for Defendant-Appellant:

William Bischoff, *Esq.*  
Assistant Public Defender  
Public Defender Service Corporation  
779 Rte. 4  
Sinajana, GU 96910

Appearing for Plaintiff-Appellee:

Marianne Woloschuk, *Esq.*  
Assistant Attorney General  
Office of the Attorney General  
590 S. Marine Corps Dr.  
Tamuning, GU 96913

**E-Received**

5/22/2020 12:46:49 PM

---

BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.<sup>1</sup>

**MARAMAN, C.J.:**

[1] Defendant-Appellant Jerome Taimanglo San Nicolas appeals a final judgment of conviction for fourth degree criminal sexual conduct. San Nicolas alleges that his evidentiary trial rights and his Confrontation Clause rights were violated when the trial court prevented him from cross-examining the victim regarding a previous allegation of sexual misconduct against a step-grandfather that was later recanted. For the following reasons, we reverse the judgment of conviction and remand for a new trial.<sup>2</sup>

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] A jury convicted San Nicolas of fourth degree criminal sexual conduct for touching H.T.—his girlfriend’s daughter—while she was sleeping. H.T.’s testimony was the only evidence regarding the sexual touching offered against San Nicolas.

[3] On cross-examination, H.T. testified that she thinks San Nicolas touched her once before. She acknowledged having no sensory perception of this incident, and this prior touching was not reported in her initial interviews with Child Protective Services or the Guam Police Department (“GPD”). It was only alleged during a later interview with Healing Hearts Crisis Center.

[4] Also during cross-examination, defense counsel attempted to ask questions about a similar allegation H.T. made against her step-grandfather seven to eight years earlier but later recanted.

The transcript reads:

---

<sup>1</sup> The signatures in this opinion reflect the titles of the justices at the time this matter was argued and submitted.

<sup>2</sup> San Nicolas also raises an allegation of prosecutorial misconduct. Because we are reversing on other grounds, we need not reach this issue. See *Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33.

Q. But what you told them, and, in fact, I guess this is your testimony, today, that you think you were asleep, but you think that Jerome, some other time touched you, when you were asleep and you were not even aware of it, correct?

A. Yes.

Q. Now, in fact, you made accusations similar to that against your -- your step-grandfather a few years before, correct?

Mr. Rapadas: Your Honor, objection. Relevance.

Transcript (“Tr.”) at 37 (Jury Trial, June 14, 2018). The prior allegation against her step-grandfather was allegedly disclosed by H.T. to GPD when she was interviewed in connection with this case. After argument and briefing, the trial court sustained the objection and excluded the evidence. The court ruled the testimony should be excluded under Guam Rules of Evidence 412 and 403. The trial court instructed the jury to disregard the statements about the recanted sexual abuse allegation, and it reiterated the instruction at the close of all the evidence.

## II. JURISDICTION

[5] This court has jurisdiction over a final judgment of conviction from the Superior Court of Guam. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-140 (2020)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

## III. STANDARD OF REVIEW

[6] “Alleged violations of the Sixth Amendment’s Confrontation Clause are reviewed de novo.” *People v. Jesus*, 2009 Guam 2 ¶ 16. “Evidentiary rulings are reviewed for an abuse of discretion . . . .” *People v. Camaddu*, 2015 Guam 2 ¶ 9 (quoting *People v. Hall*, 2004 Guam 12 ¶ 34). Trial court rulings excluding evidence in violation of the Confrontation Clause are reviewed for harmless error. *See generally Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam). A constitutional error is harmless when “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). “A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict.” *People v. Pugh*, 2018 Guam 14 ¶ 26 (quoting *Jesus*, 2009 Guam 2 ¶ 54). “This standard requires that the prosecution show a ‘fair assurance’ that the verdict was not substantially swayed by error.” *Jesus*, 2009 Guam 2 ¶ 54 (quoting *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002)).

#### IV. ANALYSIS

[7] San Nicolas alleges that the trial court’s ruling prohibiting him from cross-examining H.T. about a similar recanted allegation she made against her step-grandfather violated his Confrontation Clause rights. Appellant’s Br. at 15 (Aug. 7, 2019). He contends that the exclusion under Guam Rules of Evidence was improper because: (1) Rule 412 does not apply to questions about allegedly false allegations of sexual assault, and (2) the probative value outweighs the prejudice of the evidence. Appellant’s Br. at 15. We agree that the trial court erred in its evidentiary rulings and that San Nicolas was prejudiced. As a result, we need not reach his Confrontation Clause arguments.

##### **A. Guam Rule of Evidence 412 Does Not Apply to Cross-Examination Regarding Prior Recanted Allegations of Sexual Assault**

[8] The trial court excluded the cross-examination of H.T. regarding recanted allegations that her step-grandfather sexually assaulted her because, in its view, the evidence related to the victim’s prior sexual behavior and was not admissible under Guam Rule of Evidence (“GRE”) 412. Rule 412 provides:

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

Guam R. Evid. 412(a). This provision is Guam's rape shield law and mimics Federal Rule of Evidence 412 and provisions of many other states. *See, e.g.*, Fed. R. Evid. 412.

[9] The People of Guam ("People") argue this "false allegation" evidence falls under GRE 412, and even if it is admissible under GRE 412(b), prior notice and an *in camera* hearing are required under GRE 412(c) before introducing the evidence at trial. Appellee's Br. at 9-10 (Sept. 20, 2019). The People support their position by citing case law from certain jurisdictions. *Id.* at 10-11. Cases from these jurisdictions require a defendant to give prior notice he or she intends to introduce evidence of a prior false allegation. *See, e.g., People v. Hackett*, 365 N.W.2d 120, 125 (Mich. 1984); *Miller v. State*, 779 P.2d 87, 90 (Nev. 1989).

[10] Other jurisdictions conclude that evidence of prior false allegations does not fall under the rape shield statutes. *See State v. Long*, 140 S.W.3d 27, 30-31, 30 n.3 (Mo. 2004) (en banc); *State v. Smith*, 98-2045 (La. 9/8/99); 743 So. 2d 199, 202-03; *Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001). In these cases, the courts conclude that the evidence is not being used to prove past sexual behavior or disposition, but to question the witness's credibility. In *Long*, the Supreme Court of Missouri allowed the introduction of extrinsic evidence of a false allegation. 140 S.W.3d at 30-31. It reasoned: "Where, as in this case, a witness' credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses' prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness." *Id.* It also noted that "[e]vidence of prior complaints, as opposed to prior sexual conduct, is not rendered inadmissible by [the rape shield statute]." *Id.* at 30 n.3.

[11] The reasoning in *Long* is consistent with that in *Smith*, which found that retracted allegations of sexual assault are not evidence of a victim's past sexual behavior but are

impeachment evidence used to attack the victim's credibility. *See Smith*, 743 So. 2d at 202-03. The Seventh Circuit reiterated this sentiment in *Redmond* when it found that evidence of a recanted allegation is admissible when used to show a motivation or reason to lie, instead of simply attacking the general character of the victim. *See* 240 F.3d at 591-92. While *Redmond* found that such evidence cannot be used to show that the victim has lied at some point in his or her life, evidence of prior false allegations is admissible "by showing that [the alleged victim] had a motive for what would otherwise be an unusual fabrication." *Id.* at 592. Other jurisdictions also allow the evidence to be presented provided it is used to show bias or motive as opposed to undermining general credibility, *see Boggs v. Collins*, 226 F.3d 728, 737-38 (6th Cir. 2000), or when the witness's credibility is central to the case, *see State v. Guenther*, 854 A.2d 308, 324 (N.J. 2004).

[12] Examining the circumstances of San Nicolas's case, we find persuasive the case law from the jurisdictions finding this type of impeachment evidence outside the scope of Rule 412. First, San Nicolas attempted to cross-examine H.T. regarding a recanted allegation, which does not actually relate to prior sexual behavior or dispositions but relates to her credibility. "The credibility of a witness testifying to relevant evidence is always at issue." *Myers v. Commonwealth*, 87 S.W.3d 243, 246 (Ky. 2002). Second, cross-examination allows the defendant to test the government's evidence. As the United States Supreme Court observed:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

*Davis v. Alaska*, 415 U.S. 308, 316 (1974). We view the purpose of GRE 412 as preventing evidence that is irrelevant or meant to be harassing. It is not meant to deprive a defendant of the opportunity to impeach or discredit a witness on credibility. Because testimony regarding similar

recanted allegations of sexual assault does not fall under GRE 412, we conclude that the Superior Court erred in excluding the evidence under this rule.

**B. The Impeachment Evidence was More Probative Than Prejudicial**

[13] Having resolved admissibility under GRE 412, we must now address whether the trial court also erred in excluding the evidence under GRE 403. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Guam R. Evid. 403. “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). While the trial court is due deference for its decisions under Rule 403, “the exclusion of evidence offered by the defendant in a criminal prosecution under Rule 403 is ‘an extraordinary remedy to be used sparingly.’” *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015) (quoting *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995)).

[14] The People contend that allowing the defense to cross-examine the witness will require a mini-trial over old allegations. Appellee’s Br. at 12. In their view, it would be time-consuming and unfair to require them to rebut unrelated extrinsic evidence. *Id.* at 12-13. While the People’s concerns may be valid in an appropriate case involving dissimilar impeachment evidence, this is not that case. San Nicolas’s objection is not to the exclusion of other witnesses and evidence regarding the recanted allegation, but instead to being prevented from even asking H.T. about the allegation. Even the dissent in *Long* recognized that the first step in introducing prior act evidence is to cross-examine the victim and obtain a denial. 140 S.W.3d at 34. If H.T. admitted that she

---

made and recanted a prior allegation of criminal sexual conduct, there would be no need for extrinsic evidence or other testimony to impeach her. However, the trial court did not even allow defense counsel to obtain an answer to the initial impeaching question. Thus, we are not confronted with a GRE 403 analysis of the evidence that could have been presented regarding the recanted allegation, but we are confronted only with a GRE 403 analysis of the impeaching question itself.

[15] Here, we analyze the probative value of the impeaching question against the unfair prejudice to the People. Regarding credibility, we find no substantial *unfair* prejudice from an impeachment question asked to undermine a victim's credibility when the evidence is of a recanted allegation of criminal sexual conduct involving similar circumstances. The probative value, here, seems apparent. The only witness against the defendant was the victim. While the victim's testimony alone may sustain a conviction, *see, e.g., People v. Finik*, 2017 Guam 21 ¶¶ 20-22, this highlights the importance of the victim's credibility. As with other witnesses, it is the province of the factfinder to resolve conflicts in credibility. *See People v. Flores*, 2009 Guam 22 ¶ 82. Here, the jury was deprived of a key piece of evidence weighing on an essential witness's credibility.

[16] Based on the record before us, there appears to be no dispute that H.T.'s prior allegation against her step-grandfather was recanted. The remaining question is whether the defendant has a valid reason to cross-examine H.T. on this topic. The valid reason for cross-examination is H.T.'s credibility. Because "[c]redibility of a witness . . . is always relevant," *Mills v. Grotheer*, 957 P.2d 540, 542 (Okla. 1998), we see no reason for the trial court to have limited the defense's inquiry when the recanted allegation was similar to the present allegations. In both instances, H.T. accused a close female family member's partner of criminal sexual conduct while she appeared to sleep.

---

The probative value of the recantation that relates to the witness's credibility outweighs any unfair prejudice. The trial court abused its discretion in excluding the evidence.

**C. San Nicolas was Prejudiced by Excluding the Impeachment Testimony**

[17] The final issue we must address is whether San Nicolas was prejudiced by the evidentiary error. Since we concluded this error was evidentiary, and not constitutional, we apply the following test for harmless error: whether it is more probable than not that the error did not materially affect the verdict. *See Pugh*, 2018 Guam 14 ¶ 26. Where the victim is the only witness to the crime, credibility is central to the case. We cannot conclude that it is more probable than not that excluding evidence of the victim's recanted allegation of a similar nature did not materially affect the verdict. While there is a possibility the jury may have accepted H.T.'s testimony, it may have also reached a different conclusion if presented with the recanted allegation. This undermines confidence in the outcome. *See, e.g., People v. Meseral*, 2014 Guam 13 ¶ 47 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))). Reversal is required. *See Pugh*, 2018 Guam 14 ¶ 26. We, therefore, cannot conclude there exists a "fair assurance" that the verdict was not swayed by the error. *Jesus*, 2009 Guam 2 ¶ 54 (quoting *Seschillie*, 310 F.3d at 1214).

**V. CONCLUSION**

[18] We **REVERSE** the Judgment of Conviction and **REMAND** for a new trial.

\_\_\_\_\_  
/s/  
F. PHILIP CARBULLIDO  
Associate Justice

\_\_\_\_\_  
/s/  
ROBERT J. TORRES  
Associate Justice

\_\_\_\_\_  
/s/  
KATHERINE A. MARAMAN  
Chief Justice