IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ROBERT TYRONE DIAZ REYES,
Defendant-Appellant.

Supreme Court Case No. CRA19-007
Superior Court Case No. CF0687-17

OPINION

Cite as: 2020 Guam 33

Appeal from the Superior Court of Guam
Determined on the briefs submitted October 30, 2019
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Robert Tyrone Diaz Reyes appeals his convictions for Third Degree Criminal Sexual Conduct and Fourth Degree Criminal Sexual Conduct. In his appeal, Reyes argues that: (1) the cumulative effect of the prosecutor's misconduct through multiple improper comments was plain error; (2) the trial court improperly instructed the jury on interpreting circumstantial evidence; (3) the trial court erred in failing to *sua sponte* instruct the jury as to intoxication and that his counsel was ineffective in failing to request such an instruction; and (4) the trial court abused its discretion in allowing the prosecution to question him as to whether the victim was capable of providing consent. For the reasons below, we affirm the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On the evening of December 1, 2017, Reyes, J.W., and their friends, Errol Alegre, Jr. and Katarina Martinez, met at an apartment unit at Pia Marine for drinks before a night out. The group of friends gathered to celebrate Alegre's birthday. Before this evening, Reyes and J.W. shared a close relationship spanning ten years and considered each other "best friends." Transcript ("Tr.") at 64 (Jury Trial, Jan. 17, 2019); Tr. at 54, 92-93 (Jury Trial, Jan. 18, 2019).

[3] During the gathering at Pia Marine, the group of friends drank alcohol, specifically, tequila and Crown Royal, a type of liquor. While at the apartment, J.W. had "two, maybe three" alcoholic drinks, while Reyes had "at least five" drinks. Tr. at 4, 94 (Jury Trial, Jan. 18, 2019). The group eventually left the apartment and went to the "W," a club in Tumon, where they met their friend, Erica Bucoy. There, the friends continued drinking alcohol. At the "W," J.W. remembered having

a drink from a bottle of vodka and a vodka-cranberry, a drink which Reyes gave her, while Reyes had "at least another five drinks." *Id.* at 98.

[4] Following the night at the "W," Bucoy, who came with Reyes, drove J.W. home because she was "drunk." Tr. at 75-76 (Jury Trial, Jan. 16, 2019); Tr. at 103-106 (Jan. 18, 2019). On the drive to J.W.'s apartment, J.W. vomited out of the window of Bucoy's car and fell asleep. They eventually arrived at the apartment, and when Bucoy opened the door to her vehicle, she observed that J.W. was "passed out." Tr. at 77 (Jury Trial, Jan. 16, 2019). Bucoy remembers Reyes telling her, "I got her [referring to J.W.], I'll take care of her." *Id.* at 78. Reyes then assisted J.W. up the stairs to her apartment unit, into her apartment, and eventually inside her bedroom.

[5] J.W. has no personal recollection of being driven home by Bucoy in her vehicle, vomiting or passing out in Bucoy's vehicle, walking with Reyes up the stairs to her apartment unit, or entering her bedroom. After the vodka-cranberry drink at the "W," J.W. "blacked out" and had only vague memories of the events that ensued. Tr. at 10 (Jury Trial, Jan. 18, 2019). Upon waking up after arriving home from the "W," J.W. recalled: "The first thing I remember is [Reyes] on top of me. . . . He was having sex with me. . . . I could feel his penis . . . [i]n my vagina." Tr. at 70 (Jury Trial, Jan. 17, 2019). J.W. felt "incoherent" and was "so intoxicated" that she could not "say anything, or do anything." *Id.* at 71. She then fell back asleep. When she awoke a second time, J.W. noticed Reyes lying next to her. She then ran out of her room, which was closed, and cried. While outside her bedroom, J.W. encountered her roommate, Jesse Baza. She directed Baza to her room, at which point, Baza entered and asked Reyes to leave. Reyes left and called Bucoy for a ride. Later, Baza accompanied J.W. to the Guam Memorial Hospital, where she was seen by a doctor.

[6] In the days and hours following the incident, Reyes spoke with his friends and J.W. about what occurred during the early morning hours of December 2, 2017. Bucoy, who picked up Reyes

immediately following the incident, recalled that Reyes told him, "I think me and [J.W.] had sex." Tr. at 82 (Jury Trial, Jan. 16, 2019). Alegre remembers that Reyes told him that "he [fucked] up" and that "[s]omething happened between him and [J.W.]." Tr. at 10-11 (Jury Trial, Jan. 17, 2019). Alegre also stated that he recalled Reyes telling him he doesn't remember if he had "finished" when he had sex with J.W. *Id.* at 12. Martinez recalled that Reyes told her he had "drunk sex" with J.W. and that "it was mostly all of him in it, like [J.W.] wasn't really there." *Id.* at 52. J.W. also recalled that Reyes apologized to her about the incident, told her that "he doesn't think he ejaculated," and that she should not worry about getting pregnant or contracting a sexually transmitted disease. *Id.* at 76-77; Tr. at 69-70, 121, 151 (Jury Trial, Jan. 18, 2019).

[7] Reyes denied having any sexual contact with J.W. *See* Tr. at 138 (Jury Trial, Jan. 18, 2019) (Reyes: "I believe that I did not have sex with [J.W.]"); *id.* at 145 (Prosecutor: "But your testimony is still that you did not have sex with [J.W.] that night?"; Reyes: "Yes"); *id.* at 152 (Prosecutor: "Is it possible that you two did have sex, but you just don't remember it?"; Reyes: "No."); *id.* at 156 (Reyes: "I know nothing happened."). He also contended that Bucoy, Alegre, Martinez, and J.W. misunderstood their conversations with him about the events that took place at J.W.'s apartment. Rather, Reyes recalled that after arriving at J.W.'s apartment from the "W," the two went straight into her bedroom, and that he went to sleep. He claims he did not wake up that morning until Baza entered J.W.'s bedroom and told him to leave.

[8] Reyes was later indicted on charges of Third Degree Criminal Sexual Conduct (as a Second Degree Felony) and Fourth Degree Criminal Sexual Conduct (as a Misdemeanor). The indictment alleged that, on or about December 2, 2017, Reyes intentionally engaged in sexual intercourse and intentionally had sexual contact with J.W. when he knew or had reason to know that she was mentally incapacitated or physically helpless. A jury trial on these charges began on January 16, 2019. During trial, the jury heard testimony from J.W., Reyes, Alegre, Bucoy, Baza, and Martinez,

along with law enforcement officials involved in the investigation (Officer Rachel Benavente, Officer Carl Lizama, Officer Angel Santos, and Zenobia Lynn), and Dr. William Weare from Healing Hearts Crisis Center. Dr. Weare testified as an expert witness.

[9] Bucoy, who testified during the government's case-in-chief, had the following exchange with the prosecutor as to J.W.'s clothing:

> Q Okay. Did [Reyes] tell you anything about [J.W.'s] clothing?
>
> A No.
>
> Q Did [Reyes] say he changed her?
>
> . . . .
>
> A No.

Tr. at 84 (Jury Trial, Jan. 16, 2019).

[10] During Reyes's cross-examination, the prosecutor questioned Reyes regarding J.W.'s clothing and Bucoy's statements:

> Q Okay. So what was [J.W.] wearing when you laid [sic] in bed?
>
> A [W]hatever she was wearing when we got in.
>
> . . . .
>
> Q Okay. Did you help her change at all?
>
> A No, sir.
>
> Q Did you ever tell Erica Bucoy that you helped [J.W.] change her clothes?
>
> A No, sir.
>
> Q Okay. Do you know why Erica Bucoy would believe that?
>
> A No, sir.
>
> Q Is your testimony today that you did not change [J.W.'s] clothing that day . . . ?

A Yes.

Q She did that all on her own?

A Well, I didn't do it, because I went straight to bed.

Tr. at 136-37 (Jury Trial, Jan. 18, 2019).

[11] The prosecutor also questioned Reyes about whether J.W. could consent to sexual intercourse:

> Q Okay. So in any event, do you think -- if anybody had sex with [J.W.] that night, would that have been consensual sex or was she too drunk to consent to sex?
>
> A I believe that I did not have sex with her. I -- Yup.
>
> Q I understand. That's not my question.
>
> [Defense counsel]: Objection, speculation. He -- he's not saying that he [had] sex with anybody, he has no idea what -- what consent was and what consent was not. He [is] saying, he didn't. And he's -- from [sic] him to speculate about consent with somebody else, is not right.
>
> [Prosecutor]: Your Honor, he physically observed her. He saw how she was. He helped her upstairs. Put her in the bedroom –
>
> The Court: Overruled. Go ahead and ask the question.
>
> Q [By Prosecutor]: Could any man have . . . consensual sex with [J.W.], in the state that she was in that night?
>
> A [By Reyes:] Probably not, but she was conscious enough to walk, and she was aware of what's going, but at the same time, I would say she was aware enough to know what's going on. She wasn't totally, physically helpless.

Id. at 138-139.

[12] During closing and rebuttal arguments, the prosecutor made these comments, which Reyes alleges were improper:[1]

[1] For statements D, E, F, J, L, M, and Q, a more complete statement is provided. For ease of reference, we have italicized in those specific statements the section that Reyes did not argue as allegedly improper, but which we included herein for context.

(A) "[J.W.] would've had to verbally consent and agree to sexual intercourse that night for it to be okay." Tr. at 28 (Jury Trial, Jan. 22, 2019);

(B) "Now, the defendant had a plan. The defendant planned that event that night." *Id.*

(C) "[Reyes is] the one giving out the drinks that day. Not just to [J.W.], but to the other people at the party. He's the one in control of the alcohol." *Id.*;

(D) "He had a plan; took off her clothes, took off her panties, took off her tampon, *and he has sex with her while she was asleep.*" *Id.*;

(E) "She woke up in the middle of it. I think he saw what happened, and he realized, I got caught. She woke up in the middle of it. I have to pretend to sleep. I have to stop. *That's why there's no ejaculation. That's why there's no semen, because he had to stop.*" *Id.*;

(F) "But that's the reason why people use alcohol for these types of situations. *The individual, the suspect would think that they'll be so drunk, they won't remember.*" *Id.* at 29;

(G) "How do we know [Reyes] acted intentionally? He removed her dress, he removed her panties, took out the tampon, inserted his penis. Those are all intentional acts." *Id.* at 30;

(H) "[J.W.] was asleep. . . . When she woke up and saw him there, he had to do something. He stopped and pretended to go to sleep." *Id.* at 33;

(I) "He locked the bedroom door, took off her clothes." *Id.* at 34;

(J) "*You have the evidence of the dress, you can -- you get to actually hold that dress if you want to, what she was wearing that night. This is real, that's why I had it admitted.* This is real. It's not a fake story, okay. This really happened to somebody." *Id.*;

(K) "[J.W.], what does she have to gain by testifying the way she did on the stand? . . . What does she gain from doing this? Not a thing." *Id.* at 35;

(L) "*[Defense counsel is] going to talk about money, later, I'm assuming.* She had to go to GMH. When you go to GMH, you have to pay for ER bills. That's a lot -- That's a lot of money. She was willing to do those things, okay. *It's not about money.*" *Id.*;

(M) "Well, I also want to talk about the emotions, okay. You have to ask yourself, would [J.W.], if she was making this up, would she have acted the way she did throughout this case? *One of the witnesses described her. Jesse Baza said she looked traumatized.*" *Id.* at 36;

(N) "I asked the victim, what hurt the most, [J.W.] said the betrayal. We all heard of Caesar. Caesar was a ruler back in the day, in Greece, and after being in power for a long period of time, he was assassinated, and his last words were, 'Et tu, Brute.' 'Et tu, Brute.' 'And you Brutus.' 'Even you, Brutus.' His best friend was also stabbing him as he was dying. He didn't care about being stabbed. He didn't care about dying, losing power. It was his best friend, his betrayal that hurt the most." *Id.* at 38;

(O) "'[I]t was rape.' When she said that, I had chills. I wanted to stand up, and I wanted to applaud her for saying that, okay." [Referring to Martinez's testimony] *Id.* at 39;

(P) "You have to believe there was no sex for you to acquit Mr. Reyes." *Id.* at 70;

(Q) "There's no reason to disbeli[eve] Errol. There's none at all. There's no reason for him to go on that stand and lie *about them having sex. Remember what [Reyes] told him . . . 'I fucked up.' 'We had sex.*'" *Id.* at 73; and

(R) "And we all know that there was sex that night. It was rape, because she was too drunk to consent." *Id.*

[13] After closing arguments, the trial court instructed the jury. The instructions included the following oral instruction on circumstantial evidence:

> If the circumstantial evidence as to any particular charge is susceptible to two reasonable interpretations, one of which points to the defendant's guilt, and the other to his innocence, you must adopt that interpretation which points to the defendant's guilt [sic], and reject that interpretation that points to his -- reject the interpretation that points to his guilt.

Tr. at 13 (Jury Trial, Jan. 23, 2019). The trial court also provided a written jury instruction regarding circumstantial evidence, which stated:

> If the circumstantial evidence as to any particular charge is susceptible of two reasonable interpretations, one of which points to the Defendant's guilt, and the other to his innocence, you must adopt that interpretation which points to the Defendant's innocence, and reject that interpretation that points to his guilt.

Record on Appeal ("RA"), tab 52 at 24 (Jury Instrs., Jan. 23, 2019).

[14] Following trial, a jury found Reyes guilty of both charges in the indictment. Reyes was sentenced to eight years in prison for his convictions of Third Degree Criminal Sexual Conduct

and Fourth Degree Criminal Sexual Conduct, with four of the eight years suspended. Judgment was entered, and Reyes timely appealed.

II. JURISDICTION

[15] We have jurisdiction over appeals from a final judgment of conviction entered by the Superior Court of Guam. *See* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-223 (2020)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[16] The court "review[s] claims of prosecutorial misconduct for plain error when a defendant fails to object at trial." *People v. Lessard*, 2019 Guam 10 ¶ 7. Further, "[w]hen no objections to jury instructions are made at trial, we review the instructions for plain error." *People v. Nathan*, 2018 Guam 13 ¶ 9 (citing *People v. Gargarita*, 2015 Guam 28 ¶ 11). "Under plain error review, [the] court '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; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Id.* (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

[17] "Ineffective assistance of counsel claims are questions of law, which this court reviews *de novo*." *Id.* ¶ 10 (quoting *People v. Damian*, 2016 Guam 8 ¶ 11).

[18] "A trial court's evidentiary decisions are reviewed under an abuse of discretion standard." *People v. De Soto*, 2016 Guam 12 ¶ 19 (quoting *People v. Perez*, 2015 Guam 10 ¶ 19). "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." *People v. Pugh*, 2018 Guam 14 ¶ 16. For prosecutorial comments, under the harmless error standard, a conviction will be reversed due to error only if "it is more likely than not that the comment affected the jury's

verdict" in a way that "taint[ed] the underlying fairness of the proceedings." *People v. Blas*, 2015 Guam 30 ¶ 19 (quoting *People v. Moses*, 2007 Guam 5 ¶ 7).

IV. ANALYSIS

[19] On appeal, Reyes raises several issues. First, he alleges prosecutorial misconduct resulting from comments made by the prosecutor during cross-examination of Reyes and throughout closing and rebuttal arguments. Second, he argues the trial court committed plain error when it orally instructed the jury on how to interpret circumstantial evidence. Third, he alleges the trial court erred in failing to *sua sponte* instruct the jury as to intoxication and that his counsel was ineffective in failing to request such an instruction. Finally, Reyes argues the trial court abused its discretion in allowing the prosecution to question him as to whether J.W. could provide consent. We address each of Reyes's arguments.

A. While Some Prosecutorial Comments Were Improper, They Did Not Affect Reyes's Substantial Rights or Infect the Trial with Unfairness

[20] Reyes alleges the prosecutor made eighteen erroneous comments during closing and rebuttal arguments, referenced and labeled above as statements A-R, "that interfered with the jury's independent evaluation of the evidence, thereby depriving Reyes of the fair trial to which he was entitled."[2] Appellant's Br. at 16 (Sept. 13, 2019). He contends that most of the comments were made "in order to inflame the passions or prejudices of the jury against Reyes." *Id.* at 22-31. Reyes further argues the prosecutor made improper comments during the cross-examination of Reyes by misstating witness testimony.

[21] Because of the number of allegedly improper prosecutorial comments, we adopt the following framework of organization. First, we explain the general principles surrounding

[2] The challenged statements were not objected to by Reyes during trial; therefore, we review them for plain error.

prosecutorial misconduct. Second, we organize the allegedly improper prosecutorial comments into four categories: statements alleged to constitute improper vouching, statements alleged as improper statements of law, statements alleged as improper inferences from the evidence, and statements alleged as generally inflammatory.[3] Third, we explain any authority for each category followed by an analysis of each statement in that category for error. Should an error be clear and obvious, we analyze the statement for whether it affected Reyes's substantial rights and if reversal is necessary. Finally, we review separately Reyes's argument that the prosecutor made improper comments during the cross-examination of Reyes by misstating witness testimony.

[22] Of all the challenged comments, we find four to be improper and erroneous: statements A, O, and R, and the comments misstating witness testimony during Reyes's cross-examination. Based on the authorities and analysis below, none of these improper comments affected Reyes's substantial rights requiring reversal or infected the trial with unfairness to make the resulting conviction a denial of due process.

1. Prosecutorial misconduct

[23] Prosecutorial misconduct occurs when a "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *People v. Mendiola*, 2010 Guam 5 ¶ 12 (quoting *People v. Evaristo*, 1999 Guam 22 ¶ 20). When addressing claims of prosecutorial misconduct, we must first determine whether the challenged statements were improper. *De Soto*, 2016 Guam 12 ¶ 63.

[24] Prosecutorial comments not objected to at trial are reviewed for plain error, which is the applicable standard of review for the challenged statements. *See Mendiola*, 2010 Guam 5 ¶ 11. "Under plain error review, [the] court 'will not reverse unless (1) there was an error; (2) the error

[3] Rather than repeat each statement it its entirety, we refer to the specific statements made by the prosecutor according to the alphabetic assignment of each statement, i.e., statements A-R, as stated in section I of this Opinion.

is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Nathan*, 2018 Guam 13 ¶ 9 (quoting *Felder*, 2012 Guam 8 ¶ 19).

[25] To establish that an error affected substantial rights, a defendant must establish by "'a reasonable probability' that but for the claimed error the result of the proceeding would have been different." *Lessard*, 2019 Guam 10 ¶ 16 (quoting *People v. Taisacan*, 2018 Guam 23 ¶ 37). Stated differently, a defendant must establish that "upon a review of the entire record, 'the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.'" *Id.* (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 36). By contrast, "errors do not affect substantial rights when the prosecution presented overwhelming evidence of guilt regarding the issue or element affected by the claimed error." *People v. Kanistus*, 2017 Guam 26 ¶ 28. In addition, a miscarriage of justice under plain error review occurs when the court, "'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Moses*, 2007 Guam 5 ¶ 36 (citations omitted).

[26] Should we determine that multiple improper comments were made, we apply a cumulative error analysis, which considers "all errors and instances of prosecutorial misconduct which were preserved for appeal with a proper objection or which were plain error." *Id.* ¶ 57 (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 n.21 (9th Cir. 1988)). "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *De Soto*, 2016 Guam 12 ¶ 69 (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003)).

2. Statements alleged to constitute improper vouching

[27] The first set of comments Reyes alleges were improper concern allegations of prosecutorial vouching. "Vouching occurs when the [prosecutor] either: (1) suggests that the government is aware of evidence not presented to the jury which would tend to support a particular witness' testimony; or (2) places the prestige of the government behind the witnesses through personal assurances of their veracity . . . ." *People v. Diego*, 2016 Guam 5 ¶ 35 (quoting *People v. Ueki*, 1999 Guam 4 ¶ 19). The latter, which is primarily relevant here, is dangerous "because a jury 'may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.'" *People v. Guerrero*, 2017 Guam 4 ¶ 43 (quoting *Mendiola*, 2010 Guam 5 ¶ 16).

[28] Should an instance of improper vouching be established, "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. When evaluating the prejudicial effect of prosecutorial vouching, we consider several 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. Other factors we may consider in determining the effect of the prosecutor's vouching on the outcome are the form of the vouching, the extent of the personal opinions asserted, how far a prosecutor's statements exhibited extra-record knowledge supporting a witness's veracity, and the testimony's import viewed in the context of the case as a whole. *People v. Roten*, 2012 Guam 3 ¶ 38 (citing *United States v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993)).

a. Statement O was erroneous and constituted improper vouching

[29] Reyes argues that statement O constituted vouching because it was an improper personal endorsement of a witness's supposed testimony. In response, the People admitted the statement "was at most, implied vouching." Appellee's Br. at 21 (Oct. 17, 2019). We agree with both propositions: statement O is improper implied vouching. In stating, "I had chills," "I wanted to stand up," and "I wanted to applaud her" when Martinez supposedly stated, "it was rape," the prosecutor placed the prestige of the government behind the witness through personal assurances of her veracity, which constitutes vouching. *See* Tr. at 39 (Jury Trial, Jan. 22, 2019). And while the prosecutor did not directly state that Martinez was being truthful, the import of his comment implied that he personally believed Martinez's supposed conclusions. Using the personal pronoun "I" in statement O is also problematic, as "a prosecutor has no business telling the jury his individual impressions of the evidence." *Moses*, 2007 Guam 5 ¶ 31 (quoting *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992)). By using a personal pronoun, the prosecutor improperly imposed his beliefs and his impression of Martinez's testimony.

[30] While statement O was erroneous and improper, here, it did not affect Reyes's substantial rights because it is unlikely this specific instance of vouching affected the outcome. The vouching by the prosecutor concerned the testimony of a witness, Martinez, who was testifying about what she believed occurred between J.W. and Reyes. The situation is unlike the vouching in *Mendiola*, when the court ruled that reversal—due to improper vouching for the victim's testimony—was required when the only evidence that proved the defendant's guilt was testimony of the victim and her family members who the victim had told months later. 2010 Guam 5 ¶¶ 32-34. Here, the vouching concerned the credibility of a non-victim witness. Furthermore, the prosecutor put forth other substantial evidence of Reyes's guilt, specifically, the testimony of J.W. about her physical state, the sexual encounter, and Reyes's admissions, and the testimony of Martinez, Bucoy, and

Alegre, who all testified that Reyes admitted in some form he and J.W. had had sex that morning. Given the context of the vouching and the substantial evidence of Reyes's guilt, statement O was not prejudicial and likely did not affect the outcome of trial.[4]

b. Statement R constituted improper vouching

[31] The next comment alleged by Reyes to be improper vouching is statement R, when the prosecutor argued, "And we all know that there was sex that night. It was rape, because [J.W.] was too drunk to consent." Tr. at 73 (Jury Trial, Jan. 22, 2019). We find this statement to constitute vouching because the prosecutor was endorsing the credibility of the statements of particular witnesses.

[32] In making statement R, the prosecutor made a personal assurance of the truthfulness of J.W.'s allegations, and in using the pronoun "we," the prosecutor indirectly placed the prestige of the government behind J.W. through personal assurances of her veracity. This type of personal assurance is particularly problematic in sexual assault cases, where the verdict often hinges on the credibility and truthfulness of the victim. Statement R also seemed to imply that Martinez, Bucoy, and Alegre were all truthful when they testified about Reyes's statements that he had had sex with J.W.

[33] Though statement R was improper, the comment did not affect Reyes's substantial rights because it likely did not affect the outcome of trial. Not only did the government put forth substantial evidence of Reyes's guilt through his admissions and J.W.'s testimony, but both the prosecutor and the court reminded the jury of their role as fact-finder and that counsel's statements

[4] Reyes alternatively argues that statement O was a misstatement of the evidence, arguing that Martinez never testified that "it was rape." Appellant's Br. at 29. The record, however, shows that Martinez testified that the statements Reyes told her of his encounter with J.W. "sounds like rape," later stating on cross-examination that "I'm disappointed, because I knew it was rape." Tr. at 52, 58-59 (Jury Trial, Jan. 17, 2019). Thus, the portion of statement O referencing Martinez's testimony was not a misstatement of the evidence.

were not evidence. During closing arguments, the prosecutor stated: "Your notes and your memory are what control the evidence in this case" and that "what an attorney says . . . is not evidence." Tr. at 37, 74 (Jury Trial, Jan. 22, 2019). The jury was also instructed by the trial court that they were sole judges of the facts, that they alone determine the credibility of the witnesses, and that the closing statements of counsel were not evidence. Thus, considering the neutralization by the prosecutor and the trial court of the statement, the statement had little prejudicial effect on the outcome of trial.

c. Statements E, J, K, M, and Q did not constitute improper vouching

[34] Reyes alleges that statement E constituted improper vouching when the prosecutor stated: "I think [Reyes] saw what happened and he realized, I got caught." Tr. at 28 (Jury Trial, Jan. 22, 2019). Reyes argues by using the phrase "I think," the government was impermissibly vouching for J.W. This argument is flawed because the government did not use the phrase to articulate any personal assurance of veracity of any witness. In using the phrase "I think," the prosecution was merely offering to the jury an inference that can be drawn from the evidence; specifically, testimony from J.W. that she had awoken during the sexual encounter, and that Reyes may have noticed that and stopped. *See United States v. Nersesian*, 824 F.2d 1294, 1328 (2d Cir. 1987) (suggesting that phrases like "I think," although not acceptable, do not merit reversal unless the summation when viewed as a whole reflects improper vouching). The statement after the phrase "I think" further illustrates the inference that the prosecutor was hoping to make, which was there was no physical evidence of semen because Reyes did not "finish," i.e., ejaculate.[5] *See Guerrero*, 2017 Guam 4 ¶ 50 (finding that use of phrase "I submit" was proper when prefaced or followed

[5] Immediately following statement E, the prosecutor stated, "That's why there's no ejaculation. That's why there's no semen, because he had to stop." Tr. at 28 (Jury Trial, Jan. 22, 2019).

by evidence presented at trial). Thus, statement E did not constitute vouching and was not improper.

[35] Reyes also alleges that through statement J, the prosecutor improperly vouched for J.W.'s allegation that Reyes sexually assaulted her by stating: "This is real. It's not a fake story, okay. This really happened to somebody." Tr. at 34 (Jury Trial, Jan. 22, 2019). However, we find the context of this statement to be significant. Immediately before making statement J, the prosecutor had stated: "You have the evidence of the dress, you can -- you get to actually hold that dress if you want to, what she was wearing that night. This is real, that's why I had it admitted . . . ." *Id.* Thus, the prosecutor was partially referring to physical evidence already admitted for the jury's consideration, i.e., J.W.'s clothing. Statement J was also made after questioning by defense counsel to J.W. which implied that she may have dreamed of the incident. *See* Tr. at 71 (Jury Trial, Jan. 17, 2019) (Defense counsel: "Did you tell the police that at first you thought maybe you were dreaming?"); Tr. at 57 (Jury Trial, Jan. 18, 2019) (Defense counsel: "And you said, 'It's like a dream,' Is that correct?"). Therefore, in context, statement J was a fair comment given testimony and evidence in the record. Statement J is also not an instance of vouching because the prosecutor's statement does not suggest any personal assurance of J.W.'s veracity.

[36] Reyes also asserts that statements K and M were vouching because, in pointing to J.W.'s motive and demeanor, *see* Tr. at 35 (Jury Trial, Jan. 22, 2019) ("What does she gain from doing this?"); *id.* at 36 ("if she was making this up, would she have acted the way she did"), the prosecution was vouching for J.W.'s truthfulness. We find both statements to be proper as they were not personal assurances of J.W.'s veracity. In *People v. Meseral*, we stated, "Questions that ask the jury to consider what motive a witness would have for lying are not improper because they 'properly call[] on the jury to use its common sense and experience to determine whether [the witness was] testifying truthfully." 2014 Guam 13 ¶ 38 (alterations in original) (citations omitted).

Here, in making statements K and M, the prosecution was merely asking a rhetorical question to the jury as to J.W.'s motive and demeanor. The statements were not a personal assurance of veracity, nor were they references to matters outside the record to support the credibility of J.W.

[37] Finally, Reyes argues that statement Q was vouching when the prosecution stated on rebuttal that "[t]here's no reason to disbelieve [Alegre]. . . . There's no reason for him to go on that stand and lie . . . ." Tr. at 73 (Jury Trial, Jan. 22, 2019). However, the context in which this statement was made shows that the statement was not an interjection of the prosecutor's opinion of the truthfulness of Alegre's testimony. Rather, before and after statement Q, the prosecutor outlined specific testimony in the record to explain Alegre's testimony and his motives.[6] In doing so, the prosecutor explained that Alegre was testifying on behalf of both Reyes and J.W.

[38] Statement Q was also made after defense counsel had misstated in closing arguments that "[Alegre] said, '100 percent it did not happen.'" Tr. at 56 (Jury Trial, Jan. 22, 2019). Thus, with context, the prosecutor's use of the phrase "no reason to disbelieve [him]" or "no reason for him to go on that stand and lie" was a fair argument in response to defense counsel's mischaracterization of Alegre's testimony and reasonable inferences from the facts in the record. *See State ex rel. Edgell v. Painter*, 522 S.E.2d 636, 642 (W. Va. 1999) (per curiam) (stating that the court cannot conclude that use of phrase "no reason to disbelieve [a witness]" by a prosecutor was improper when it offered reasons based on reasonable inferences from the facts).

[6] Before statement Q, the prosecutor argued, "I strongly urge you to get the playback from . . . Alegre . . . . Alegre did testify that they had sex. When he said it wasn't rape, it wasn't because they didn't . . . . He said it's because he thought it was consensual. . . . He never once said there wasn't sex. And . . . Alegre is on [Reyes's] side." Tr. at 73 (Jury Trial, Jan. 22, 2019). Immediately following statement Q, the prosecutor reminded the jury to recall the specific admissions Reyes told Alegre.

3. Statements alleged as improper statements of law

[39] The second set of comments concern what Reyes describes as misstatements of the law. As the prosecutorial comments related to misstatements of the law were not objected to at trial, we review them for plain error. *See Mendiola*, 2010 Guam 5 ¶ 11.

a. Statement A was improper

[40] Reyes argues that statement A "was a clear misstatement of the law" because "there is no requirement in Guam law that consent to sexual intercourse must be given *verbally*." Appellant's Br. at 22. In reply, the People argue that Reyes misinterprets the comment as a statement of law when instead "it was a comment to explain the circumstances of the crime." Appellee's Br. at 9-10. Further, even if the statement were construed as a statement of law, the People argue that it was proper because an individual "is not capable of consenting to sexual intercourse when they are asleep or unconscious." *Id.* at 10. Though this latter contention is true, this is not the import of statement A. On its face, statement A suggests that consent to sexual intercourse can be given only verbally, which is incorrect.

[41] Rather, consent can be expressed or implied through physical signs, words, actions, and/or conduct.[7] *See People v. Tenorio*, 2007 Guam 19 ¶ 56 (implying that consent can be communicated either verbally or physically); *see also* Cal. Penal Code § 261.6 (defining consent for sexual assault crimes); *State v. Kikuta*, 253 P.3d. 639, 657 (Haw. 2011) (stating generally that "[c]onsent may be express, but may also be implied, defined as 'consent inferred from one's conduct rather than from one's direct expression'"). Thus, it was error for the prosecutor to state that "[J.W.] would've had

[7] Unlike in other jurisdictions, our statutes do not provide a definition of sexual consent. However, we need not adopt a specific definition of sexual consent here because the issues presented on appeal do not hinge on whether J.W. actually consented to sexual contact with Reyes, but rather whether she had the capacity to consent considering her physical state.

to verbally consent and agree to sexual intercourse," because the statement disregarded that consent can be non-verbal.

[42] While statement A was error, it did not affect Reyes's substantial rights or prejudice him. Reyes's defense was not that J.W. verbally consented to sexual contact; his defense was essentially that consent was unnecessary because no sexual contact occurred between him and J.W. Therefore, the prosecutor's misstatement foreclosing other ways of expressing consent did not prejudice his defense or affect the outcome of the proceeding.

b. Statement P was not a misstatement of the law

[43] Reyes also contends that statement P, where the prosecutor stated that "[y]ou have to believe there was no sex for you to acquit Mr. Reyes," was a misstatement of the law. Tr. at 70 (Jury Trial, Jan. 22, 2019); Appellant's Br. at 30. Statement P, however, was an argument to the jury meant to explain Reyes's defense that no sexual contact of any kind occurred between him and J.W. Thus, it was not a misstatement of the law, but a fair characterization of Reyes's defense.

4. Statements alleged as improper inferences of the evidence

[44] The third set of comments concern nine statements by the prosecutor which Reyes describes as improper inferences based on the evidence, misstatements of the evidence, and/or improper comments of facts not supported in evidence. Before analyzing these statements, we recognize a prosecutor "must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence [presented]." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993); *see also Mendiola*, 2010 Guam 5 ¶ 15 (stating that prosecutor "has the freedom at trial to argue reasonable inferences from the evidence [presented]"). Arguing improper inferences from the evidence may amount to prosecutorial misconduct if the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Mendiola*, 2010 Guam 5 ¶ 12 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181

(1986)). Because the comments alleged as improper inferences were not objected to at trial, we review them for plain error. *Id.* ¶ 11.

[45] In his brief, Reyes contends that statements B, C, D, E, F, G, H, I, and L were all erroneous because they were based on no evidence in the record or were misstatements of the evidence meant to bolster the prosecution's theory that Reyes "planned" the sexual assault of J.W. *See* Appellant's Br. at 22-28. Based on our analysis below, we find none of these statements to be erroneous. The statements constituted permissible inferences and arguments that could be reasonably drawn from the evidence presented to the jury.

a. Statement B was a proper inference

[46] Reyes argues that statement B, where the prosecutor suggested that Reyes "had a plan" and "planned that event," were improper inferences. Appellant's Br. at 22. Because of the testimony at trial, the suggestion in statement B that Reyes had a plan was fair and reasonable. For example, Reyes testified that he and his friends had "planned" to go to Pia Marine in order to "drink prior to going to the club" and that he had given J.W. a drink. Tr. at 95, 99 (Jury Trial, Jan. 18, 2019). Bucoy also testified that upon arriving at J.W.'s home after leaving the "W," Reyes told her he would "take care of [J.W.]" Tr. at 78 (Jury Trial, Jan. 16, 2019). J.W.'s testimony of Reyes giving her a drink, the changes in her clothing, and the removal of a tampon she was using further lend credit to the prosecutor's theory and inference that Reyes intended to have sex with J.W. And while defense counsel may not agree with the prosecutor's theory and use of the word "plan," the statement offered was a reasonable interpretation of the evidence that the jury could accept or reject. Therefore, we find that statement B was not an improper inference.

b. Statements D and G were proper inferences

[47] Reyes alleges that statements D and G were additional comments meant to bolster the prosecutor's "unsupported" theory that Reyes carried out a plan to have sex with J.W. Appellant's

Br. at 24, 26. Reyes argues there is no evidence that he took off J.W.'s clothes, including her underwear, or that he removed the tampon she had used when she went to the "W." However, these acts can be reasonably inferred from the testimony of J.W. At trial, J.W. testified that she was wearing different clothes than what she wore to the "W" when she woke upthe next morning, and the clothes she had worn were on the floor. She also testified that when she awoke in bed with Reyes, she was not wearing the underwear or tampon she wore to the "W." As to the tampon, J.W. claimed that Reyes removed her tampon since it was not disposed of in the way she normally disposes of them. Based on these statements, it was proper and reasonable for the prosecutor to infer that Reyes took off J.W.'s clothes, including her underwear, and removed the tampon she was using, before having sex with her.

c. Statement I was a proper inference

[48] For the same reasons as statements D and G, statement I was a proper inference based on the evidence. Statement I, however, also included the inference that "[Reyes] locked the bedroom door . . . ." Tr. at 34 (Jury Trial, Jan. 22, 2019). The inference that Reyes locked the door to J.W.'s bedroom also is supported in the record. Baza, J.W.'s roommate, testified that when he woke up that morning, he left his room and saw that J.W.'s door was locked and that it is "usually never like that" because J.W. leaves the door "ajar." Tr. at 33 (Jury Trial, Jan. 17, 2019). Thus, it was not unreasonable for the prosecutor to suggest that Reyes locked the door before having sex with J.W.

d. Statement C was a proper inference

[49] Statement C concerns a comment by the prosecutor that Reyes was giving alcohol to everyone and that he was "in control of the alcohol" while at the "W." Tr. at 28 (Jury Trial, Jan. 22, 2019). The statement was a proper inference based on the evidence. Bucoy testified that Reyes was pouring drinks for everyone and that he had passed her a drink and told her to "catch up." Tr.

at 75 (Jury Trial, Jan. 16, 2019). Martinez testified that Reyes was mixing drinks. Reyes also admitted that he gave J.W. and other people a drink at the "W." Thus, it was reasonable for the prosecutor to suggest that Reyes had "control" over the alcohol that night.

e. Statement F was a proper inference

[50] Reyes contends that statement F was improper because it "attempted to further bolster [the prosecutor's] baseless theory that Reyes was carrying out a premeditated plan" to have sex with J.W. Appellant's Br. at 25. Statement F, however, was a proper argument to further articulate the prosecution's theory of Reyes's intent. In stating, "that's the reason why people use alcohol for these types of situations," the prosecutor was suggesting that Reyes may have been drinking with J.W. because he intended to have sex with her. Tr. at 29 (Jury Trial, Jan. 22, 2019). Immediately following statement F, the prosecutor stated: "the individual, the suspect would think that they'll be so drunk [referring to J.W.] they won't remember." *Id.* Because J.W. was "drunk" and had "blacked out," the prosecutor was making a fair argument to support their theory of the case. *See* Tr. at 69 (Jury Trial, Jan. 17, 2019); Tr. at 106 (Jury Trial, Jan. 18, 2019).

f. Statements E and H were proper inferences

[51] Statements E and H were also proper inferences because testimony established that J.W. was "drunk" and that when she had awoken, she felt Reyes's penis inside her vagina. *See* Tr. at 69-70 (Jury Trial, Jan. 17, 2019); Tr. at 106 (Jury Trial, Jan. 18, 2019). While there was no explicit testimony that Reyes "stopped [any sexual contact] and pretended to go sleep," such actions can be reasonably inferred by statements Reyes made to Alegre and J.W. that he did not "finish," or ejaculate, when they had sex. *See* Tr. at 12 (Jury Trial, Jan. 17, 2019); Tr. at 70 (Jury Trial, Jan. 18, 2019). J.W. also testified that when she woke up a second time, Reyes was lying beside her. Thus, it was not unreasonable for the prosecutor to infer that Reyes may have stopped the sexual

encounter after J.W. awoke the first time, and that Reyes slept or pretended to sleep to avoid being caught.

g. Statement L was a proper inference

[52] Statement L, where the prosecutor stated that J.W. visited GMH and that when an individual visits GMH, "you have to pay for ER bills," was also a proper inference. Tr. at 35 (Jury Trial, Jan. 22, 2019). J.W. testified that she went to GMH because she was insured there and that she was examined by a doctor. It can be reasonably inferred that J.W. incurred costs for this hospital visit. Furthermore, the statement was made by the prosecutor in response to Reyes's theory that J.W. was making up the allegations of sexual assault so she could continue living with her roommate rent free. *See* Tr. at 128 (Jury Trial, Jan. 18, 2019) (Reyes: "[J.W.] would tell me, '[Baza] doesn't even make me pay [for rent],'" "[J.W.], basically [] goes there rent free," "[J.W.] was happy, the fact that she didn't have to pay for any rent."); *id.* at 157 (Reyes stating that J.W.'s roommate was never at the apartment and suggesting that J.W. became emotional because he had slept over that night and her roommate was home). Therefore, with context, statement L was a proper inference and a fair argument in response to Reyes's reasoning of J.W.'s motives.

[53] We find statements B, C, D, E, F, G, H, I, and L as proper inferences based on the testimony and evidence presented to the jury. Each statement reasonably interpreted the evidence that the jury could accept or reject.

5. Statements alleged as generally inflammatory

[54] The last set of comments concern statements generally alleged to be inflammatory. Reyes argues that statement N's historical analogy to the historical figures of Caesar and Brutus was improper because it "inflame[d] the passions or prejudices of the jury" and "infringed on Reyes's right to a fair trial." Appellant's Br. at 29. In light of testimony that explained Reyes and J.W.'s close relationship, we find statement N to be proper under the circumstances.

[55] Generally, "[p]rosecutors may not make comments calculated to arouse the passions or the prejudices of the jury." *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994), *rev'd in part on other grounds*, 518 U.S. 81 (1996). During closing arguments, however, "a prosecutor may state matters not in evidence that are common knowledge" and may use "illustrations drawn from common experience, history, or literature" to argue its case. *People v. Cunningham*, 25 P.3d 519, 585 (Cal. 2001); *see also People v. Harrison*, 106 P.3d 895, 921 (Cal. 2005) (listing cases); *Gaede v. State*, 801 N.W.2d 707, 710 (N.D. 2011) (holding that certain literary allusions to the Bible were permissible to illustrate related concepts raised in trial). We have found no reversible error in a prosecutor's use of historical figures or figures of speech during closing arguments, when used appropriately. *See Moses*, 2007 Guam 5 ¶¶ 35-37 (finding no error in prosecutor's reference to God). Thus, a prosecutor is not restricted from using illustrations to "state its views regarding which reasonable inferences may or may not be drawn from the evidence." *Cunningham*, 25 P.3d at 585.

[56] In statement N, the prosecutor drew an analogy between the well-known historical story of the betrayal of the ruler Caesar by his friend Brutus and the betrayal J.W. felt from being sexually assaulted by Reyes. We find this historical analogy to be permissible as J.W. testified that she felt betrayed by Reyes, a person she considered a close friend. *See* Tr. at 78 (Jury Trial, Jan. 17, 2019) (Prosecutor: "How did waking up next to [Reyes], knowing what he did, how did that make you feel?" J.W.: "Betrayed."); Tr. at 77 (Jury Trial, Jan. 18, 2019) (Prosecutor: "What hurt more, the fact that you were sexually assaulted by [Reyes] or that he was friend for ten years and did this to you?" J.W.: "The second one."). Statement N was therefore neither erroneous nor improper. Though we find statement N to be permissible under the circumstances, we caution that historical references to matters outside the evidence risk going beyond the bounds of advocacy and may amount to prosecutorial misconduct when not used carefully.

6. Examination of Reyes regarding Bucoy's supposed testimony

[57] Separate from the improper comments alleged during closing arguments, Reyes argues that the prosecutor misstated the testimony of a witness, Erica Bucoy, as to whether Reyes helped J.W. change her clothes. Reyes argues that the misstatement "was an intentional, calculated effort by the prosecutor to give the jury an inaccurate impression" of the testimony. Appellant's Br. at 21. While we agree with Reyes that the prosecutor misstated Bucoy's testimony, the misstatements did not affect Reyes's substantial rights or the outcome of the case.

[58] During the direct examination of Bucoy, the prosecutor asked if Reyes had told her he changed J.W.'s clothes that night, to which she replied, "No." Tr. at 84 (Jury Trial, Jan. 16, 2019). However, during the cross-examination of Reyes, the prosecutor then asked Reyes: "Do you know why [Bucoy] would believe that [you helped J.W. change her clothes]?" Tr. at 136-137 (Jury Trial, Jan. 18, 2019). The prosecutor therefore misstated Bucoy's statement because she had instead testified that she and Reyes did not have an exchange to that effect. The misstatement of Bucoy's testimony, however, was inconsequential and did not affect Reyes's substantial rights because the jury was reminded by the prosecutor of their role as fact-finder. During closing arguments, the prosecutor stated:

> However, when you look at a witness' testimony, what I say -- if I said a witness said something, do you disagree with it? Your memory controls. [Defense counsel], if he says something that you guys disagree with a witness saying, your memory controls, okay. Your notes and your memory are what control the evidence in this case.

Tr. at 37 (Jury Trial, Jan. 22, 2019). In addition, the trial court and the prosecutor emphasized to the jury that arguments, statements, and questions made by counsels were not evidence. *See id.* at 74 (Prosecutor: "It's not what we say. What we say is not evidence . . . . What an attorney says in this case is not evidence."); RA, tab 52 at 27 (Jury Intrs.). Because of these cautionary instructions, the prosecutor's single misstatement of witness testimony did not affect Reyes's

substantial rights. *Cf. United States v. Hudson*, 432 F.2d 413, 414 (9th Cir. 1970) (per curiam) (holding a prosecutor's misstatement of testimony did not require reversal when defense counsel could reply to prosecution's alleged misrepresentation, and prosecutor reminded jury of their role as fact-finder and that statements and arguments of counsel were not evidence). The single misstatement of witness testimony also could not have affected the outcome of trial given other substantial evidence presented of Reyes's guilt.

7. Dangers associated with improper vouching

[59] While we find statements A, O, and R, and comments misstating witness testimony during Reyes's cross-examination do not rise to the level of prejudice, we caution the government to refrain from using personal pronouns in their closing or rebuttal arguments in order to avoid running afoul of the dangers associated with improper vouching. *See Guerrero*, 2017 Guam 4 ¶ 57 ("We do not condone the use of the pronoun 'I' in a prosecutor's closing statements, and it is not good practice for prosecutors to continually use that pronoun."). While prosecutors should have reasonable latitude in fashioning closing arguments, they must always be mindful of the jury's role in determining the credibility of witnesses. Therefore, prosecutors should refrain from the poor practice of using personal pronouns as it may have the unintended effect of interjecting the personal beliefs of the prosecutor, as to the truthfulness or veracity of witnesses, to the jury. *See Nersesian*, 824 F.2d at 1328; *see also United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996).

[60] We remind counsels of the unique evidentiary posture when trying cases involving allegations of criminal sexual conduct. Under 9 GCA § 25.40, a criminal sexual conduct victim's testimony need not be corroborated. This presents a scenario whereby a jury's verdict sometimes hinges almost entirely on witness credibility. As is the case here, where the victim describes allegations of criminal sexual conduct and the defendant denies that any sexual contact occurred, prosecutors must be especially careful to stay within the bounds of proper conduct and advocacy

in order to avoid interference with the role of the jury as the ultimate adjudicator over the credibility of witnesses. Statements by a prosecutor that vouch for the credibility of a witness, that draw improper inferences from the evidence presented, or that misstate law or facts pose real dangers to a defendant's right to a fair trial and should be avoided. Trial judges must be particularly attuned to these dangers and mitigate against them to ensure that such statements do not infect the trial with unfairness or hinder the jury's duty to assess the evidence impartially.

B. The Trial Court's Mistaken Oral Instruction Was Cured by the Written Jury Instruction

[61] Next, we address whether the trial court committed plain error when it instructed the jury on circumstantial evidence. Reyes argues the trial court erroneously instructed the jury how circumstantial evidence susceptible of two reasonable interpretations should be treated. As no objection to the jury instruction was made at trial, the court reviews the instruction for plain error. *Nathan*, 2018 Guam 13 ¶ 9.

[62] Before jury deliberations, the trial court orally instructed the jury as follows regarding the treatment of circumstantial evidence:

> If the circumstantial evidence as to any particular charge is susceptible to two reasonable interpretations, one of which points to the defendant's guilt, and the other to his innocence, you must adopt that interpretation which points to the defendant's guilt [sic], and reject that interpretation that points to his -- reject the interpretation that points to his guilt.

Tr. at 13 (Jury Trial, Jan. 23, 2019). The trial court also provided a written jury instruction as to circumstantial evidence, which reads:

> If the circumstantial evidence as to any particular charge is susceptible of two reasonable interpretations, one of which points to the Defendant's guilt, and the other to his innocence, you must adopt that interpretation which points to the Defendant's innocence, and reject that interpretation that points to his guilt.

RA, tab 52 at 24 (Jury Instrs.). Based on our review, the trial court misspoke when it gave the oral instruction. The court should have stated that, when considering circumstantial evidence

susceptible to two reasonable interpretations, the jury must adopt the interpretation that points to the defendant's "innocence"; instead, the trial court mistakenly stated "guilt." Tr. at 13 (Jury Trial, Jan. 23, 2019). Reyes contends this mistake amounted to plain error. We disagree.

[63] In *People v. Mills*, 226 P.3d 276 (Cal. 2010), the Supreme Court of California considered discrepancies between oral and written instructions. In considering three discrepancies between the oral and written instructions, the *Mills* court held there was no reversible error when the correctly worded instruction, in written form, was provided to the jury and when the jury was instructed that the final wording—written instructions—were to control in their deliberations. *Id.* at 312-13. The court reasoned that "[t]he risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke." *Id.*

[64] Similarly, our trial courts are not immune to the risk of discrepancies between written and oral jury instructions, particularly in cases where the instructions are lengthy. We hold that "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control."[8] *Id.*; *see also United States v. Ancheta*, 38 F.3d 1114, 1116-17 (9th Cir. 1994) (holding that district court's oral misstatement of jury instructions as to burden of proof did not amount to plain error because court provided jury with written instructions that properly stated the burden). As "juries are presumed to follow instructions," *People v. Callahan*, 2018 Guam 17 ¶ 33, the oral misstatement by the trial court

[8] Should a trial court provide instructions in written form, we recommend that it inform the jury that the jury will be given written instructions, that such instructions constitute the final wording of the court, and that the written instructions will control in their deliberations.

as to how to interpret circumstantial evidence was sufficiently cured by the written jury instructions.[9]

C. The Trial Court Was Not Required to Instruct the Jury as to Intoxication

[65] Next, we consider whether the trial court was required to *sua sponte* instruct the jury as to intoxication. Reyes contends that because he was charged with "intentionally" engaging in sexual intercourse and sexual contact with J.W., the trial court should have been required to *sua sponte* instruct the jury as to intoxication. We disagree. While Guam law is clear that evidence of intoxication is admissible to negate an element of an offense charged, *see* 9 GCA § 7.58(b) (2005), an instruction on intoxication was not required because such an instruction would have been incompatible with Reyes's defense.

[66] In *People v. Nathan*, we made clear that when evidence of a defendant's intoxication has been presented to the jury, an instruction on intoxication is not always required. 2018 Guam 13 ¶ 21. Reyes appears to make the same argument we considered in *Nathan* by stating that "when significant evidence of a defendant's intoxication has been presented to the jury . . . an intoxication instruction is required." Appellant's Br. at 39. We rejected this argument in *Nathan* and stated that "the mere fact a defendant may have been drinking prior to the commission of a crime does not establish intoxication" and does not always give rise to the level of requiring an instruction. 2018 Guam 13 ¶ 21 (citing *People v. Robinson*, 84 Cal. Rptr. 796, 798 (Ct. App. 1970)). An instruction would have been necessary if defense counsel was relying on intoxication as a defense.

[9] In response to *Mills*, Reyes argues that there is no indication in the trial record that the written instructions were ever provided to the jury during its deliberations. While this is true, there is also no evidence in the record to suggest that written jury instructions were not provided to the jury. Moreover, the fact that written jury instructions are part of the record on appeal suggests that the jury was provided with the written instructions.

Even if we were to believe Reyes's assertion that the written instructions were not provided to the jury, the single error in reciting the contested instruction was sufficiently neutralized by other oral instructions that properly stated the burden of proof, the definition of reasonable doubt, and the difference between direct and circumstantial evidence.

See Robinson, 84 Cal. Rptr. at 798 (holding that intoxication instruction would be warranted where evidence of intoxication raises factual issue as to defendant's specific intent); *People v. Ramirez*, 791 P.2d 965, 978 (Cal. 1990) (holding that trial court has duty to instruct on intoxication only "when the evidence warrants and the defense is not inconsistent with the defendant's theory of the case"); *Commonwealth v. Erdely*, 713 N.E.2d 965, 968 (Mass. 1999) (holding that voluntary intoxication instruction is not warranted when defendant claims he did not commit the crimes).

[67] Here, Reyes did not advance an intoxication defense. Reyes testified that he had neither sexual intercourse nor sexual contact with J.W.; he never argued that he did have sexual intercourse or contact with J.W. but was too intoxicated to form the requite criminal intent. *See* Tr. at 138 (Jury Trial, Jan. 18, 2019) (Reyes: "I believe I did not have sex with [J.W.]"); *id.* at 145 (Prosecutor: "But your testimony is still that you did not have sex with [J.W.] that night?" Reyes: "Yes"); *id.* at 152 (Prosecutor: "Is it possible that you two did have sex, but you just don't remember it?" Reyes: "No."); *id.* at 156 (Reyes: "I know nothing happened."). Reyes and his counsel further suggested that J.W. may have dreamed of the incident or fabricated the allegations so she could continue living with her roommate rent free. *See id.* at 128 (Reyes: "[J.W.] would tell me, "[Baza] doesn't even make me pay [for rent]," "[J.W.], basically[] goes there rent free," "[J.W.] was happy, the fact that she didn't have to pay for any rent."); *id.* at 157 (Reyes stating that J.W.'s roommate was never at the apartment and suggesting that J.W. became emotional because he had slept over that night and her roommate was home); *see also* Tr. at 17 (Jury Trial, Jan. 16, 2019) (defense counsel describing J.W story as "a dream, she doesn't know if it's reality"); Tr. at 71 (Jury Trial, Jan. 17, 2019) (Defense counsel: "Did you tell the police that at first you thought maybe you were dreaming?"); Tr. at 57 (Jury Trial, Jan. 18, 2019) (Defense counsel: "And you said, 'It's like a dream.'"). Thus, an intoxication instruction would have been incompatible with Reyes's defense that no sexual contact occurred.

[68] Moreover, in *Nathan*, we cited to *Commonwealth v. Brown*, 872 N.E.2d 711 (Mass. 2007), for the proposition that an instruction on intoxication would be necessary only if there was evidence of "debilitating intoxication" such that "intoxication impaired the defendant's ability to form any requisite intent." *Nathan*, 2018 Guam 13 ¶ 21 (citing *Brown*, 872 N.E.2d at 727-28). In *Brown*, the Supreme Judicial Court of Massachusetts held that the evidence did not warrant the provision of an intoxication instruction because no evidence was presented that any alcohol ingested by the defendant had any effect on his ability to form any requisite criminal intent. 872 N.E.2d at 727-28. Similarly, while Reyes claims there was "extensive evidence of [his] high level of intoxication" presented to the jury, an examination of the record and Reyes's testimony does not reveal that Reyes's alcohol consumption impaired his ability to form the requisite intent. Appellant's Br. at 39. Reyes recounted the events of that evening and following morning with specific detail: he testified to his memory of leaving the "W," walking J.W. up to her apartment and into her room, and falling asleep. In addition, when pressed by the prosecution on cross-examination if it was possible that he and J.W. did have sex but that he just did not remember it, Reyes stated "no," later stating, "I know nothing happened." Tr. at 152, 156 (Jury Trial, Jan. 18, 2019). That testimony supports the proposition that Reyes was not so intoxicated that he could not form the requisite intent for the crimes charged. For this reason, and because an instruction on intoxication would have been incompatible with Reyes's defense, the trial court did not have a duty to instruct the jury *sua sponte* as to intoxication.

D. The Record is not Developed for the Court to Determine if Trial Counsel was Ineffective in Failing to Request an Instruction on Intoxication

[69] Separate from the trial court's supposed failure to instruct the jury as to intoxication, Reyes contends that his trial counsel was ineffective in failing to request a jury instruction regarding intoxication. Because the record is not sufficiently complete to make a proper finding as to Reyes's

trial counsel's performance, we decline to reach the merits of Reyes's claim of ineffective assistance of counsel.

[70] To determine whether a defendant was deprived of the effective assistance of counsel, we employ the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the test, "a defendant must prove that: (1) trial counsel's performance was so deficient as to fall below the prevailing professional norms; and (2) the deficient performance so prejudiced the defendant as to deprive him of a fair trial." *Guerrero*, 2017 Guam 4 ¶ 59 (citing *Strickland*, 466 U.S. at 687, 694). As we have stated in previous opinions, ineffective assistance of counsel claims "are more appropriately addressed in a habeas corpus proceeding because it requires an evidentiary inquiry beyond the official record." *Id.* ¶ 60 (quoting *Meseral*, 2014 Guam 13 ¶ 13).

[71] Reyes contends that his trial counsel was ineffective when counsel failed to request a jury instruction on intoxication. Although we explained in the preceding section that the trial court was not required to give an intoxication instruction *sua sponte*, that would not have precluded Reyes's trial counsel from requesting such an instruction. However, to determine why Reyes's trial counsel failed to request the instruction would require an evidentiary inquiry beyond the official record. Therefore, we decline to reach the merits of Reyes's claim of ineffective assistance of counsel.

E. The Trial Court did not Abuse its Discretion in Allowing the Prosecutor to Question Reyes on Consent

[72] Finally, we address whether the trial court abused its discretion when it allowed certain questions by the prosecutor to Reyes on whether J.W. was capable of consent. On cross-examination, the prosecutor, over defense counsel's objections, asked Reyes if J.W. could have had consensual sex with anyone that night considering her intoxicated state. *See* Tr. at 138-139 (Jury Trial, Jan. 18, 2019) (Prosecutor: "[D]o you think -- if anybody had sex with [J.W.] that

night, would that have been consensual sex or was she too drunk to consent to sex?"). Reyes replied, "I believe that I did not have sex with her," and when pushed for a more direct answer, he admitted that J.W. was "probably not" capable of consenting that night. *Id.* Reyes alleges that the trial court abused its discretion in allowing the question because it called for improper speculation. He argues the error was highly prejudicial because his answer "was arguably an admission . . . that [J.W.] was incapable of consenting to sex . . . ." Appellant's Br. at 18. We disagree and find that the question posed by the prosecution was permissible under the circumstances.

[73] The indictment charged Reyes with intentionally engaging in sexual contact and intercourse with J.W. while she was "mentally incapacitated or physically helpless." RA, tab 9 at 1-2 (Indictment, Dec. 26, 2017). To establish that J.W. was "physically helpless," a term defined in the jury instructions, the prosecutor had to offer evidence to demonstrate that J.W. was "unconscious, asleep[,] or for any other reason is physically unable to communicate unwillingness to an act," i.e., sexual contact or intercourse. RA, tab 52 at 50 (Jury Instrs.) ("Physically Helpless Defined"); *see also* 9 GCA § 25.10(a)(6) (2005). Because the case hinged on this element and whether J.W. was too intoxicated to communicate a willingness to have sex, questions over her demeanor and whether she was "too drunk to consent" were proper. The prosecutor's questions of whether J.W. could have had consensual sex with any other person helped to establish if J.W. was in a state where she could not consent to any sexual contact with Reyes. Additionally, the prosecutor's questions did not call for Reyes to speculate as to J.W.'s physical state and ability to consent, but to give his personal observations of J.W.'s demeanor and assessment if she was "too drunk to consent to sex." Tr. at 138-139 (Jury Trial, Jan. 18, 2019). For these reasons, the trial court did not abuse its discretion in allowing the prosecutor to question Reyes on consent under the circumstances.

V. CONCLUSION

[74] We find statements A, O, and R, as well as the prosecutor's question to Reyes as to Bucoy's testimony, to be error. However, these errors did not affect Reyes's substantial rights, nor did they infect the underlying trial with unfairness to make the resulting conviction a denial of due process. We additionally find that the cumulative effect of these errors was not prejudicial and did not rise to the level that would have changed the outcome of the proceedings or undermined the fundamental fairness of the trial.

[75] We find that the trial court's mistake in giving oral jury instructions was cured by the written jury instructions, that the trial court did not have to instruct the jury as to intoxication, and that the trial court did not abuse its discretion in allowing the prosecutor to question Reyes on consent.

[76] We **AFFIRM** the judgment of conviction.

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
F. PHILIP CARBULLIDO
Chief Justice