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SUPREME COURT
OF GUAM

# IN THE SUPREME COURT OF GUAM

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

**v.**

**VINCENT CHARGUALAF PEREZ,**
Defendant-Appellant.

Supreme Court Case No.: CRA14-004
Superior Court Case No.: CF0511-13

## OPINION

### Cite as: 2015 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on October 13, 2014
Hagåtña, Guam

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

**MARAMAN, J.:**

**[1]** Defendant-Appellant Vincent Chargualaf Perez appeals from a final judgment convicting him of five counts of Second Degree Criminal Sexual Conduct (as a 1st Degree Felony). Perez argues the trial court erred when: (1) admitting hearsay statements made by the victim's mother regarding the victim's report of sexual abuse; (2) admitting the victim's testimony about counseling sessions over a relevancy objection; and (3) sustaining the People's "leading question" objection when Perez asked the defense witness whether she had seen Perez inappropriately touch the victim. Perez contends the cumulative effect of the trial court's evidentiary errors was prejudicial and effectively denied him a fair trial.

**[2]** We hold that the trial court abused its discretion in admitting the hearsay statement made by the victim's mother, but that such error was harmless. We also hold that the victim's testimony relating to counseling services was relevant. Further, the trial court properly exercised control over the mode of interrogating the defense witnesses. Accordingly, the trial court's judgment is affirmed.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**[3]** Perez was indicted for one count of First Degree Criminal Sexual Conduct (As a 1st Degree Felony), five counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony), one Count of Terrorizing (As a 3rd Degree Felony), and three Counts of Child Abuse (As a Misdemeanor). The Child Abuse charges were dismissed.

**[4]** The criminal sexual conduct ("CSC") charges stem from allegations that Perez performed sexual acts upon a minor victim, K.D.S., between the dates of January 13, 2011 through June 30,

2012. K.D.S. was born in 1997, and is her mother's eldest daughter. The third charge concerns Perez's threats to kill the victim's mother.

[5] The mother became romantically involved with Perez, her coworker at the time, and he moved into her apartment in Anigua in September of 2008. Perez, the mother, K.D.S., and K.D.S.'s young biological siblings (H., S., and C.) lived at the Anigua apartment together.[1] In addition, Perez had four children, D.P., S.P., R.I., and N.I.[2] In May 2010, the family moved out of the Anigua apartment and into another apartment in Mangilao. D.P. lived for two to three months at the Anigua residence and two to three months at the Mangilao residence, but not for the entire time her father stayed at either residence. S.P., R.I., and N.I. would go back and forth between living with their father and mother.

**A. The Assaults**

[6] The Anigua residence had two bedrooms, one belonging to the victim's mother and Perez, and another used by the children. While the family lived at the Anigua apartments, K.D.S. testified her mother would work from around 7:00 or 8:00 in the morning until late at night.[3] After school, K.D.S. would either return to the apartment and remain inside, or go to her grandmother's house while the younger children played outside. K.D.S. also testified that Perez was home when she got off school, and he began touching her breasts and vaginal area when the other children were not present. She estimated that Perez assaulted her 25 times every month in various areas in the apartment while the other children were outside and stated Perez instructed her to keep the touchings a secret.

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[1] H. was thirteen, S. was ten, and C. was seven at the time of trial.

[2] D.P. was twenty years old, R.I. was seventeen, and S.P. was fifteen at the time of trial.

[3] Perez's daughter, on the other hand, testified her father would not arrive home until 4:00 or 5:00, and that the victim's mother had a regular work schedule from 8:00 to 5:00.

[7] K.D.S. indicated the touching continued when the family moved to a two-bedroom residence in Mangilao. She explained these touchings occurred frequently throughout the house while her mother was at work and the children were outside. K.D.S. further testified that on one occasion Perez unsuccessfully attempted to insert his penis into her vagina.

[8] The mother testified that in November 2010, she moved from the Mangilao residence into her parents' house due to financial instability and a desire to move away from Perez. K.D.S. attested, however, that the touchings continued when her mother brought her and her siblings to Perez's apartment at Tamuning Lodge. According to her testimony, Perez would touch her when the children were in bed watching television, or when her mother was outside smoking and talking to the neighbors. K.D.S. also testified Perez inserted his finger into her vagina at all three residences.

[9] K.D.S.'s mother ended the relationship with Perez in August of 2013 following emotionally abusive texts sent by him. Perez continued to send her frequent voice mail messages, on some days professing his love, and on other days his hate for her. This continued until the messages escalated. On September 17, 2013, Perez threatened to kill K.D.S.'s mother and her children by way of a vehicular head-on collision. This incident, coupled with an episode in which she observed Perez driving by and parking near her house, prompted her to seek a restraining order.

[10] Once K.D.S. learned that her mother was reporting Perez for the threats, she drove to the Agana Precinct to disclose the sexual assaults. The first person K.D.S. informed of the sexual assault was her aunt. K.D.S. then told her mother about the assaults before police officers took K.D.S. aside for questioning.

**B. The Trial**

[11] At trial, the People called five witnesses: the victim's mother, K.D.S., the victim's aunt, and the two officers who interviewed K.D.S. when she made her sexual assault complaint. The People's first witness was K.D.S.'s mother, who was questioned about how she came to learn of the sexual assaults while at Agana Precinct:

A: I was sitting there, then all of a sudden my sister calls the phone, I see her number, I answered it. And she says, "*Come out here right now, it's important.*"

Q: Okay. And what did you do?

A: I got off my seat, out of the room and went outside, I saw my daughter, [K.D.S.].

Q: How did you feel?

A: I was wondering what's going on.

Q: Okay.

A: She hugged - - she came up to me, hugged me, and she said "*Mom.*" She started crying, and I said, "*What, what's wrong?*" "*He touched me.*" "*Touched you?*"

MR. MILLER: Objection, Your Honor.

Transcripts ("Tr.") at 3, 32 (Jury Trial, Day 2, Nov. 13, 2013). Perez objected on the ground that the testimony was inadmissible hearsay. In response, the People argued the statement was an excited utterance. The court overruled Perez's objection finding that the statement fell within the present sense impression exception to hearsay.

[12] K.D.S. took the stand following her mother as the People's second witness. K.D.S. testified about the details of the assaults as well as the circumstances under which she reported the sexual assault at Agana Precinct on September 17, 2013.

**[13]** The People asked K.D.S. if she saw anyone to discuss her feelings following her report to the police:

| | |
|---|---|
| Q: | . . . Since you went to the police and told what had been happening, have you seen anybody to talk about your feelings or how this has affected you? |
| MR. MILLER: | Objection, Your Honor . . . . |
| THE COURT: | Your objection? |
| MR. MILLER: | Relevancy, Your Honor. |
| MS. VASILIADES: | It's relevant because it goes to the emotional and psychological injury. |
| THE COURT: | Overruled. |
| MR. MILLER: | On the (indiscernible) crime, Your Honor. |
| THE COURT: | I'm sorry; I'm not going to grant your objection. Go ahead. |

*Id.* at 92-93. K.D.S. went on to testify that she met with a victim advocate from the Guam Police Department and sought services at Healing Hearts. The People then asked K.D.S. if she went anywhere other than Healing Hearts and Perez again objected:

| | |
|---|---|
| Q: | Okay. After that have you gone anywhere else? |
| A: | Yes. |
| Q: | Okay. |
| A: | I - - |
| MR. MILLER: | Objection, Your Honor. |
| | . . . . |
| THE COURT: | Your objection? |
| MR. MILLER: | Relevancy. Where she travels after the alleged crime is irrelevant. |
| THE COURT: | Okay. Ms. Vasiliades? |

MS. VASILIADES: It's. . .It's not actually where she's travelling, she was going to say anywhere else in a sense that where else did she get counseling.

. . . .

MR. MILLER: Everything she did after the crime is not relevant to proving the elements to the crime.

MS. VASILIADES: It is because it goes to psychological and emotional injury that she's been in counseling; it's the same thing as having a physical injury.

THE COURT: (Indiscernible) I'll overrule your objection.

*Id.* at 94. Following the overruled objection, K.D.S. testified she sought counseling services from Doris Tolentino at the GCIC on one occasion.

**[14]** After an unsuccessful motion for acquittal, the defense called three witnesses: Perez's eldest daughter D.P., his younger daughter R.I., and his son S.P. During opening statements, Perez suggested that K.D.S. fabricated claims because she didn't like Perez and also because she was jealous of the attention that her mother was getting at the police station. Another defense tendered by Perez was that it was unlikely K.D.S. was abused 25 days out of a given month without the numerous inhabitants noticing. K.D.S. had testified the assaults occurred during a period where as many as nine people were living in the same apartment. During the defense's case-in-chief, trial counsel tried to ask Perez's daughter D.P. whether she had ever witnessed any sexual assault by her father against K.D.S. while she stayed at the Anigua and Mangilao apartments:

Q: During the two months that you were living at the Anigua apartment, how . . . how much time did you spend, actually, in the apartment?

A: I was there almost every day, depending if I had appointments or not. That was the only time I would leave.

| | |
|---|---|
| Q: | During the time that you stayed there, did you observe your father inappropriate [sic] touch - - |
| MS. TENORIO: | Objection, Your Honor. |
| | . . . . |
| THE COURT: | The objection? |
| MS. TENORIO: | Leading. |
| THE COURT: | Leading? Any . . . any arguments to that? |
| MR. MILLER: | I - - It's a yes or no question. Did you see any - - |
| THE COURT: | Thank you. The court's going to sustain the objection. |

Tr. at 20 (Jury Trial, Day 3, Nov. 14, 2013).

**[15]** Perez again attempted to ask the witness whether she had seen her father touch K.D.S.:

| | |
|---|---|
| Q: | Okay.<br>Did you see your father touch [K.D.S.] during the time that you were there? |
| MS. TENORIO: | Objection. |
| THE COURT: | Come forward, please, Counsel? |
| | . . . . |
| THE COURT: | Your objection? |
| MS. TENORIO: | It's still leading. |
| THE COURT: | Mr. Miller, it's leading. And you tried that question before. Stop it. |

*Id.* at 23. Perez next questioned his seventeen year old daughter, R.I., who lived with Perez and K.D.S. at the Anigua and Mangilao residences. R.I. testified as to the following:

> Q: . . . Can you describe the relationship between [K.D.S.] and your father?
>
> A: (Pause) I know she did - - she didn't like my dad, because I see that she doesn't respect him. . . .

*Id.* at 43. Additionally, R.I. also offered the following testimony:

> Q: . . . Did [K.D.S.] ever complain to you about your father's behavior?
>
> A: No.

*Id.* at 45. The final defense witness was Perez's fifteen-year-old son, S.P., who resided with K.D.S. and Perez at the Anigua and Mangilao residences. S.P. testified as follows:

> Q: . . . did you observe any behaviors between your father and [K.D.S.] that you thought were unusual?
>
> A: No.
>
> Q: Did [K.D.S.] ever talk to you about your father?
>
> A: No.

*Id.* at 55-56.

**[16]** The jury returned a guilty verdict on the five counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony) and Terrorizing (As a Third Degree Felony), but found Perez not guilty of First Degree Criminal Sexual Conduct (As a 1st Degree Felony). Perez was sentenced to fifteen years of incarceration on all five counts of Second Degree Criminal Sexual Conduct, with the sentences to run concurrently. Perez was also sentenced to three years of incarceration for the Terrorizing conviction, to run consecutively.

**[17]** Judgment was entered, and Perez timely filed his Notice of Appeal.

## II. JURISDICTION

**[18]** This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. §§ 1424-1(a)(2) (Westlaw through Pub. L. 113-296 (2014)); 7 GCA §§ 3105, 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

## III. STANDARD OF REVIEW

[19] A trial court's evidentiary decisions are reviewed under an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997);[4] *see also People v. Roten*, 2012 Guam 3 ¶ 13 ("[A] trial court's decision concerning the admission of evidence over a hearsay objection is reviewed under an abuse of discretion standard."); *People v. Jesus*, 2009 Guam 2 ¶ 18. We have "defined an abuse of discretion as that 'exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'" *People v. Evaristo*, 1999 Guam 22 ¶ 6 (quoting *People v. Quinata*, 1999 Guam 6 ¶ 17).

[20] "[W]here 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." *Roten*, 2012 Guam 3 ¶ 41; *see also United States v. Williams*, 133 F.3d 1048, 1051 (7th Cir. 1998) (applying similar standards under the Federal Rules of Evidence.); *Jesus*, 2009 Guam 2 ¶¶ 53-55. A trial court's evidentiary rulings should not be reversed "absent prejudice affecting the verdict." *People v. Fisher*, 2001 Guam 2 ¶ 7.

## IV. ANALYSIS

### A. Whether the Trial Court Erroneously Admitted the Mother's Testimony Regarding K.D.S.'s Out-of-Court Report of Sexual Assault.

[21] The parties in this case dispute whether the mother's testimony reiterating K.D.S.'s statement at the Agana Precinct that Perez touched her was hearsay. Perez argues the statement was hearsay and the trial court erroneously admitted the testimony over his hearsay objection. Appellant's Br. at 9 (June 30, 2014). The People counter that the mother's testimony was nonhearsay because it was merely "background information about how the police became

[4] "The Guam Rules of Evidence are essentially identical to its like-numbered counterparts in the Federal Rules of Evidence. Therefore, interpretations of the Federal Rules of Evidence from other jurisdictions are persuasive authority." *People v. Jesus*, 2009 Guam 2 ¶ 32 n.8.

involved" not offered for the truth of the matter asserted. Appellee's Br. at 25 (July 22, 2014). The People's nonhearsay argument is brought up for the first time on appeal.[5] *See* Tr. at 32 (Jury Trial, Day 2); Appellant's Reply Br. at 1 (Aug. 6, 2014). At trial, the People argued the statement was an excited utterance. Tr. at 32 (Jury Trial, Day 2). The court overruled Perez's objection and found the statement fell within the present sense impression hearsay exception. *Id.* at 33.

**[22]** Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Guam R. Evid. ("GRE") 801(c). Generally, a hearsay statement is inadmissible at trial unless it falls into an exception to the hearsay rule. *See* GRE 802. Exceptions that are "not excluded by the hearsay rule, even though the declarant is available as a witness," are enumerated in Rule 803. *See* GRE 803.

**[23]** Before turning to the hearsay exceptions argued by the People and sustained by the trial court, we must first determine whether the phrase "he touched me," as stated by K.D.S.'s mother, is a hearsay statement, or whether it is permissible nonhearsay. *See* Tr. at 32 (Jury Trial, Day 2).

**1. The mother's testimony was hearsay.**

**[24]** There are limited circumstances when a witness's testimony regarding a sexual assault victim's disclosure of rape can be offered as background rather than for the truth of the matter asserted. *See Roten*, 2012 Guam 3 ¶ 19. For example, testimony regarding the disclosure of a sexual assault report is permissible if it will assist the jury in understanding the circumstances

[5] An argument may be addressed for the first time on appeal if it clarifies a significant issue of law. *See Taitano v. Lujan*, 2005 Guam 26 ¶ 15. Whether the mother's statement was hearsay or nonhearsay is a significant issue of law in this case and will be considered.

giving rise to the disclosure. *See id.* However, the substance and specific content of the conversation cannot be disclosed because such testimony would be hearsay. *Id.*

[25] In *Roten*, we held that the trial court abused its discretion in admitting an officer's testimony reiterating the victim's statements because it was impermissible hearsay, but found the error harmless because ample evidence on the record supported the guilty verdict. *Id.* ¶¶ 24, 47, 50. Our holding in *Roten* resembles the California approach to testimony related to victim reports of sexual assault:

> [U]nder principles generally applicable to the determination of evidentiary relevance and admissibility, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred.

*People v. Brown*, 883 P.2d 949, 950 (Cal. 1994) (emphasis omitted). The California court cautioned, however, that "only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule." *Id.* at 957-58.

[26] In this case, the mother testified at trial about K.D.S.'s complaint of sexual assault, stating: "[K.D.S.] hugged - - she came up to me, hugged me, and she said '*Mom.*' She started crying, and I said, '*What, what's wrong?*' '*He touched me.*' '*Touched you?*'" Tr. at 32 (Jury Trial, Day 2).

[27] The People stress that K.D.S.'s mother's testimony was nonhearsay offered as background information to explain how the police became involved in the sexual abuse investigation and probative to the jury to understand why K.D.S. went to the police station.

Appellee's Br. at 25. Perez counters that the testimony was offered for the truth of the matter asserted because "[t]he Government's entire case with respect to the Second Degree Criminal Sexual Conduct charges rested on whether Perez touched the victim." Reply Br. at 1-2.

**[28]** Testimony about K.D.S.'s conduct, specifically that she was crying and hugged her mother, qualifies as permissible nonhearsay testimony because it was made in reference to observable behavior. However, the statement "*he touched me*" is inadmissible hearsay offered for the truth of the matter asserted. The Second Degree Criminal Sexual Conduct charges are dependent upon whether Perez inappropriately touched K.D.S., and K.D.S.'s statement to her mother was offered to prove that Perez did in fact touch her. Since the statement is hearsay, it must fall within a hearsay exception to be admissible.

**2. The mother's statement does not fall within a hearsay exception.**

**[29]** At trial, the People argued that the mother's hearsay testimony that Perez touched K.D.S. was admissible as an excited utterance exception to the hearsay rule, but the trial court admitted the testimony, over Perez's hearsay objection, under the present sense impression exception to hearsay. Tr. at 32 (Jury Trial, Day 2). The "present sense impression" exception to the hearsay rule permits statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." GRE 803(1). Present sense impressions "are considered to be trustworthy because the contemporaneity of the event and its description limits the possibility for intentional deception or failure of memory." *United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002).

**[30]** The "excited utterance" exception, on the other hand, provides an exception to the hearsay rule for statements "relating to a startling event or condition made while the declarant

was under the stress of excitement caused by the event or condition." GRE 803(2).[6] This exception "stems from a belief that a statement made during a moment of excitement and without the opportunity to reflect on the consequences of one's statement has greater indicia of truth and reliability than a similar statement offered in the relative calm of the courtroom." *Jesus*, 2009 Guam 2 ¶ 35. For a hearsay statement to be admitted under Guam's excited utterance exception, we require: "1) an event or condition startling enough to cause nervous excitement; 2) the statement relates to the startling event; and 3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent." *Id.* ¶ 36.

**[31]** The mother's testimony did not fall within the present sense impression exception to the hearsay rule, although the court admitted the testimony under that exception. The contemporaneous requirement is not satisfied because the People concede the statement made by K.D.S. at the Agana Precinct was made "at a minimum a month after [the mother] . . . ended her relationship with Perez in August of 2013, and at least one year after the last charged sexual assault on K.D.S." Appellee's Br. at 24. The guarantor of reliability associated with the present sense impression exception is absent due to the delay.

**[32]** Likewise, the statement does not fall within the excited utterance exception because K.D.S. did not make the statement under the "stress of excitement" caused by the sexual assaults. *See* GRE 803(2). Although a sexual assault is a condition that would cause nervous excitement, and the statement "he touched me" relates to the startling event, the third requirement is not satisfied. Too much time elapsed between the time of the alleged assault and K.D.S.'s complaint

[6] At oral argument, the People were asked if they were abandoning the "excited utterance" argument, but they maintained their position that the exception is applicable. Oral Argument at 10:32:22-10:34:43 (Oct. 13, 2014).

at the Agana Precinct for K.D.S. to be in a continued state of shock. *See Jesus*, 2009 Guam 2 ¶¶ 51-52 (statements made by the victim the day after she was physically able to make a statement to police were not made under stress of excitement).

**[33]** "[A]dmission of evidence over a hearsay objection is reviewed under an abuse of discretion standard." *Roten*, 2012 Guam 3 ¶ 13. Consequently, because the statement did not satisfy the requirements for the present sense impression exception to hearsay, the trial court abused its discretion in admitting the statement under that exception. Whether this abuse of discretion was harmless will be discussed below.

**3. Admission of the mother's hearsay statement was harmless error.**

**[34]** In Guam, when the trial court abuses its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *See Jesus*, 2009 Guam 2 ¶¶ 53-55. "Error is harmless unless it results in actual prejudice or 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Williams*, 133 F.3d at 1053 (citing *United States v. Beasley*, 809 F.2d 1273, 1280 (7th Cir. 1987)).

**[35]** The harmless error inquiry analyzes the following factors: "(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." *Roten*, 2012 Guam 3 ¶ 41 (citing *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005)). Because, as discussed further below, the trial court only abused its discretion with respect to one evidentiary error in this case, a harmless error analysis rather than cumulative error analysis is appropriate.[7]

[7] Cumulative error analysis considers "all errors and instances of prosecutorial misconduct which were preserved for appeal with a proper objection or which were plain error . . . . The cumulative impact of several errors might therefore be sufficient to persuade us to grant review when the impact of each would not."

**[36]** Although the trial court erred in admitting the mother's hearsay statement over Perez's hearsay objections, the error was harmless. Beginning with the first factor, the prosecution's case was strong enough to support a conviction exclusive of the mother's hearsay statement. For example, K.D.S. gave extensive testimony regarding the details of the sexual assaults. Tr. at 82-131 (Jury Trial, Day 2). In Guam, the testimony of a sexual assault victim does not need to be corroborated, and a victim's testimony alone can support a criminal sexual conduct conviction. *See People v. Campbell*, 2006 Guam 14 ¶ 40. Moreover, the mother testified that K.D.S. expressed interest in moving in with her father, though he refused, and K.D.S. even went to live with her grandparents for a few weeks. Tr. at 7-8 (Jury Trial, Day 2). Additionally, all family witnesses testified about the opportunity Perez had to be alone with K.D.S. *Id.* at 5, 80-82; Tr. at 29, 46, 64, 66 (Jury Trial, Day 3). All three defense witnesses testified that K.D.S. disliked Perez. Tr. at 21, 43, 55 (Jury Trial, Day 3). Evidence supporting the guilty verdict other than the hearsay statement was presented.

**[37]** As to the second factor, the People did not dwell on the improperly admitted statements. Tr. at 32-33 (Jury Trial, Day 2). The third factor, which assesses the importance of the wrongly admitted evidence, further compels our conclusion. At trial, K.D.S. testified Perez touched her breasts and vaginal area as often as 25 times every month. *Id.* at 80-83. The phrase "he touched me" provides little specific detail regarding the sexual assaults compared to K.D.S.'s direct testimony, and was comparatively inconsequential to the prosecution's case.

**[38]** Finally, the fourth factor weighs against Perez because the testimony was cumulative of other properly admitted evidence; specifically that K.D.S. testified at length about the details and

*People v. Moses*, 2007 Guam 5 ¶ 57 (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 n.21 (internal quotation marks omitted)).

frequency of the sexual assaults. *Id.* at 82-131. Because all four factors weigh in favor of the People, we hold the admission of the mother's hearsay statement was harmless error.

**B. Whether the Trial Court Erred by Admitting Testimony about K.D.S.'s Counseling Services Over Perez's Relevancy Objection.**

[39] Perez contends K.D.S.'s testimony related to seeking counseling was irrelevant and should have been excluded. Appellant's Br. at 11. In his view, her testimony about seeking counseling services a year after the charged sexual assaults was irrelevant under GRE 401. *Id.* at 11-12. Conversely, the People argue this testimony was relevant and probative because Perez told the jury in his opening statement that: (1) there would be little corroborating details to K.D.S.'s testimony; (2) her testimony should be viewed with suspicion; and (3) that she made up the allegations due to jealousy and attention-seeking behavior. Tr. at 10, 14-15, 17 (Jury Trial, Day 1, Nov. 12, 2013); Appellee's Br. at 27-28.

[40] The threshold for relevancy includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." GRE 401. This threshold was intended to be minimally stringent. *See United States v. Aranda-Diaz*, 31 F. Supp. 3d 1285, 1289 (D.N.M. 2014); *see also* Fed. R. Evid. 401 advisory committee's note. Courts have held that testimony about mental trauma following sexual assault is relevant to prove the elements of criminal sexual conduct. *State v. Alexander*, 401 S.E.2d 146, 148-49 (S.C. 1991). This testimony is pertinent because evidence of personality changes "tend[] to establish or make more or less probable that the offense occurred." 65 Am. Jur. 2d *Rape* § 52; *see also Parker v. State*, 846 A.2d 485, 496 (Md. Ct. Spec. App. 2004) (evidence of a victim's conduct following a sexual assault is

permitted to "demonstrate that the attack did occur or to show lack of consent."); *Alexander*, 401 S.E.2d. at 148.

**[41]** For example, in *State v. Cummings*, the court disagreed with the defendant's position that the adolescent victim's testimony that he was hospitalized and attempted suicide following sexual assault by his Boy Scout leader was immaterial. 716 P.2d 45, 47-48 (Ariz. Ct. App. 1985). The court held the testimony was material because it supported that the alleged incident took place because the defendant denied the sexual conduct. *Id.* at 48. In this case, K.D.S.'s testimony that she sought counseling services was relevant under GRE 401 because like the defendant in *Cummings*, Perez denied that the assaults occurred. Because K.D.S.'s testimony was relevant, the necessary inquiry is whether the testimony was unduly prejudicial under GRE 403.

**[42]** 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." GRE 403. In this case, however, Perez failed to request a GRE 403 "balancing test" after the trial court ruled that the evidence was relevant. Tr. at 92-94 (Jury Trial, Day 2); Appellee's Br. at 29. Moreover, he has not argued on appeal that the evidence was unduly prejudicial. Because Perez did not make this argument at the trial or appellate level, it will not be considered. *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 7 n.3 ("'[W]e review only issues which are argued specifically and distinctly in a party's opening brief.'" (quoting *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994))); *see also* Guam R. App. P. 13(a)(9)(A) ("[A]rgument . . . must contain . . . appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies. . . ."). Thus, K.D.S.'s

testimony about counseling services was relevant, and the trial court did not abuse its discretion on this issue.

**C. Whether the Trial Court Exercised Reasonable Control Over Perez's Counsel's Questions to Defense Witnesses.**

**[43]** Perez contends the trial court hindered his defense by erroneously limiting his counsel's questions to his daughter D.P. Appellant's Br. at 12. The People respond that the trial court properly used its discretion to control the questioning of witnesses. Appellee's Br. at 31.

**[44]** The People are correct that under GRE 611, the trial judge is permitted to "exercise reasonable control over the mode and order of interrogating witnesses," and the use of leading questions is limited on direct examination:

> (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

GRE 611(a), (c). Moreover, "'[t]he conduct of a fair trial is vested in the sound discretion of the trial judge.'" *United States v. Clinical Leasing Serv., Inc.*, 982 F.2d 900, 905 (5th Cir. 1992) (quoting *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382, 391 (5th Cir. 1985)). This discretion permits the judge to limit leading questions, and such a ruling should not be disturbed on appeal. *See United States v. Lewis*, 406 F.2d 486, 493 (7th Cir. 1969); *see also City-Wide Trucking Corp. v. Ford*, 306 F.2d 805, 807 (D.C. Cir. 1962) ("Trial judges have been and must be given a wide discretion [with respect to permitting leading questions].").

**[45]** Although the form of a question can be objectionable, "'the mere form of a question does not indicate whether it is leading.'" *People v. Williams*, 941 P.2d 752, 774 (Cal. 1997) (quoting 1 McCormick on Evidence § 6, at 17-18 (4th ed. 1992)). The main consideration is whether "'an

ordinary man would get the impression that the questioner desired one answer rather than another.'" *Id.* (citation omitted).

**[46]** Defense counsel's first excluded question, "During the time that you stayed there, did you observe your father inappropriate [sic] touch – –," was potentially leading. *See* Tr. at 20 (Jury Trial, Day 3). An ordinary person could get the impression that Perez's counsel desired a "no" rather than "yes" answer from D.P. because the term "inappropriate" arguably suggested the answer. Thus, the trial court exercised appropriate discretion in limiting this question. The second question, "Did you see your father touch [K.D.S.] during the time that you were there?", did not necessarily suggest the answer. *Id.* at 23. However, limiting this second question did not materially hinder the substance of D.P.'s testimony.

**[47]** The People analogize this case to *Lewis* where the court held there was no undue limitation on defense counsel's ability to "make [their] point" on direct examination. 406 F.2d at 493. Perez was able to "make the point" of his direct examination, including that D.P. lived at the residence and had not observed any unusual relationship between Perez and K.D.S. Tr. at 22 (Jury Trial, Day 3). Perez's use of open-ended questions on direct examination made little substantive difference because D.P. testified at length about the number of individuals in the household, the lack of opportunity for Perez to sexually assault K.D.S., and K.D.S.'s distaste for Perez. Tr. at 20, 22-23 (Jury Trial, Day 3).[8] When asked if she saw "anything unusual take

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[8] The following testimony of D.P. was permitted:

Q: . . . During the time that you stayed there, did you see anything unusual take place between your father and [K.D.S.]?

A: They never really got along.

Q: Okay.

A: That was about it. My dad would always try to avoid K.D.S., like it's the best thing to do for him, because - -

place between [her] father and K.D.S.," D.P. was permitted to respond that the two did not get along and argued over chores. *Id.* at 21-22. Two other children, R.I. and S.P., who resided with Perez and K.D.S. at the time of the alleged sexual assaults were also permitted to testify about their observations regarding the relationship between Perez and K.D.S. as well as the daily occurrences of the household. *Id.* at 40-41, 44, 55-56. Thus, limiting defense counsel's questions to D.P. was not an abuse of discretion because it was reasonable control over defense counsel's questioning of the witness, and Perez was permitted to "make the point" of his direct examination.

## V. CONCLUSION

**[48]** For the reasons stated above, we hold that although the trial court abused its discretion in admitting the hearsay statement made by K.D.S.'s mother, that error was harmless. Moreover, the trial court correctly admitted K.D.S.'s relevant testimony relating to counseling services, and the trial court properly controlled the mode of interrogating the defense witnesses. As only one evidentiary error was made by the trial court, a harmless error rather than cumulative error analysis is appropriate. Accordingly, the trial court's judgment is **AFFIRMED.**

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Chief Justice

Tr. at 22 (Jury Trial, Day 3). D.P. went on to testify that K.D.S. and Perez would "butt heads" over chores, that K.D.S. "never really liked [D.P.'s] dad," and that K.D.S. would try to cause trouble with Perez. *Id.* at 22-23.