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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

HENRY CEPEDA CHINEL,
Defendant-Appellant.

Supreme Court Case No. CRA12-028
Superior Court Case No. CF0283-12

OPINION

Cite as: 2013 Guam 24

Appeal from the Superior Court of Guam
Argued and submitted May 21, 2013
Hagåtña, Guam

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

TORRES, J.:

[1] Following a jury trial, Defendant-Appellant Henry Cepeda Chinel was convicted of one count of Third Degree Criminal Sexual Conduct (as a Second Degree Felony) and one count of Fourth Degree Criminal Sexual Conduct (as a Third Degree Felony). Chinel argues that the trial court abused its discretion by admitting evidence, under Guam Rules of Evidence ("GRE") Rules 403 and 413, of Chinel's prior commission of another criminal sexual offense. He argues that the trial court's review was cursory, insufficient to permit proper appellate review, failed to consider whether the probative value of the evidence outweighed the prejudicial effects, and that the court should have reserved ruling on the matter until the close of the People's case.

[2] We hold that the trial court did not abuse its discretion in finding that evidence of Chinel's prior commission of another criminal sexual conduct offense was admissible under GRE 413 and that the probative value of the relevant evidence was not substantially outweighed by the danger of unfair prejudice to warrant exclusion under GRE 403.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] A grand jury indicted Henry Cepeda Chinel on one count of Third Degree Criminal Sexual Conduct ("CSC"), in violation of 9 GCA § 25.25(a)(2) and (b), and three counts of Fourth Degree CSC, in violation of 9 GCA § 25.30(a)(1) and (b). The People moved to dismiss two of the three counts of Fourth Degree CSC because one of the two victims could not return from Taiwan to testify. An amended indictment issued charging Chinel with one count of Third Degree CSC and one count of Fourth Degree CSC.

[4] Prior to trial, the People filed a Notice of Intent to Introduce Prior Sexual Assaults pursuant to 6 GCA § 413 seeking to introduce evidence of Chinel's commission of another offense of criminal sexual conduct. Chinel pleaded guilty to Second Degree CSC two years earlier and was on parole following that conviction when he was arrested for the present offense. The People stated that they intended to present the evidence of the prior conviction through the testimony of the victim of the previous crime or the Superior Court Clerk of Court.

[5] Chinel filed an opposition to the Notice of Intent. He argued that the People failed to comply with the requirements of GRE 413(b), because they did not disclose the statements of witnesses or a summary of the substance of any testimony that is expected to be offered. He further contended that evidence of the prior conviction was not relevant to the present charges because the only similarity between the incidents was that they were both charged as Criminal Sexual Conduct, and otherwise lacked any common features. Moreover, he argued that the evidence was unduly prejudicial under GRE 403.

[6] The People replied that the evidence "would assist the jury in determining sexual gratification by non-consensual sexual contact with female victims" and demonstrate intent, plan, and motive. RA, tab 41 at 3 (Resp. Opp'n, June 25, 2012). They submitted that the court could issue limiting instructions to the jury. The People also argued that courts usually permit the admission of past sexual crimes in a prosecution against the person for another sex crime and admission of the evidence would not violate due process because the prosecution is still required to prove every element beyond a reasonable doubt. Finally, they contended that the notice met the requirements of GRE 413(b) by stating that the People would submit a certified copy of the judgment and have the Clerk of Court testify as to the keeping of such records.

[7] The People included a copy of the prior judgment. The judgment stated that Chinel pleaded guilty to one count of Second Degree CSC, in violation of 9 GCA § 25.20(a)(2) and (b).

[8] At the hearing on the motion, Chinel argued that, for the past conviction to be relevant, it had to bear some similarity to the present offense, such as showing a *modus operandi*, and that without more than the judgment, such could not be ascertained from the People's proffer. He contended that the factual circumstances of the offenses were different. Chinel argued that the prior offense, occurring in 2008, involved forced sexual intercourse of a 14-year old family member, while the present allegations involved touching and possible penetration of two adult tourists to whom Chinel was giving swim lessons. He contended that the prejudicial effect of introducing a past sexual criminal offense that bore such little similarity to the present offense would be too great.

[9] The People responded by arguing that GRE 413 creates an exception to the normal rule barring admission of evidence of past offenses to show the defendant's propensity. They argued that the present and past offenses bore sufficient similarity to show that Chinel had a propensity to have sex with someone who did not want to have sex with him. They also stated that they were alleging digital penetration with respect to one victim in the current case, so both cases involved penetration.

[10] The court expressed concern about using the judgment of conviction without any supporting facts. With further facts, the jury could determine why the People wanted to use the evidence. The People responded that including the plea agreement to establish the facts of the prior case would solve any such problem. Further, the People reiterated that the offenses were sufficiently similar to show Chinel's propensity to seek non-consensual sex because his prior

conviction involved sex with a minor who legally could not consent, while the present offense involved non-consensual touching of adults. The People stated that admission of the prior offense sought to demonstrate Chinel's propensity to seek sexual gratification without consent.

[11] Chinel responded that under such logic, all prior criminal sexual convictions would be admitted, implying that there should be a distinction between cases where the victim was too young to legally consent and instances where the victim did not give actual consent. He reiterated that the court still had to consider the unfair prejudice under GRE 403 as well as the requirements of GRE 413 before admitting the evidence. The People conceded that the victim of the past offense would not be testifying, meaning that the evidence would come in from the judgment of conviction and testimony from the Clerk of Court.

[12] The court held that the evidence was admissible. In reaching its decision, the court examined a number of factors set forth by the Ninth Circuit in *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001), including the similarity and closeness in time of the prior acts to the acts charged, the frequency of the prior acts, the lack of intervening circumstances, and the necessity of the evidence beyond the testimonies already offered at trial. The court indicated that the proximity in time was especially relevant because the first offense was committed in 2008, Chinel pleaded guilty in 2010, and had been released for five months before being arrested again on the present charges. The court acknowledged that under GRE 403, having a prior victim testifying might raise prejudice concerns, but here the People were conceding that it would only bring in the judgment and the plea agreement, and the Clerk of Court would testify as to the nature of the records. The court further found that GRE 413 "does permit and is intended to permit this Court to allow evidence of the Defendant's admission of guilt in a prior case that is

near in time, near in the type of charge indicted on, and although the victims are dissimilar in age, the victims are similar in their nonconsensual character." Transcript ("Tr.") at 33 (Mot. Hr'g, July 5, 2012).

[13] At trial, the judgment and plea agreement for the prior offense were admitted into evidence, as Exhibits 17 and 18, over renewed objection by Chinel. The Clerk of Court, Richard Martinez, testified concerning the nature of the judgment, and the People did not otherwise call the prior victim or other witnesses to testify regarding the past offense.

[14] The present victim testified, but Chinel did not offer cross-examination.

[15] The trial court issued a limiting instruction to the jury regarding the prior conviction. The court instructed the jury that the past conviction was not itself proof beyond a reasonable doubt that Chinel had committed the present offense, but rather went to witness credibility or to "any other matter which you find it . . . relevant." Tr. at 29 (Jury Trial, July 17, 2012).

[16] Chinel was convicted by the jury on both counts, sentenced to ten years of imprisonment on Count One and five years of imprisonment on Count Two, to run concurrently, and required to register as a sex offender. Chinel filed a timely notice of appeal.

II. JURISDICTION

[17] We have jurisdiction over appeals from final judgments pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-36 (2013)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[18] When a defendant objects to an evidentiary ruling, we review a trial court's decision to admit evidence for an abuse of discretion. *See People v. Palisoc*, 2002 Guam 9 ¶ 28 (concerning

GRE 403); *People v. Muritok*, 2003 Guam 21 ¶ 32 (stating the rule generally, in a case involving hearsay); *United States v. Guidry*, 456 F.3d 493, 501 (5th Cir. 2006) (involving Federal Rules of Evidence Rule 413, analogue to GRE 413). The trial court abuses its discretion if it applies an erroneous legal standard or makes a clearly erroneous finding of fact. *People v. Jesus*, 2009 Guam 2 ¶ 18.

[19] "A trial court abuses its discretion when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 8 (quoting *Quitugua v. Flores*, 2004 Guam 19 ¶ 12).

IV. ANALYSIS

[20] On appeal, Chinel argues first that the evidence must be admissible under both GRE 403 and 413 in order to be presented to the jury. Appellant's Br. at 6 (Jan. 18, 2013). He does not specifically argue that the trial court abused its discretion in admitting the evidence under GRE 413 itself, but rather focuses on the degree of undue prejudice he suffered as a result of the admission of the conviction and the clarity of the court's reasoning. *Id.* at 9-10. We will discuss the admissibility under GRE 413 before discussing its interplay with GRE 403.

A. GRE 413

[21] Traditionally, evidence of past crimes could be admitted for certain purposes, but such evidence was barred if introduced to "prove the character of a person in order to show that he acted in conformity therewith." GRE 404(b); *see also* Fed. R. Evid. 404(b). In 1994, Congress made a fundamental exception to this rule by enacting Federal Rules of Evidence ("FRE") Rules 413, 414, and 415. The purpose of the new rules "was to supersede Rule 404(b)'s prohibition on

evidence of like conduct showing propensity in sexual assault cases." *Martinez v. Chui*, 608 F.3d 54, 59 (1st Cir. 2010) (citing *United States v. Meacham*, 115 F.3d 1488, 1491-92 (10th Cir. 1997)).

[22] In 2006, Guam followed suit, and through a Supreme Court Promulgation Order, enacted its own versions, GRE 413 and 415.[1] *Re: Adoption of the 2006 Guam Rules of Evidence*, PRM06-001 (Promulgation Order No. 06-001, Jan. 1, 2006). The Guam Legislature subsequently enacted the new rules, which the Governor signed into law. Guam Pub. L. 28-138 (July 11, 2006). These rules are substantially similar to the federal rules, and state in the comments that the sources are FRE 413 and 415, respectively. Promul. Order No. 06-001; GRE 413, 415; Fed. R. Evid. 413, 415. Thus, we look to the federal courts' interpretations of analogous Federal Rules of Evidence when we lack case law. *People v. Roten*, 2012 Guam 3 ¶ 16.

[23] GRE 413 reads:

> In a criminal case in which the defendant is accused of an offense of criminal sexual conduct, evidence of the defendant's commission of another offense or offenses of criminal sexual conduct is admissible, and may be considered for its bearing on any matter to which it is relevant.

GRE 413(a).

[24] Similarly, GRE 415 involves admission of such acts in civil cases. GRE 415. Meanwhile, FRE 414 involves the admission of such evidence in child molestation cases.[2] Fed. R. Evid. 414.

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[1] Guam has not passed an analogue to FRE 414, and GRE 414 is "reserved."

[2] While Guam has no equivalent to this rule, GRE 413 includes offenses under Chapter 25 of Title 9 of the Guam Code Annotated, which in turn includes sexual offenses specifically against those under the age of 14 and at least 14 but younger than 16. GRE 413(d)(1); 9 GCA §§ 25.15(a)(1)-(2), 25.20(a)(1)-(2), 25.25(a)(1).

[25] Federal courts interpreting FRE 413 have deduced three threshold rules for determining if a prior offense or conduct is admissible under the rule. *See, e.g.*, *United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998). First, the defendant in the present case must be accused of sexual assault. *Id.* Second, the evidence proffered must be evidence of the defendant's commission of another past act of sexual assault. *Id.* Third, the past act must be relevant, meaning that its existence must make any fact at issue more or less probable than if such evidence were excluded. *Id.*

[26] We adopt such test and similarly apply it to GRE 413. Under GRE 413, "criminal sexual conduct" includes, among other things, any offense under Title 9 GCA, Chapter 25. GRE 413(d)(1). Chinel was charged with violating 9 GCA §§ 25.25(a)(2)-(b) and 25.30(a)(1)-(b). RA, tab 47 at 1-2 (Am. Indictment, July 12, 2012). Accordingly, the amended indictment meets the first prong of the test.

[27] Second, the evidence proffered must demonstrate past criminal sexual conduct. In the admitted judgment of conviction, Chinel pleaded guilty to one count of Second Degree CSC in violation of 9 GCA § 25.20(a)(2) and (b). RA, tab 41, App. To Mot. (Judgment, Sept. 15, 2010). The offense of criminal sexual conduct is clearly encompassed within the meaning of GRE 413.

[28] Third, and finally, the evidence of the past conviction must be relevant. As previously set forth, the purpose of the analogous FRE 413 was to specifically permit such evidence to show propensity, in contrast to the traditional prohibition of such testimony. *Martinez*, 608 F.3d at 59; *Meacham*, 115 F.3d at 1491-92; *United States v. Hollow Horn*, 523 F.3d 882, 887 (8th Cir. 2008). Evidence that a person committed a past act similar to the one charged is usually probative of their likelihood to have committed the charged act: the reason for Rule 404(b)'s

traditional prohibition was not "because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). Likewise, the Ninth Circuit stated, "it is generally accepted that a defendant with a propensity to commit acts similar to those charged is more likely to have committed the charged act than another and therefore such evidence is relevant." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000) (citing *Guardia*, 135 F.3d at 1328, 1332). The People sought to admit the past conviction to show Chinel's propensity to engage in non-consensual sexual conduct. Tr. at 18 (Mot. Hr'g). Thus, his past conviction is relevant to that matter.

[29] Accordingly, the past conviction meets the threshold requirements of GRE 413 and is admissible on that basis.[3]

B. GRE 403

1. Applicable Law

[30] While the conviction is admissible under GRE 413, it may still be deemed inadmissible for violating GRE 403. GRE 413(c) specifically states that "[t]his rule shall not be construed to limit the admission or consideration of evidence under any other rule." GRE 413(c). Chinel argues on appeal that the trial court abused its discretion by finding that admitting the past conviction did not violate GRE 403, subjecting Chinel to unfair prejudice, which substantially outweighed the evidence's probative value. Appellant's Br. at 9-10.

[3] Chinel has not renewed his argument on appeal that the People's notice of intent was deficient. Such argument is therefore abandoned, *see, e.g.*, *People v. Kitano*, 2011 Guam 11 ¶¶ 53-54, and we will not address it.

[31] As with GRE 413, FRE 413 contains a provision mandating that the other rules of evidence may yet bar evidence which is otherwise admissible under that rule. Fed. R. Evid. 413(c). Likewise, FRE 414 and 415 contain similar provisions. Fed. R. Evid. 414(c), 415(c). Numerous federal courts have held that Rule 403 still applies to evidence admissible under Rules 413, 414, and 415. *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (evidence admissible under FRE 413 is still subject to FRE 403); *United States v. LeMay*, 260 F.3d 1018, 1026-27 (9th Cir. 2001) ("As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." (in the context of upholding the constitutionality of Rule 414)); *Glanzer*, 232 F.3d at 1268-69 (holding that FRE 415 evidence is subject to FRE 403). We agree that, pursuant to GRE 413(c), evidence admitted under that rule is still subject to GRE 403.

[32] In considering a Rule 403 challenge to evidence admissible under Rules 413, 414, and 415, federal courts have typically applied the same analysis, looking to other courts' interpretations of one rule when deciding a case involving another. *E.g.*, *Glanzer*, 232 F.3d at 1268 (looking at the *Guardia* court's FRE 413 analysis when conducting its own under FRE 415); *LeMay*, 260 F.3d at 1027-28 (quoting both the *Guardia* court's FRE 413 and the *Glanzer* court's FRE 415 analysis when deciding an FRE 414 issue). Accordingly, we will examine the federal court opinions on all three rules for guidance in our interpretation of the interaction between GRE 403 and 413.

[33] GRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

GRE 403; *see also* Fed. R. Evid. 403. Generally speaking, past convictions are usually inadmissible under Rule 403 to prove propensity, precisely because such evidence tends to be unfairly prejudicial. *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) (citing *Michelson*, 335 U.S. at 475-76). However, Congress and the Guam Legislature passed rules specifically allowing past convictions to be admitted in criminal sexual conduct cases, and for the purpose of showing propensity. Fed. R. Evid. 413-415; GRE 413, 415; *Hollow Horn*, 523 F.3d at 887. Thus, to rely on the traditional rule that such evidence tends to be unfairly prejudicial is to defeat the purpose of the new rules, but to disregard it is to ignore GRE 413(c)'s statement that the other rules of evidence continue to apply.

[34] In *Guardia*, the Tenth Circuit wrestled with this dilemma. It stated that there were two possible misapplications that could result. *Guardia*, 135 F.3d at 1330. First, a "court could be tempted to exclude the Rule 413 evidence simply because character evidence traditionally has been considered too prejudicial for admission." *Id.* On the other hand, it feared "a court could perform a restrained [Rule] 403 analysis because of the belief that Rule 413 embodies a legislative judgment that propensity evidence regarding sexual assaults is never too prejudicial or confusing and generally should be admitted." *Id.* It considered both extremes to be "illogical," instead holding that a court conducting a FRE 403 analysis "should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice." *Id.* at 1330-31. The *Guardia* court cautioned that it was particularly critical for the court to "fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings." *Id.* at 1331.

[35] In deciding how to apply such a test, the parties present different suggestions. Chinel suggests that we adopt the test used by the Ninth Circuit in *LeMay*, which articulated a non-comprehensive list of five factors courts should examine. Appellant's Br. at 7-8. The People propose we rely on the Fourth and Seventh Circuits' holdings and decline to articulate a list of factors, non-exhaustive or otherwise, and simply review each case on an individualized basis. Appellee's Br. at 13-15. We examine both approaches.

[36] In *LeMay*, the Ninth Circuit listed several factors to be considered under FRE 403 with respect to evidence admitted under, in that case, FRE 414:

> (1) the similarity of the prior acts to the acts charged;
> (2) the closeness in time of the prior acts to the acts charged;
> (3) the frequency of the prior acts;
> (4) the presence or lack of intervening circumstances; and
> (5) the necessity of the evidence beyond the testimonies already offered at trial.

260 F.3d at 1027-28 (citing *Glanzer*, 232 F.3d at 1268). That court also stated that "this list of factors is not exclusive, and that district judges should consider other factors relevant to individual cases." *Id.* at 1028. The court explained that the trial court had not explicitly examined each issue, as the Ninth Circuit had not decided *Glanzer* when the trial court faced the issue, but it did conduct a "searching inquiry," grilling the prosecutor about the need to use the information and reserving ruling on the motion until after the prosecution had introduced all of its other evidence. *Id.* The Ninth Circuit ultimately concluded that the district court "struck a careful balance between LeMay's rights and the clear intent of Congress that evidence of prior similar acts be admitted in child molestation prosecutions." *Id.* at 1030. The court in *Glanzer*

articulated all of the above factors, as well as stating that the district court could rely on other factors "that might arise on a case-by-case basis." 232 F.3d at 1268-69.

[37] By contrast, the Fourth and Seventh Circuits have taken a slightly different approach. In *United States v. Rogers*, the Seventh Circuit explicitly rejected the Ninth Circuit's factor test. 587 F.3d 816, 823 (7th Cir. 2009). It stated that "[i]f we thought that a list of 'factors' would be helpful in this process, we would offer one, but, unlike our colleagues in the Ninth Circuit, we believe that lists are unhelpful in the end for this inquiry." *Id.* Rather, it held that whether evidence admitted under FRE 413 is unduly prejudicial under FRE 403 "depends on the context and individual circumstances of each case, and we prefer not to cabin artificially the discretion of the district courts." *Id.* (citation omitted). The Fourth Circuit also appears to approve of the Seventh Circuit's approach, in contrast to the Ninth Circuit's, stating that "the Seventh Circuit's more flexible approach seems preferable in view of this circuit's general view that a district court has 'wide discretion' in admitting or excluding evidence under Rule 403." *United States v. Kelly*, 510 F.3d 433, 437 n.3 (4th Cir. 2007) (applying Fed. R. Evid. 414). The *Kelly* court, however, stated this in *dicta*, declaring "disposition of this case does not require choosing between these views." *Id.*

[38] In addition to recognizing the special treatment that Rule 413 accords to prior sexual assault offenses in prosecutions charging a defendant with sexual assault, the Seventh Circuit also held that "the district court enjoys wide discretion in admitting or excluding evidence [under Rule 413], and our review of its evidentiary rulings is highly deferential." *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005). The court in that case did not otherwise list any particular factors or standards, other than to note that both the present case and past conduct

involved pedophilia, allowing the jury to infer that the defendant was a pedophile and so more likely to commit another such offense. *Id.* at 488. The court added that the government did not "dwell" on the prior sexual assault, but rather submitted the evidence via a copy of the prior conviction and "brief testimony" of the investigating officer. *Id.*

[39] We hold that, going forward, the trial courts should apply the Ninth Circuit's test from *LeMay*. Courts should examine: (1) the similarity of the prior acts to the acts charged; (2) the closeness in time of the prior acts to the acts charged; (3) the frequency of the prior acts; (4) the presence or lack of intervening circumstances; and (5) the necessity of the evidence beyond the testimonies already offered at trial. *LeMay*, 260 F.3d at 1028. However, this list of factors is not exhaustive or mandatory, and the trial courts retain flexibility to consider such other factors as are relevant to the cases before them. *Id.* They may consider additional factors that would help them resolve the cases, or they may ignore any of the *LeMay* factors that are irrelevant. As a consequence, we do not require that in every case the court must specifically address each factor. Rather, we must be satisfied that the trial courts conducted a searching inquiry citing any *LeMay* factors particularly relevant to the case, discussing any other factors that may be relevant, and considering both the amount of unfair prejudice and probative value in making determinations. We believe this approach provides some degree of guidance to the trial courts, rather than giving them no standards or benchmarks at all, while granting them the necessary flexibility to consider the particular facts before them.

2. Application

[40] Applying the *LeMay* factors to the present case, we affirm the trial court's decision to admit the evidence. Although the trial court did not have the benefit of an appellate opinion

articulating the applicable test, the trial judge chose to rely upon some of the factors set forth in *Lemay*.[4] Even though the trial court did not need to cite those factors for this reason, it did so anyway. Tr. at 32 (Mot. Hr'g). Specifically, the court cited to *LeMay* and the time between incidents, the similarity of the acts, the frequency of the prior acts, the lack of intervening circumstances, and other relevant factors. *Id.* at 32-33. Thus, the trial court articulated and applied the correct test.

[41] We hold that the trial court did not abuse its discretion in applying the test. The court found that although there were differences in the age of the victims, both offenses involved non-consensual sexual conduct. *Id.* at 32-33. The court agreed with Chinel that non-consent alone was not enough to render such offenses similar, because all criminal sexual conduct cases involve non-consent. *Id.* at 32. However, it found both offenses similar, even with one involving a minor family member and the other with an adult tourist, because both involved non-consent and consent was not otherwise proved. *Id.*

[42] The court found it "extremely relevant" that Chinel was paroled for only five months from his prior conviction before being arrested for the present offense, and that there were only four years total between commission of the offenses. *Id.* at 31-32. At least one court has held that far longer periods of time do not subject the defendant to unfair prejudice. *See Hollow Horn*, 523 F.3d at 888-89 (noting 11 and 20 year gaps did not render evidence unfairly prejudicial). The trial court was within its discretion to weigh heavily the very short amount of

[4] This was true in *LeMay*, where the Ninth Circuit stated that the district court had decided that case before the opinion in *Glanzer*, and although the district judge did not discuss each of the factors deemed relevant in *Glanzer*, there was no error where "the record reveals that [the district judge] exercised his discretion to admit the evidence in a careful and judicious manner." 260 F.3d at 1028.

time between the offenses, as well as the time between Chinel's release and the subsequent offense.

[43] In assessing the frequency of the prior act, the court stated that Chinel's criminal sexual act occurred "again, within five months of release." Tr. at 32 (Mot. Hr'g). The trial court should have focused on the number of acts rather than timing, as the timing goes to the previous prong. This is not an abuse of discretion, because the court inquired further.

[44] The trial court found no intervening circumstances. *Id.* No intervening circumstances appear in the record, and Chinel has not argued that there were any. Indeed, the primary "intervening circumstance" was that Chinel was incarcerated for a considerable amount of time between the offenses, perhaps restricting his ability to commit another one. To that end, the court was right to focus in particular on the time between his release and the new offense, as discussed above. Regardless, the court did not make any explicit findings in this area, and Chinel cannot point to any error in this respect.

[45] In addressing the People's need for the evidence, Chinel correctly notes that the victim's credibility was not attacked at trial. Appellant's Br. at 9; Tr. at 42 (Jury Trial, July 12, 2012). The Ninth Circuit in *LeMay* considered bolstering the credibility of the victim to be a valid reason for bringing in a prior conviction. 260 F.3d at 1028. The People did not advance this as a reason to admit the evidence of Chinel's prior conviction, but instead argued for its admissibility to show propensity. Tr. at 24 (Mot. Hr'g). The People had evidence of the present offense through direct testimony of a victim. Tr. at 11-42 (Jury Trial, July 12, 2012). However, as in *LeMay*, here there was a dearth of corroborating physical evidence. *See* Tr. at 153-57 (Jury Trial, July 9, 2012) (testimony of Officer Faustino noting the absence of physical evidence in

this case); *LeMay*, 260 F.3d at 1028-29 (discussing the need for the prior convictions given the lack of corroborating evidence). While the evidence of the past conviction was not as urgently necessary as it might have been in other circumstances, there was a need for additional probative evidence, particularly given the absence of physical evidence and reliance on the testimony of one victim in particular, and it was not an abuse of discretion to find the evidence admissible on this basis.

[46] Further, the trial court took steps to limit any possible unfair prejudice. The court noted approvingly that only the Clerk of Court would testify concerning the judgment of conviction and plea agreement, rather than having the prior victim testify. Tr. at 33-34 (Mot. Hr'g). This is much less prejudicial than in *LeMay*, where the Ninth Circuit approved of the prosecution presenting testimony of the mother of an infant the defendant had previously raped. *LeMay*, 260 F.3d at 1029-30 (approving the mother's testimony despite its "highly charged," "powerful," and "shocking" nature, because "evidence of a defendant's prior acts of molestation will always be emotionally charged and inflammatory.").

[47] The court also gave a limiting instruction, informing the jury that the prior conviction was itself not proof beyond a reasonable doubt of Chinel's guilt in the present case, but went to any matter for which it is relevant. Tr. at 29 (Jury Trial, July 17, 2012). While it is possible such instruction could have been more fully developed to guard against the dangers of unfair prejudice and to more precisely instruct the jury of the matters on which it might be relevant, it was a correct and sufficient instruction. Moreover, Chinel did not object to such instruction, nor did he raise any argument pertaining to the instruction in his brief, and so any argument that it was

erroneous is waived and abandoned. *Kitano*, 2011 Guam 11 ¶ 54 (issues not raised in a brief are abandoned).

[48] The trial court asked for the plea agreement to be admitted along with the judgment, so that there would be some factual information for the jury to consider. Tr. at 19-20 (Mot. Hr'g). Arguably, this could be considered more prejudicial, since it shed more detail on the past offense and made it more prominent. However, the court stated that doing this would help the jury understand why the People wanted to admit the evidence and to decide if there were similar facts. *Id.* at 20. Rule 403 pertains only to "unfair prejudice," and presenting more factual information to the jury could just as easily enable them to distinguish between the present and past offenses. Further, Chinel did not object to this at the hearing. *Id.* Without deciding whether including more factual information is likely to be more or less prejudicial in general, we hold that the trial court did not abuse its discretion in having the plea agreement admitted without objection, where its stated intent was to help establish factual similarity or differences between the offenses.

[49] In sum, the trial court conducted a thorough review of the matter, applied the correct legal standard, made reasonable factual findings, and did not abuse its discretion in ultimately concluding that the danger of unfair prejudice from the admission of the evidence of the past conviction did not substantially outweigh its probative value.

3. Deciding the Issue before Trial

[50] Chinel argues that the trial court should not have decided the issue *in limine* before trial, but rather should have waited until the close of the People's case, reasoning that if the court had

known that there would be no attack on the victim's credibility, the court could have reasoned that there was no real need for the evidence. Appellant's Br. at 9-10.

[51] Deciding evidentiary issues *in limine* is generally permitted, but is not required. *See Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 157 n.16 (3d Cir. 2002) ("Although an *in limine* hearing is not required, district courts might find this a useful technique for considering the admission of evidence proffered under Rule 415."). The Ninth Circuit in *LeMay* noted approvingly of the district court's decision to wait "until after the prosecution had introduced all its other evidence, in order to get a feel for the evidence as it developed at trial before ruling on whether LeMay's prior acts of child molestation could come in." *LeMay*, 260 F.3d at 1028. While this is a valid reason to delay ruling, it is also true that by ruling earlier, the court can avoid the circumstance of having such evidence presented to the jury, and then, if the court decides the evidence should be excluded after all, having to "unring the bell" and attempt to tell the jury to disregard it. *Brodit v. Cambra*, 350 F.3d 985, 1005 (9th Cir. 2003) (citing *Kelly v. New W. Fed. Sav.*, 56 Cal. Rptr. 2d 803, 808 (Ct. App. 1996) (noting that pretrial motions *in limine* to preclude the introduction of prejudicial evidence "avoid the obviously futile attempt to 'unring the bell'" once the evidence is aired before the jury)). Where the court has to choose from two reasonable options, each with strengths and weaknesses, we have no basis to hold that it abused its discretion in choosing one over the other.

[52] Further, Chinel did not request that the court reserve ruling on the matter. Failure to do so renders the action subject to plain error review. *See People v. Evaristo*, 1999 Guam 22 ¶ 23; *People v. Jones*, 2006 Guam 13 ¶¶ 8-9. Needless to say, if the court's action was not an abuse of discretion, Chinel cannot meet the higher standard of demonstrating plain error.

[53] Finally, the decision to seek immediate review, rather than reserving ruling, can be viewed as a tactical decision on the part of Chinel. Challenging it beforehand allows the parties to know what will and will not be allowed, while waiting renders the trial proceedings and strategy more unpredictable. *See, e.g.*, *People v. Quintanilla*, 1998 Guam 17 ¶¶ 10-12 (citing *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990), for the proposition that courts will refuse to second-guess tactical decisions made by defense counsel where such decisions were reasonable under the circumstances, though in *Quintanilla*'s holding the actions taken by counsel were not reasonable). In any event, Chinel is not raising an ineffective assistance of counsel claim, as in *Quintanilla*, only that the court should have reserved ruling despite his failure to request as much. The trial court did not abuse its discretion in ruling on the matter before trial.

V. CONCLUSION

[54] The trial court properly found the evidence of Chinel's past conviction for criminal sexual conduct to be admissible under GRE 403 and 413. It applied many of the appropriate factors from *LeMay*, did not clearly err in making findings of fact or weighing those factors, and properly took steps to limit the prejudicial impact. The court did not abuse its discretion in ruling on the matter before trial, and Chinel waived any argument by failing to request that the

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court wait until after the People presented evidence. Accordingly, Chinel's convictions and sentence are **AFFIRMED.**

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

NOV 12 2013

By: Charlene T. Santos
Deputy Clerk
Supreme Court of Guam