

**IN THE SUPREME COURT OF GUAM**

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

v.

**WARREN PETER DIEGO,**  
Defendant-Appellant.

**OPINION**

**Cite as: 2016 Guam 5**

Supreme Court Case No.: CRA14-018  
Superior Court Case No.: CF0390-12

Appeal from the Superior Court of Guam  
Argued and submitted on August 12, 2015  
Hagåtña, Guam

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

**MARAMAN, J.:**

[1] Defendant-Appellant Warren Peter Diego appeals his conviction for the crimes of Second Degree Criminal Sexual Conduct and Child Abuse. He was sentenced to twenty years for the Criminal Sexual Conduct charge and one year for the misdemeanor Child Abuse charge, which run concurrently. For the reasons herein, we affirm Diego's convictions.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Diego was indicted by a grand jury for the offenses of Second Degree Criminal Sexual Conduct and Child Abuse. At Diego's trial, J.P.S. testified that on Friday, April 6, 2012, when she was eleven years old, she was in the bedroom of her mother and her mother's boyfriend, Warren Diego, watching TV with them. After J.P.S. put a DVD into the player, she found that Diego had moved from one side of the bed to the middle of the bed leaving only a space next to him open for J.P.S. to lie on the bed. While watching the DVD, J.P.S. claims that her mother fell asleep and she thought Diego was asleep as well.

[3] She discovered that he was not asleep when he put his hand on her leg and moved it up her shorts and into her panties, touching her vaginal area. At first, J.P.S. claimed that she pretended to be asleep, but soon after got up and left the room and returned to her own bedroom. During her testimony, J.P.S. identified Diego as the man who touched her that night. Before the conclusion of J.P.S.'s direct examination, the People asked J.P.S. if everything she testified to and everything in her written statement was true. J.P.S. answered both questions in the affirmative.

[4] J.P.S.'s mother testified that the Monday after the alleged incident, April 9, 2012, she drove J.P.S. to school, and stated that she noticed something was wrong with J.P.S. She then testified that she asked J.P.S. what was wrong. J.P.S. began to cry and told her that Diego had touched her. J.P.S.'s mother testified that she then called Diego and asked him, "[h]ow could you do that to me?" Transcript ("Tr."), vol. 3 at 86 (Jury Trial, Sept. 20, 2013). She claimed that he began to cry and responded that "he was sorry" and "that he's sick and he needs help." *Id.*

[5] At trial, during opening statements, the People described Diego's arrest and stated that "he voluntarily agreed to go with [the police], and then, as his constitutional right, invoked his right to remain silent." Tr., vol. 1 at 8 (Jury Trial, Sept. 18, 2013). Following opening statements, the defense filed a motion for a mistrial claiming this comment violated Diego's rights. Further, during one of the arresting officer's direct examination, the People asked the officer about the circumstances surrounding Diego's arrest. Officer Mesa testified that he and Officer Corpuz transported Diego to the Tiyan Criminal Investigation Section. The People's direct examination of Officer Mesa continued:

Q And what happened at that location?

A Uhm - - Officer Corpus attempted to interview Mr. Diego.

Q And what happened next?

A Mr. Diego invoked his right to - -

Tr., vol. 2 at 93 (Sept. 19, 2013). An objection by the defense interrupted Officer Mesa's answer, and the defense informed the court that this matter was the subject of the motion for a mistrial that was recently filed. The response by the officer was stricken from the record by the court. Questioning resumed and again the People asked what happened at Tiyan. The officer

again tried to answer that Diego invoked his right to remain silent, leading to another defense objection. The response was again stricken. Finally, the People asked the officer when Diego was advised of his constitutional rights, to which the defense again objected. The court denied the defense's motion for mistrial based on the comments made in the People's opening statement regarding Diego's invocation of his right to remain silent.

[6] The court also granted the People's motion to admit evidence of Diego's prior criminal convictions involving sexual assault from the state of Oklahoma pursuant to Rule 413 of the Guam Rules of Evidence ("GRE"). The court included Jury Instruction 3 and 3M in the final instruction, which instructed the jury not to consider any stricken testimony or testimony involving the defendant's right to remain silent. There was also a limiting instruction included regarding evidence of prior bad acts, which was numbered 3N.

[7] Diego was found guilty of the first charge of Second Degree Criminal Sexual Conduct (as a first degree felony) and the second charge of Child Abuse (as a misdemeanor). He was sentenced to twenty years for the Criminal Sexual Conduct charge and one year for the misdemeanor Child Abuse charge, the sentences to run concurrently. Diego timely appealed his convictions.

## II. JURISDICTION

[8] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-114 (2015)); 7 GCA §§ 3107, 3108(a) (2005); *see also* 8 GCA §§ 130.10, 130.15(a) (2005).

## III. STANDARD OF REVIEW

[9] When reviewing the admission of evidence under GRE 413 over an objection, the abuse of discretion standard of review is applied. *See People v. Chinel*, 2013 Guam 24 ¶ 18. If an

abuse of discretion is found, reversal is warranted only where the abuse is not harmless. See *People v. Jesus*, 2009 Guam 2 ¶¶ 53-55. “A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict.” *Id.* ¶ 54 (citing *People v. Moses*, 2007 Guam 5 ¶ 18).

[10] Because there was no objection to the admission of the testimony regarding Diego’s registry as a sex offender, the plain error standard is applied. See *People v. Diaz*, 2007 Guam 3 ¶ 24.

[11] When reviewing a constitutional violation, such as a comment on a defendant’s invocation of his right to remain silent, the standard of review is harmless error, with a higher burden of proof than for non-constitutional errors. *People v. Flores*, 2009 Guam 22 ¶ 112 (“The test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted)).

[12] Because there was no objection to the People’s questioning of the victim, this court reviews its admission for plain error. See *Diaz*, 2007 Guam 3 ¶ 24. “The plain error standard is met when: ‘(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.’” *People v. Diego*, 2013 Guam 15 ¶ 23 (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

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#### IV. ANALYSIS

##### A. Prior Convictions as GRE 413 Evidence

###### 1. Abuse of Discretion

[13] The trial court admitted into evidence two prior judgments previously entered against Diego in Oklahoma pursuant to GRE 413; the first judgment relates to Diego's guilty plea to two counts of Lewd Molestation and the second judgment stems from a charge of one count of Sex Offender Residing Within 2000 Feet of School (as a felony). Record on Appeal ("RA"), tab 51 at 6 (Dec. & Order, Mar. 26, 2013). In *People v. Chinel*, we adopted the Tenth Circuit's three-part test to determine admissibility of evidence under Rule 413<sup>1</sup>:

First, the defendant in the present case must be accused of sexual assault. Second, the evidence proffered must be evidence of the defendant's commission of another past act of sexual assault. 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.

2013 Guam 24 ¶ 25 (citing *United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998)).

[14] Although the trial court's Decision and Order to admit the two prior judgments into evidence preceded *Chinel*, the court did consider the admissibility of the evidence under GRE 403 and 413 and also relied on *Guardia*. RA, tab 51 at 5 (Dec. & Order). This court must now perform the appropriate analysis to determine if the trial court abused its discretion in admitting Diego's two prior convictions under GRE 413. The first prong, that the defendant be accused of a sexual assault, is clearly met because Diego is appealing his conviction of Second Degree Criminal Sexual Conduct. RA, tab 6 (Indictment, July 5, 2012). The second prong, that the evidence proffered must be evidence of the defendant's commission of another past act of sexual assault, requires a more detailed analysis. Diego's two prior convictions admitted into evidence

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<sup>1</sup> Though the Tenth Circuit is citing Federal Rule of Evidence ("FRE") 413, it is the source for GRE 413, therefore, the Tenth Circuit's interpretation of FRE 413 is persuasive. See GRE 413 (source).

by the trial court are from Oklahoma, so it must initially be determined whether these convictions were offenses of “criminal sexual conduct” as defined by GRE 413(d). RA, tab 51 at 2 (Dec. & Order).

[15] GRE 413(d) provides that an “‘offense of criminal sexual conduct’ means a crime under Federal law, Guam law, or the law of a State . . . that involved” any of the following:

(1) any conduct proscribed by chapter 25 of Title 9, Guam Code Annotated;

(2) any conduct proscribed by chapter 109A of title 18, United States Code;

(3) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(4) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

GRE 413(d).

[16] One of Diego’s convictions was for Lewd Molestation and the second was for a charge of Sex Offender Residing Within 2000 Feet of a School, which was a violation of the terms of his release from the first conviction. *See* RA, tab 51 at 2 (Dec. & Order).

[17] Lewd molestation makes it a crime to “[l]ook upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality . . . .” Okla. Stat. tit. 21 § 1123(A)(2) (2015). The People’s Notice of Intent to Introduce Prior Sexual Assaults Pursuant to 6 GCA subsection 413 did not provide any additional facts or circumstances concerning the conviction. *See* RA, tab 37



at 2 (Notice Intent to Introduce Prior Sexual Assaults Pursuant to 6 GCA subsection 413, Dec. 19, 2012). More specifically, no evidence was introduced concerning the specific conduct of Diego that led to this conviction. *See id.* Lewd molestation under the Oklahoma statute includes conduct that would not be considered criminal sexual conduct under GRE 413(d), specifically to “look upon” the body of a minor in a lewd or lascivious manner. This conduct is not conduct proscribed by the criminal sexual conduct laws of Guam or the United States or that involves contact which would satisfy the requirements of GRE 413(d). If the People had obtained and included further information regarding this conviction which proved that Diego committed an offense of criminal sexual conduct within the meaning of GRE 413(d), this conviction may have been properly admitted. However, the People failed to introduce such evidence. Therefore, this court finds that the Oklahoma conviction under this statute, without any accompanying facts surrounding the conviction, cannot be considered an offense of criminal sexual conduct for the purposes of GRE 413 evidence. Therefore, to admit evidence of this conviction was an abuse of discretion.

[18] When considering the conviction of Sex Offender Residing Within 2000 Feet of a School, it is clear that the evidence of this conviction was not evidence of Diego’s commission of another past act of criminal sexual conduct as it only involved a violation of living restrictions as a sex offender. Therefore, this conviction is inadmissible under GRE 413, and admitting it as such was an abuse of discretion.

## 2. Harmless Error

[19] If an abuse of discretion is found, reversal is warranted only where the abuse is not harmless. *See Jesus*, 2009 Guam 2 ¶¶ 53-55. “A non-constitutional error requires reversal unless it is more probable than not that the error did not materially affect the verdict.” *Id.* ¶ 54



(citing *Moses*, 2007 Guam 5 ¶ 18). Factors to consider include: “(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.” *People v. Roten*, 2012 Guam 3 ¶ 41; see also *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

[20] Even excluding the improperly admitted evidence, the case against Diego was strong. The People’s case against Diego centered on the victim’s account of the incident. See Tr., vol. 1 at 23-25. She identified Diego as the person who touched her. *Id.* at 37-38. This alone is enough to sustain a conviction. See 9 GCA § 25.40 (2005) (“The testimony of a victim need not be corroborated . . . .”); *People v. Flores*, 2004 Guam 18 ¶ 31 (holding that Guam law does not require corroboration of a victim’s testimony). Additionally, the testimony of the victim’s mother included a statement by Diego where he admitted that he was sick and needed help. Tr., vol. 3 at 86 (Sept. 20, 2013). The prosecution properly moved for leave of the court to admit the evidence, which further supports a finding of harmless error as the prosecution’s conduct was not culpable. Finally, as the evidence was clearly not cumulative,<sup>2</sup> its importance to the case must be scrutinized. As discussed earlier, the evidence of Diego’s convictions were not central to the case, as the prosecution had very strong evidence against him without the convictions. Accordingly, we hold that even though the court abused its discretion in admitting evidence of Diego’s prior criminal convictions, the admissibility of the convictions was harmless and did not materially affect the verdict.

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<sup>2</sup> This consideration is more important for improperly admitted hearsay. See *Roten*, 2012 Guam 3 ¶ 43 (“Erroneous admission of . . . cumulative testimony is less prejudicial than admission of unique testimony.”).

**B. Registry as a Sex Offender as GRE 413 Evidence: Plain Error**

[21] Evidence that Diego was a registered sex offender on Guam was introduced through testimony by the People's witness, Erika Perez, who was a Judiciary of Guam employee at the Guam Sex Offender Registry. Tr., vol. 2 at 46 (Sept. 19, 2013). There was no objection to her testimony about his voluntary registration with her office. *See id.* Therefore, this court should review the admission of this evidence for plain error. *See Diaz*, 2007 Guam 3 ¶ 24. "The plain error standard is met when: '(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Diego*, 2013 Guam 15 ¶ 23 (quoting *Felder*, 2012 Guam 8 ¶ 19).

[22] As discussed above, the facts surrounding Diego's sexual offense conviction are unknown. Therefore, the conduct that required him, under Oklahoma law, to register as a sex offender is also unknown. Because the evidence of his conviction is inadmissible under GRE 413, the subsequent sex offender registry is also inadmissible under GRE 413. Admitting it was error. Regardless of whether the error was plain, this court finds that the error did not affect Diego's substantial rights as the case against him was strong without the admission of this evidence.

[23] Because the case against Diego is strong given the remaining admissible evidence and the error did not affect Diego's substantial rights, there was no plain error.

**C. Commentary on Diego's Invocation of his Right to Remain Silent**

[24] The United States Supreme Court has held that a defendant's invocation of his right to remain silent carries no penalty, and that it would deprive a person of his due process if his silence was permitted to be used against him. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976) ("We

hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.”). Another Supreme Court case found that the Constitution “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” *Griffin v. California*, 380 U.S. 609, 615 (1965). When reviewing such comments on the defendant’s invocation of his rights, it must be determined whether “absent the prosecutor’s allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a guilty verdict?” *United States v. Hasting*, 461 U.S. 499, 510-11 (1983) (citing *Harrington v. California*, 395 U.S. 250, 254 (1969)).

[25] Such a constitutional violation is subject to a harmless error standard of review and reversal is not warranted where “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder*, 527 U.S. at 15 (1999)) (internal quotation marks omitted). The court must consider “the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant’s guilt.” *United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991) (citing *Scarborough v. Arizona*, 531 F.2d 959, 962 (9th Cir. 1976)).

[26] Diego argues that both the People’s opening statement and comments made by the People’s witness, Officer Mesa, contained content relating to his rights to remain silent and his right to an attorney that were prejudicial. Appellant’s Br. at 9 (Mar. 9, 2015). Both comments made by the People and the People’s witness about Diego’s invocation of his rights are subject to a harmless error standard. See *Chapman v. California*, 386 U.S. 18, 20 (1967).

## 1. Opening Statement

[27] During their opening, the People described the situation surrounding Diego's arrest. Tr., vol. 1 at 8 (Sept. 18, 2013). Regarding his invocation of rights, the People stated that "he voluntarily agreed to go with [the police], and then, as his constitutional right, invoked his right to remain silent." *Id.* In response, Diego filed a motion for a mistrial declaring this comment was a violation of Diego's rights, and the People responded that the comments were not prejudicial and were intended to help describe the scene surrounding Diego's arrest. Tr., vol. 3 at 4-12 (Sept. 20, 2013). Further, the People pointed out that Diego did not object at the time the comments were made and further argued that even if the comments were potentially prejudicial, their effect could be cured and amount to harmless error because of the overwhelming evidence against Diego. *Id.* at 8-11.

[28] The court denied the motion, citing *Holding v. State*, 290 Ark. 458, at 462-63, 721 S.W.2d 614, *United States v. Kurlemann*, 708 F.3d 722 (6th Cir. 2013),<sup>3</sup> *Lakeside v. Oregon*, 435 U.S. 333 (1978), *Stevenson v. State*, 2013 Ark. 100, 426 S.W.3d 416, and *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013). Tr., vol. 3 at 12 (Sept. 20, 2013). Specifically, the court noted that *Maldonado v. Superior Court*, 274 P.3d 1110 (Cal. 2012), and *Okatan*, 728 F.3d 111, provide the authority to deny the motion for mistrial. Tr., vol. 3 at 12-13 (Sept. 20, 2013).

[29] The cases cited by the trial court do not contain the harmless error analysis found in *Newman*, but the decision may still be affirmed if this court finds that the admission of the evidence is harmless beyond a reasonable doubt. *See Newman*, 943 F.2d at 1157-58. The court in *Newman* was reviewing the trial court's decision not to grant a new trial where it found that a limiting jury instruction was curative. *Id.* The *Newman* court found, however, that the

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<sup>3</sup> *Kurlemann* has been amended and superseded, but this opinion does not rely on this case.

prosecutor asked the arresting officer questions that elicited extensive answers that were focused on the defendant's silence. *Id.* at 1158. The following questions and answers were objected to and given curative instructions:

Q. Did you advise him of his rights?

A. I did at that point in time.

Q. And what was decided at that point?

A. Mr. Newman would remain silent. He wished not to make a statement.

....

Q. He said that he wanted - he didn't want to say anything. Did he say that he would be willing to later, though?

A. At that point in time he said he might be willing later to give a statement .

*Id.* at 1156. The court found these questions and responses had the effect of suggesting that the defendant "must have been guilty because an innocent person would not have remained silent."

*Id.* at 1158. Additionally, the remaining evidence against the defendant was all circumstantial evidence, with no witnesses claiming to have seen him commit the crime. *Id.* The Ninth Circuit, in another case, held there was harmless error where it found prosecutorial misconduct in the form of two comments made in the prosecution's closing and two questions that the defendant refused to answer because there was "overwhelming evidence of guilt in the record." *Ahlswede v. Wolff*, 720 F.2d 1108, 1110 (9th Cir. 1983) ("Neither remark was manifestly intended as, nor was of such character that the jury would naturally and necessarily take it to be, a comment on the failure to testify.").

[30] It has already been established that the case against Diego is extremely strong, making this obvious error harmless. Although the People gave an unclear reason for commenting on Diego's invocation of his rights, it is well-settled law that any comment on the invocation of

such rights is error. Although it was a constitutional violation for the People to comment on Diego's invocation of his right to remain silent and such conduct should be avoided, considering the strength of the case against him and Jury Instruction 3M (jury not to consider any testimony involving the defendant's right to remain silent) given to the jury as a curative measure, these comments in the present context are harmless.

## 2. Witness Comments

[31] Next, this court must analyze the comments made by the People's witness, Officer Mesa. The prosecution never explicitly asked the officer if Diego decided to remain silent; however, the officer did, twice, volunteer that Diego invoked his right to remain silent. Tr., vol. 2 at 93-94 (Sept. 19, 2013). The questions that elicited these responses did not specifically seek information about his invocation of his rights, but only asked the officer to explain what happened next. *Id.* The last objection came when the People asked, "When was the defendant advised of his constitutional rights?" *Id.* at 96-97. It was this third question that seems the most troublesome, because the People specifically asked about Diego's right to remain silent, which as previously stated is conduct the People should avoid.

[32] The trial court erred in allowing any comments and questions about Diego's invocation of his rights, but they are not as grave as the comments made in the People's opening. Further, these questions and answers were properly stricken from the record. *Id.* at 94-95. Therefore, these errors are also harmless. We take this opportunity to again advise the People that they should never comment on a defendant's invocation of his rights, regardless of the intent behind the comments.

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#### D. Witness Vouching

[33] Finally, Diego argues that the People committed prosecutorial misconduct in the form of vouching for the victim. *See* Appellant’s Br. at 14-15. During the victim’s redirect examination, the People asked her the following:

Q: Okay. And is everything you testified to the truth?

A: Yes.

Q: And is everything you wrote in the written statements the truth?

A: Yes.

Q: Okay. Now is that written statement a true and accurate copy of what you gave to police that day?

A: Yes.

Tr., vol. 1 at 60 (Sept. 18, 2013). There was no objection by Diego to this testimony. *See id.* Where there was no objection to such questioning during the trial, the plain error standard is applied. *See People v. Evaristo*, 1999 Guam 22 ¶ 29.

[34] This standard of review requires first a finding of error, next the error must be plain, and finally, the error must have affected a substantial right. *United States v. Olano*, 507 U.S. 725, 732 (1993). If a plain error is found, then reversal is warranted only where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 732 (alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted).

[35] The court must initially determine whether there was an error in the form of the People improperly vouching. *See People v. Ueki*, 1999 Guam 4 ¶ 19. “Vouching occurs when the government either: (1) suggests that the government is aware of evidence not presented to the jury which would tend to support a particular witness’ testimony; or (2) places the ‘prestige of



the government behind the witnesses through personal assurances of their veracity . . . .” *Id.* (alteration in original) (quoting *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991)).

[36] The questions asked of the victim did not constitute vouching as they neither suggested the People were aware of evidence not presented to the jury nor did they place the “prestige of the government behind the witness.” *Id.* The question regarding J.P.S.’s written statement was asked to provide a basis for the statement before it was entered into evidence. *See Tr.*, vol. 1 at 60 (Sept. 18, 2013). The question regarding the statement’s truthfulness is reasonable and does not consist of vouching as it neither suggests the People are aware of evidence not presented nor places the prestige of the government behind the statement. *See Ueki*, 1999 Guam 4 ¶ 19. Because these questions do not constitute vouching, there is no error thus ending this inquiry.

#### V. CONCLUSION

[37] Based on the foregoing, we **AFFIRM** Diego’s convictions because any errors committed in this case were harmless or did not constitute plain error given the strong evidence against him.

/s/

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F. PHILIP CARBULLIDO  
Associate Justice

/s/

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KATHERINE A. MARAMAN  
Associate Justice

/s/

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ROBERT J. TORRES  
Chief Justice