IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ARNOLD BLANCO KITANO,
Defendant-Appellant.

OPINION

Cite as: 2011 Guam 11

Supreme Court Case No.: CRA09-011
Superior Court Case No.: CF0499-08

Appeal from the Superior Court of Guam
Argued and submitted on September 10, 2010
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Arnold Blanco Kitano appeals from a final judgment convicting him of one count of First Degree Criminal Sexual Conduct and one count of Second Degree Criminal Sexual Conduct (both First Degree Felonies). Kitano argues that the judgment should be vacated and the case remanded for a new trial because the trial court erred in rulings related to the government's untimely disclosure of possible exculpatory material and failure to preserve certain evidence, and because the trial court denied him the right to testify in his own defense.

[2] For the reasons set forth below, we affirm Kitano's convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Kitano was indicted by the grand jury for one count of First Degree Criminal Sexual Conduct (As a 1st Degree Felony) ("First Degree CSC") and one count of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony) ("Second Degree CSC").

[4] The charges against Kitano stemmed from an alleged attack on C.L.[2] during the early morning hours of October 13, 2008. C.L. was at her place of business, a massage parlor in Tumon, on the night of the attack. A male individual entered the premises and asked for permission to use the restroom. Soon after, he cornered C.L. and forced her to engage in certain sexual acts. C.L. was eventually able to escape from her attacker and flag down a passing motorist for help. In the meantime, C.L.'s attacker fled the scene.

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[1] On January 18, 2011, Justice F. Philip Carbullido was sworn in as Chief Justice of the Supreme Court of Guam. The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

[2] Pursuant to Guam Rules of Appellate Procedure Rule 3(d)(3)(B), we shall refer to the victim by initials only. *See* Guam R. App. P. 3(d)(3)(B) ("All motions, briefs, opinions, and orders of the court shall refer to . . . a victim of a sex crime . . . by initials only.").

[5] Guam Police Department Officer Peter Tydingco was the first to arrive on the scene. Transcripts, ("Tr."), vol. 2 at 14 (Cont. Jury Trial, Jan. 16, 2009). C.L. gave Officer Tydingco a description of the attacker that initially was vague as to age, height, and weight. C.L. eventually composed herself and provided Officer Tydingco a better description. C.L. described her attacker as being between late-30s and early 40s, wearing brown shorts and a t-shirt, having shoulder-length hair and a mustache, being possibly local, and having numerous tattoos on his arms and chest. C.L. specifically described one tattoo on the assailant's chest that she was able to view when he removed his shirt during the attack. The tattoo was described as being on the center of his chest and depicting a female with long hair combed to the right.

[6] Officer Donny Tainatongo later arrived on the scene to take photographs. Officer Tainatongo's field notes relating to the incident contained a brief description of the assailant. Kitano contends that this description was based on information relayed over the police radio by Officer Tydingco. Officer Tainatongo's field notes described the suspect as male, possibly Guamanian, in his 30s-40s, height and weight unknown, with a mustache and numerous tattoos.

[7] On the evening of October 25, 2008, the police asked C.L. to come to the Tumon precinct for a follow-up interview. There, C.L. provided a more detailed description of her attacker, including his complexion, the color of his hair, and his build. C.L. also re-described the assailant's chest tattoo, as well as drew a picture of the tattoo on the precinct whiteboard. Kitano was unaware of this drawing until the information was revealed at trial during the cross-examination of Officer Paul Tapao. Kitano learned during the same line of questioning that the drawing had been erased without it first being photographed or in some other way preserved.

[8] At approximately the same time as C.L.'s interview, the police apprehended Kitano and brought him to the Tumon precinct for questioning. The police asked Kitano to remove his shirt

so that they could view his tattoos. After determining that a tattoo on Kitano's chest matched the description of the tattoo on C.L.'s alleged attacker, the police arrested Kitano for the October 13 attack.

[9] Prior to trial, Kitano moved to exclude evidence of prior bad acts, as well as photo line-up identification and any in-court identification of Kitano by C.L. on the grounds of suggestive identification. Kitano claimed that C.L. was allowed to view him on the Tumon precinct's closed-circuit television monitors while he was being questioned on October 25. The trial court granted Kitano's motion to exclude evidence of prior bad acts, but denied Kitano's motion to suppress suggestive identification, finding that there was no evidence of a suggestive identification.

[10] On November 25, 2008, Kitano made an 8 GCA §§ 70.10 and 70.15 motion to compel discovery, requesting production by the government of discoverable material, including any *Laxamana* field notes from the police as well as any *Brady* exculpatory evidence. On January 6, 2009, three weeks after the discovery motion and nine days before opening statements, Plaintiff-Appellee People of Guam ("the People") filed a Supplemental Witness List and turned over parts of a report prepared by Officer Tainatongo, including several photographs taken the night of the alleged attack. The following day, Kitano moved to dismiss the case or, in the alternative, to exclude these materials, including Officer Tainatongo's testimony, citing to the delayed disclosure. After a hearing on the motion, the trial court granted Kitano's motion to exclude the evidence, finding that the delayed disclosure caused prejudice to Kitano, but that the delay was not so serious as to warrant dismissal.

[11] During trial, however, Kitano asked the court to allow the limited testimony of Officer Tainatongo. Kitano wanted to question Officer Tainatongo about the description of the assailant

he received on the night of the attack, but did not want Officer Tainatongo to be able to testify about Kitano's prior bad acts, which had been previously excluded at Kitano's request. The trial court denied Kitano's motion, ruling that if it allowed Officer Tainatongo to testify, then his entire police report and photographs would be admissible.[3]

[12] At trial, the issue was raised of whether Kitano would testify in his own defense. Kitano chose not to testify.

[13] The jury returned a verdict of guilty as to all charges. Kitano was sentenced to life imprisonment without the possibility of parole as to the First Degree CSC charge, and to fifteen (15) years imprisonment as to the Second Degree CSC charge, both sentences to run concurrently.

[14] Judgment was entered and Kitano timely filed his Second Amended Notice of Appeal.

II. JURISDICTION

[15] This court has jurisdiction over appeals from final judgments pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 112-23 (2011)); 7 GCA §§ 3105, 3107(b), and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[16] We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Fisher*, 2001 Guam 2 ¶ 7 (quoting *J.J. Moving Serv., Inc. v. Sanko Bussan (GUAM) Co.*, 1998 Guam 19 ¶ 31). "Alleged *Brady* violations are reviewed *de novo*." *Id.* ¶ 12 (quoting *United States v. Alvarez*, 86 F.3d 901, 903 (9th Cir. 1996)). Whether a *Brady* violation warrants a new trial is reviewed for an abuse of discretion. *People v. Flores*, 2009 Guam 22 ¶ 59 (quoting *State v. Wilson*, 200 P.3d 1283, 1292 (Kan. Ct. App. 2008)).

[3] Kitano informed the trial court that if it decided to allow Officer Tainatongo to testify fully, Kitano would withdraw his motion to admit Officer Tainatongo's limited testimony.

[17] We review matters concerning the Confrontation Clause *de novo*. *People v. Salas*, 2000 Guam 2 ¶ 11 (citing *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992)). Whether the trial court infringed on the defendant's constitutional right to testify is a mixed question of law and fact reviewed *de novo*. *See United States v. Stark*, 507 F.3d 512, 515 (7th Cir. 2007) ("We review *de novo* the question whether an evidentiary ruling infringed upon a defendant's constitutional right to testify." (citations omitted)); *United States v. Gordon*, 290 F.3d 539, 546 (3d Cir. 2002) ("We review de novo 'claims of constitutional violations, such as the denial of the right to testify.'" (quoting *United States v. Leggett*, 162 F.3d 237, 245 (3d Cir. 1998))).

IV. ANALYSIS

A. Alleged *Brady* Violations

[18] Kitano argues that the People's delay in disclosing Officer Tainatongo's field notes as well as its failure to preserve C.L.'s drawing of her assailant's tattoo violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

[19] In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." *Brady*, 373 U.S. at 87. A similar requirement is found under Guam's discovery statute, which requires the prosecuting attorney to disclose "any material or information which tends to negate the guilt of the defendant as to the offense charged . . . ." 8 GCA § 70.10(a)(7) (2005).

[20] "'[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is probability sufficient to undermine confidence in the outcome.'"

Fisher, 2001 Guam 2 ¶ 13 (quoting *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988)).

[21] There are three components of a *Brady* violation. *Flores*, 2009 Guam 22 ¶ 61; *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "First, the evidence at issue must be favorable to the accused," either because it is exculpatory or because it is impeaching. *Flores*, 2009 Guam 22 ¶ 61 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "Second, the evidence must have been suppressed by the government, either willfully or inadvertently." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 110 (1976)). Third, prejudice must have ensued, i.e., the defendant must have been deprived a fair trial. *Id.* (citing *Bagley*, 473 U.S. at 676-78). "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281. This is because *Brady*'s "'overriding concern [is] with the justice of the finding of guilt,' not with the accused's ability to prepare for trial." *Norris v. Schotten*, 146 F.3d 314, 334 (6th Cir. 1998) (quoting *Agurs*, 427 U.S. at 113 & n.20).

[22] Generally, the principles announced in *Brady* do not apply to a tardy disclosure of exculpatory evidence, but rather to a complete failure to disclose. *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986) (citing *United States v. Holloway*, 740 F.2d 1373, 1381 (6th Cir. 1984), *cert. denied*, 469 U.S. 1021 (1984)). If previously undisclosed evidence was eventually disclosed during trial, a *Brady* violation did not occur unless the defendant was prejudiced by the delay. *Flores*, 2009 Guam 22 ¶ 62 (citing *Word*, 806 F.2d at 665); *see also Madsen v. Dormire*, 137 F.3d 602, 605 (8th Cir. 1998) ("This is so because '[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.'" (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977))). The appropriate consideration in that situation is whether the

disclosure came so late as to prevent the defendant from receiving a fair trial. *Id.* (citing *Bagley*, 473 U.S. at 674-78). If a defendant received "exculpatory evidence 'in time to make effective use of it,' a new trial is, in most cases, not warranted." *Id.* (quoting *United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988)).

1. Delayed disclosure of Officer Tainatongo's field notes

[23] Kitano argues that the People's delayed disclosure of Officer Tainatongo's field notes violated Kitano's rights under *Brady*. Kitano contends that the notes contained C.L.'s initial description of her alleged attacker to Officer Tydingco, who then relayed the information to Officer Tainatongo via police radio. Kitano essentially argues that the notes were material because they did not mention any prominent tattoos on the assailant's chest, which demonstrates discrepancies in C.L.'s descriptions and could have been used to impeach the testimony of C.L. and Officer Tydingco. Thus, had the information been timely disclosed to the defense, the result of the trial would have been different because Kitano would have been able to prepare a more aggressive argument against C.L.'s ability to accurately identify her attacker, which would have created greater reasonable doubt of Kitano's guilt.

[24] In response, the People argue that Officer Tainatongo's field notes are not *Brady* material because they do not contain any exculpatory or impeachment information; rather, the field notes are consistent with the description given to Officer Tydingco by C.L. and transmitted over the police radio, the only difference being that the description in Officer Tainatongo's field notes is less complete. The People contend that "[t]his makes sense, given that Officer Tydingco had the role of first responder on the day of the attack and had direct contact with the victim, while Officer Tainatongo arrived later to take photographs." Appellee's Br. at 12 (Aug. 13, 2010).

[25] Furthermore, the People assert, even if Officer Tainatongo's field notes contained exculpatory evidence, it could not be characterized as material because had the trial court permitted Kitano to present the evidence to the jury, "there is no likelihood that this would have had any effect on the guilty verdicts, because Officer Tainatongo's information is a wholly contained subset of Officer Tydingco's information, rather than a different set of data altogether." *Id.* at 12-13.

[26] We agree with the People. Ultimately, Kitano's *Brady* argument fails because the information contained in Officer Tainatongo's field notes is not material as there is not a reasonable probability that had the evidence been disclosed sooner – or been introduced at trial – it would have produced a different verdict. Both C.L. and Officer Tydingco testified at length as to C.L.'s description of the assailant on the night of the alleged attack. Even if Kitano had been able to offer Officer Tainatongo's testimony regarding the description he received over the police radio in order to suggest to the jury that C.L.'s initial description of her alleged attacker was inconsistent with her later descriptions, it is unlikely that this would have swayed the jury into finding Kitano not guilty of the attack. The description of the suspect contained in Officer Tainatongo's notes, though lacking in detail, is not inconsistent with the description C.L. purportedly gave Officer Tydingco on the night of the attack.

[27] Moreover, assuming *arguendo* that the field notes contained exculpatory or impeachment evidence, the fact that Kitano did not move for a continuance in order to be afforded an opportunity to better assess the new evidence hurts any argument that he suffered prejudice by the delay. Because there is not a reasonable probability that a more timely disclosure of Officer Tainatongo's field notes would have turned the case in Kitano's favor, the delay did not amount to a *Brady* violation.

2. Failure to preserve C.L.'s drawing of assailant's tattoo

[28] Kitano argues that the government violated his right to due process by failing to preserve C.L.'s drawing of her alleged attacker's chest tattoo on the precinct's whiteboard.

[29] Under the federal constitution, the government's failure to provide evidence within its control to a criminal defendant may violate the defendant's right to due process of law in two situations.

[30] The first situation concerns a violation of the defendant's *Brady* rights through the withholding of exculpatory evidence. In that situation, the Supreme Court has held that when the government suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant. *See Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*" (emphasis added)).

[31] The second situation concerns the failure of the police to preserve evidence that *might* be useful to the accused. In that situation, by contrast, the Court recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it . . . *might* have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (emphasis added). The Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[4] *Id.* at 58.

[4] The Court explained that part of the reason for the difference in treatment is that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining import of materials whose contents are unknown and, very often, disputed." *Youngblood*, 488 U.S. at 57-58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)). Another part stems from the Court's unwillingness to read the "fundamental fairness" requirement of the Due Process Clause "as imposing on the police an undifferentiated and absolute duty to retain

Although the Court did not precisely define "bad faith," it did hold that the "presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56 n. *.

[32] We find C.L.'s drawing to be the sort of "potentially useful evidence" referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady*. At best, C.L.'s drawing was so different from Kitano's actual tattoo that had the jury been able to see the drawing, it would have found C.L. and Officer Tydingco's testimonies to completely lack credibility.

[33] The People assert that the failure to preserve C.L.'s drawing did not violate Kitano's right to due process under *Youngblood* because Kitano has not shown that the police erased the drawing in bad faith. We agree. Kitano has not even alleged that the police acted in bad faith when they erased the drawing before preserving it in some way.[5] Indeed, at oral argument, counsel for Kitano conceded that the trial record is consistent with the government's position that there was no bad faith on the part of the police in erasing the drawing. Digital Recording at

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and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 58. The Court believed that

> requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id.

[5] It appears that the underlying issue in this case is one that has not been formally raised on appeal: that is, Kitano's belief that the police used suggestive techniques in order to influence C.L. to identify Kitano as her attacker. Kitano argues that the drawing of the tattoo should have been preserved because "[i]f Officer Tapao drew the picture in response to [C.L.]'s description, the drawing would create doubt as to whether the police coached C.L.'s identification of the Defendant since the police were able to examine the Defendant's tattoos at the precinct and possibly use his distinct tattoos to influence [C.L]." Appellant's Br. at 13 (July 13, 2010). Thus, Kitano does not allege that the police acted in bad faith in erasing C.L.'s drawing, but instead alleges that the drawing might not even have been C.L.'s in the first place. In light of the trial court's finding that there was no evidence of suggestive identification, as well as Kitano's failure to appeal that decision, it is beyond the scope of this appeal to consider Kitano's suggestive identification argument.

2:07:36 (Oral Argument, Sept. 10, 2010). Kitano has failed to establish a due process violation under *Youngblood*. Thus, there was no error.

B. Alleged Violation of Kitano's Right to Confrontation

[34] Kitano contends that the trial court infringed upon his constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), when it ruled that if Kitano elicited any testimony from Officer Tainatongo, all other evidence from Officer Tainatongo, including testimony regarding Kitano's prior bad acts that had been previously suppressed at Kitano's motion, would be admissible.[6] Appellant's Br. at 15-17 (July 13, 2010).

[35] The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[36] Kitano argues that the trial court's refusal to allow the limited testimony of Officer Tainatongo "cut off the testimony of Officer Tydingco, [C.L.], and effectively kept one investigator, Officer Tainatongo off the witness stand completely." Appellant's Br. at 16. Kitano contends that by threatening to allow the People to introduce Kitano's other bad acts if Kitano called upon Officer Tainatongo to testify at trial, the trial court "prevented an effective opportunity to question C.L. about her perceptions at [the] time of the crime and the officer's recollections of her perceptions told to him at the crime scene." *Id.* Thus, Kitano contends, the trial court limited Kitano's confrontation of his accusers and denied the jury the opportunity to learn that C.L. was not consistent in her identification of Kitano. *Id.* at 16-17.

[6] The trial court relied upon the "rule of completeness" embodied in Guam Rules of Evidence Rule 106 to reach its decision. Appellant's Excerpts of Record ("ER") at 60-62 (Dec. & Order, Jan. 21, 2009). Rule 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Guam R. Evid. 106.

[37] The People assert that there was no violation of Kitano's right to confrontation under *Crawford.* We agree. In *Crawford*, the Supreme Court held that out-of-court testimonial statements by witnesses are barred under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses. 541 U.S. 36, 54 (2004). This holding is inapposite to the instant case. This case does not involve a situation in which testimonial hearsay of an unavailable witness was admitted without the defendant being afforded an opportunity of prior cross-examination of the witness. Instead, the issue is whether the trial court's decision that all of Officer Tainatongo's evidence would be admissible should Kitano elicit testimony from Officer Tainatongo prevented Kitano from fully confronting C.L., Officer Tydingco, and Officer Tainatongo.

[38] The Confrontation Clause "applies to 'witnesses' against the accused – in other words, those who 'bear testimony.'" *Id.* at 51. Although Officer Tainatongo was listed as a government witness, he was not a witness against the accused because he did not testify against Kitano in court, and none of his out-of-court statements were offered at trial. C.L. and Officer Tydingco, on the other hand, *were* witnesses against the accused because they did testify against Kitano at trial. Essentially, Kitano contends that had he been allowed to elicit the limited testimony of Officer Tainatongo, Officer Tainatongo *might* have testified that he did not hear over the police radio that the alleged assailant had a prominent chest tattoo. Then this potential testimony would have been used to impeach C.L. and Officer Tydingco as to whether C.L. initially described her attacker as having a prominent chest tattoo. Kitano argues that by threatening to allow all of Officer Tainatongo's report to come in if he was called to the stand, the trial court essentially denied Kitano the right of effective cross-examination of C.L. and Officer Tydingco.

[39] We disagree. "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)) (alterations in original). If Kitano's right to effective cross-examination was in any way hampered, it was through no fault of the trial court, but rather was a result of defense counsel's tactical decision to forego examining Officer Tainatongo for fear that other parts of his report might be admitted. We believe that notwithstanding the "rule of completeness" embodied in Guam Rules of Evidence Rule 106, Kitano could have carefully tailored his examination of Officer Tainatongo in such a way that other parts of his report would not have been admitted. Moreover, while cross-examination of C.L. and Officer Tydingco might not have been as extensive as Kitano wanted, we conclude that it comported with the Confrontation Clause's guarantee of an opportunity for effective cross-examination. Accordingly, there was no error.

C. Alleged Violation of Kitano's Right to Testify

[40] Kitano contends that he was denied his constitutional right to testify in his own defense when the trial court "undertook to intimidate the Defendant and his defense counsel into waiving" that right. Appellant's Br. at 22. At issue is the following exchange between the court and defense counsel:

THE COURT:	are we ready, Mr. - -
[DEFENSE COUNSEL]:	Could I just talk to him for one more time? Because I got a note that the court's apprise [sic] him of his rights (indiscernible). (Indiscernible) court?
THE COURT:	How much more, [Counsel]?
[DEFENSE COUNSEL]:	Just five minutes.

THE COURT: All right. Go ahead. And I'm going to be citing 8 GCA 75.60.[7] Warn him, and tell him that the doors could open once he testify [sic], and that would also include other prior acts.

[DEFENSE COUNSEL]: No, actually, I thought the court ruled already that his prior convictions - -

THE COURT: Prior cases. If there's any.

[DEFENSE COUNSEL]: - - could not come in.

THE COURT: Well, no.

[PROSECUTOR]: We talked [about] the prior convictions, but not the 413 stuff.

[DEFENSE COUNSEL]: No, I (indiscernible) the court's ruling. I don't think the court ruled that that's admissi - - I thought the court ruled that was inadmissible? That - -

THE COURT: You go find out what it is, [Counsel], because honestly - - Go find out, then you can come in here and tell me, because the jury has been waiting back there for an hour, sir. Please.

(Pause.)

THE COURT: Do you have any sections that I could look at?

[PROSECUTOR]: That's what we're trying to figure out right now.

(Pause.)

(Off the record.)

THE COURT: Welcome back in, ladies and gentlemen, to CF499-08, People versus Arnold Kitano. At this time, defense.

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[7] Title 8 GCA § 75.60 provides:

> A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself but if he offers himself as a witness he may be cross-examined by the prosecuting attorney and the attorney for any codefendant as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him at the trial or proceeding by the prosecuting attorney.

8 GCA § 75.60 (2005).

> [DEFENSE COUNSEL]: Your Honor, at this time we'll - - we don't have any additional witnesses, so we'll just rest our case.

Tr., vol. 3 at 47-48 (Jury Trial – Day 3, Mar. 31, 2010).

[41] Kitano asserts that the trial court's comments

> were a warning to the Defendant and his defense counsel that he should not testify in his own defense. The warning also prejudged an issue not before the court, that is if the Defendant testified and if the prosecution chose to offer impeachment evidence, that the court would admit it, regardless of any argument that defense counsel would make.

Appellant's Br. at 18.

[42] Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir. 1997). However, while courts generally agree that a defendant's waiver of his right to testify must be knowing, voluntary, and intelligent, courts are split as to whether a trial court must advise a defendant of his right to testify and inquire into a defendant's waiver of that right. Michele C. Kaminski, Annotation, *Requirement that Court Advise Accused of, and Make Inquiry With Respect to, Waiver of Right to Testify*, 72 A.L.R.5th 403 § 2[a] (1999).

[43] A majority of jurisdictions have taken the view that the trial judge has no duty to advise the defendant of his right to testify or to ascertain on the record whether the defendant's waiver of that right is knowing, voluntary, and intelligent. *Id.* §§ 2[a], 11-19. These courts offer various rationales to support this view, including the notion that conducting such a colloquy is akin to the trial court participating in trial strategy. *Id.* §§ 11-12; *see also, e.g.*, *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir. 1993) ("[J]udicial interference with this strategic decision poses a danger that 'the judge will appear to encourage the defendant to invoke or waive this right. . . .'"); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (noting that requiring judge to inquire of

defendant directly whether he wants to testify places judge between the lawyer and his client and can produce confusion as well as delay); *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (reasoning that to require trial court to conduct a colloquy with defendant regarding right to testify could inappropriately influence defendant to waive his right *not* to testify); *Commonwealth v. Glacken*, 883 N.E.2d 1228, 1234 (Mass. 2008) ("Because of the delicate balance between a defendant's right to testify on his own behalf and his equally fundamental right not to testify . . . [s]uch a colloquy might give the defendant the impression that he was being urged by the judge to testify . . . ." (alterations in original) (citation and internal quotation marks omitted)); *State v. Savage*, 577 A.2d 455, 473 (N.J. 1990) (placing responsibility for informing defendant of right to testify on defense counsel rather than on trial court).

[44] Moreover, many courts have held that, where a defendant is represented by counsel, the trial court may presume, in the absence of the defendant's assertion of the right to testify, that the defendant, through defense counsel, has waived the right to testify, without conducting a colloquy with the defendant. 72 A.L.R.5th 403 § 15; *see also, e.g.*, *United States v. Edwards*, 897 F.2d 446, 446-47 (9th Cir. 1990).

[45] Several courts following the majority approach have held that, though not necessary, an on-the-record inquiry is advisable in order to reduce any uncertainty surrounding a defendant's failure to testify and thus minimize litigation on the issue. 72 A.L.R.5th 403 § 10; *see also, e.g.*, *State v. Gulbrandson*, 906 P.2d 579, 598 (Ariz. 1995) (recognizing that while trial court is generally not required to have defendant make an on-the-record waiver of right to testify, it may be prudent to do so); *State v. Walen*, 563 N.W.2d 742, 751-52 (Minn. 1997) (declining to use its supervisory powers to impose on trial court the duty to perform an on-the-record colloquy with every criminal defendant who does not testify, but recognizing the usefulness of such a

colloquy); *Phillips v. State*, 782 P.2d 381, 382 (Nev. 1989) (stating that on-the-record colloquy with defendant regarding his right to testify, although not necessary for valid conviction, is good practice). Other courts have held that such an inquiry may in fact be necessary under certain circumstances, such as where the court is aware of attorney-client conflicts or that the defendant is being prevented from exercising his right to testify. 72 A.L.R.5th 403 §§ 5-9; *see also, e.g.*, *United States v. Pennycooke*, 65 F.3d 9, 12-13 (3d Cir. 1995) (noting that colloquy may be required where attorney-client conflicts are evident); *Crawley v. Commonwealth*, 107 S.W.3d 197, 199 (Ky. 2003) (holding that trial court's failure to inquire as to whether defendant made a knowing and voluntary waiver of right to testify constituted error where trial court knew that defendant wanted to testify but was kept from the stand by defense counsel); *State v. Edwards*, 173 S.W.3d 384, 386 (Mo. Ct. App. 2005) (finding that although trial court has no duty to inquire from a defendant who remains silent throughout proceedings regarding whether he will testify, it is error for trial court to be informed of defendant's desire to testify and not allow defendant to take the stand); *cf. Hodge v. Haeberlin*, 579 F.3d 627, 639-40 (6th Cir. 2009) (finding that barring any statements or actions from defendant indicating disagreement with counsel on desire to testify, colloquy and on-the-record waiver not required).

[46] In a minority of jurisdictions, an affirmative duty on the part of the trial court to advise a defendant of his right to testify is imposed. The few courts that have held that a trial court must *sua sponte* conduct a colloquy with a defendant regarding the right to testify "often reason that the right to testify is so fundamental and personal that the procedural safeguards offered by this colloquy are necessary to ensure that the defendant understands the significance of the waiver of the right, particularly where the defendant is unrepresented." 72 A.L.R.5th 403 § 2[a]; *see also, e.g.*, *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991) (stating that judges should make an on-

the-record inquiry after close of defendant's case into whether non-testifying defendant understands and voluntarily waives right to testify); *People v. Curtis*, 681 P.2d 504, 514-15 (Colo. 1984) (holding that whether there is proper waiver of right to testify should be clearly determined by trial court on the record); *Tachibana v. State*, 900 P.2d 1293, 1303 (Haw. 1995) (holding that trial court must advise criminal defendants of their right to testify and must obtain on-the-record waiver of that right in every case in which defendant does not testify).

[47] In the instant case, Kitano contends that under either the majority approach or the minority approach, the trial court violated his right to testify.

[48] Kitano argues that under the majority approach, the trial court was precluded from making any inquiry regarding Kitano's decision whether or not to testify, and the trial court's warning to defense counsel was akin to its giving advice to Kitano regarding whether or not he should testify. We do not agree that the majority rule is so broad as to preclude the trial court's actions in this case. The underlying issue in all of the aforementioned cases, including those cited by Kitano, was whether the trial court should be *required* to conduct a colloquy with regard to a defendant's right to testify. The majority rule appears to be that the trial court has *no affirmative duty* to conduct a colloquy or otherwise inquire into the defendant's decision; this is not the same as Kitano's contention that the majority rule prohibits the trial court from engaging in such an inquiry.

[49] Kitano also argues that under the minority or "advisement" rule, the trial court erred because it did not conduct a colloquy directly with Kitano regarding his right to testify. It is unclear from the record whether Kitano was present in the courtroom during the discussion between the trial court and defense counsel regarding Kitano's decision whether or not to testify. In any event, we decline to follow the minority approach. Instead, we strongly encourage the

trial court to obtain through a neutral colloquy an on-the-record waiver from every criminal defendant who does not testify, but we hold that failure to conduct such a colloquy is not fatal error. A colloquy may be required in certain circumstances, such as where the defendant is unrepresented or where the trial court is aware that the defendant wishes to testify but is being kept from the stand by defense counsel. Neither of those circumstances exists in this case.

[50] Moreover, we disagree with Kitano that the trial court in this case prejudged the issue of the admissibility of any impeachment evidence that might have been offered by the government had Kitano testified. The trial court merely instructed defense counsel, "Warn him, and tell him that the doors *could* open once he testify [sic], and that would also include other prior acts." Tr., vol. 3 at 47 (Jury Trial – Day 3) (emphasis added). The trial court did not state with any certainty that such impeachment evidence *would* be admitted should Kitano testify. Additionally, Kitano was afforded the opportunity to inform the trial court as to its prior decision regarding the admissibility of Kitano's prior bad acts, but instead of doing so, Kitano chose to simply rest his case.[8]

[51] Accordingly, we find that the trial court's comments did not amount to a violation of Kitano's constitutional right to testify.

C. Failure to Brief Issues Raised in Statement of Issues

[52] Guam Rules of Appellate Procedure Rule 7(b)(3) provides that unless the entire transcript is ordered, an appellant must within ten days of filing a notice of appeal file a statement of the issues that he intends to raise on appeal. Guam R. App. P. ("GRAP") 7(b)(3). Kitano filed a Statement of Issues on Appeal on April 15, 2010, and later filed an Amended Statement on April

[8] Ideally, the trial court's colloquy will be a simple inquiry into whether the defendant has been apprised of his right to testify and whether he knowingly and voluntarily waives that right. Although the trial court in the instant case went beyond this simple inquiry, we do not find its actions to constitute reversible error.

22, 2010. The Amended Statement of Issues enumerates nine issues which Kitano intended to raise on appeal, including alleged errors in jury instructions and sentencing. However, Kitano's Brief filed on July 13, 2010, discussed only the evidentiary issues and the alleged denial of his right to testify.

[53] We have previously declined to reach issues that were raised but not analyzed in the appellant's brief. In *People v. Quinata*, the appellant's brief listed an issue but failed to revisit the issue in the opening brief or in the reply brief. 1999 Guam 6 ¶ 22. We pointed to former GRAP Rule 13(b)(5), which provided that the brief of the appellant shall include an argument which "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument shall include analysis and explanation of the appellant's contentions." *Id.* ¶ 23. We held that this rule together with the rules regarding the consequences of a non-compliant brief require the issue be deemed abandoned. *Id.* ¶ 25.

[54] Given our prior decision that failure to brief an issue that is raised in the brief but not otherwise argued in the brief constitutes an abandonment of that issue, we find that here, where the issues are not even mentioned in the appellant's brief but rather only appear in the appellant's Rule 7(b)(3) statement of issues, those issues have been abandoned by the appellant and need not be addressed in this opinion.

V. CONCLUSION

[55] The People's delayed disclosure of Officer Tainatongo's field notes did not violate Kitano's right to due process under *Brady* because the field notes are not material, there being little probability that its earlier production would have changed the outcome of the trial. The

People's failure to preserve C.L.'s drawing likewise did not violate Kitano's right to due process under *Youngblood* because there was no showing of bad faith on the part of the police.

[56] The trial court's denial of Kitano's motion to admit the limited testimony of Officer Tainatongo did not violate Kitano's right to confront his accusers, as Kitano was afforded an opportunity to call Officer Tainatongo to the stand but declined to do so, and any limitation on Kitano's ability to effectively cross-examine C.L. or Officer Tydingco was an implication of this tactical decision.

[57] Finally, Kitano was not denied his right to testify in his own defense because the trial court did not impermissibly interfere in that decision. We hold that although it is advisable for the trial court to obtain an on-the-record waiver of the right to testify from every defendant who does not testify, the failure to do so is not reversible error except in limited circumstances, which did not exist in this case. Moreover, we find that the trial court did not prejudge the issue of the admissibility of any impeachment evidence that may have been offered by Officer Tainatongo.

[58] For the foregoing reasons, the 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