# IN THE SUPREME COURT OF GUAM

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

**v.**

**GREG ANTHONY CRUZ,**
Defendant-Appellant.

Supreme Court Case No.: CRA15-009
Superior Court Case No.: CF0476-13

## OPINION

**Cite as: 2016 Guam 15**

Appeal from the Superior Court of Guam
Argued and submitted on October 19, 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 Greg Anthony Cruz appeals from a final judgment convicting him of two counts of Second Degree Criminal Sexual Conduct ("CSC") (As a 1st Degree Felony). Cruz contends the prosecutor's comments during closing argument regarding implications that may be inferred from Cruz's choice to not testify and lack of evidence controverting the victim's testimony violated Cruz's Fifth Amendment right to remain silent. Next, Cruz maintains that the trial court erred in failing to preliminarily instruct the jury regarding certain principles of criminal law. Finally, Cruz argues that the trial court's failure to grant a mistrial following closure of the courtroom during the minor victim's testimony violated his Sixth Amendment, Organic Act, and statutory rights to a public trial, amounting to reversible error. For the following reasons, we affirm in part, reverse in part, vacate the judgment and remand for a new trial.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Procedural Background

**[2]** Cruz was charged with eight counts of Second Degree CSC (As a 1st Degree Felony) for allegedly sexually assaulting J.C.R., a minor victim, in violation of 9 GCA §§ 25.20(a)(2) & (b). The trial court subsequently granted Cruz's motion for acquittal as to counts 3, 4, 5, 6, 7, and 8. The People filed an Amended Indictment charging Cruz with two counts of Second Degree CSC (As a 1st Degree Felony).

**[3]** The jury returned a guilty verdict for both counts. Cruz was sentenced to ten years of incarceration for Second Degree CSC (As a 1st Degree Felony), Count 1, and ten years for Count 2, to run concurrently with the sentence imposed for Count 1. The Judgment was entered on the docket, and this timely appeal followed.

**B. Factual Background**

**[4]** J.C.R. testified at trial that Cruz, her uncle, took her to a movie at the Micronesia Mall on August 31, 2013. During the movie, Cruz allegedly inserted his hand into her underwear and touched her vagina.

**[5]** Prior to J.C.R.'s testimony, the People moved to exclude the general public pursuant to 8 GCA § 91.01, contending that the victim's age of fifteen, and the subject matter of expected testimony, satisfied the threshold requirements for statutory courtroom closure. Cruz contested the motion for closure.[1] The People withdrew their motion before trial began.

**[6]** After J.C.R.'s direct testimony, the court revealed to the parties that the courtroom doors had been locked, restricting public entry. Both defense counsel and the prosecution expressed surprise, were unaware that the courtroom was locked during the testimony, and believed the People's motion to exclude the public had been withdrawn. Although the record reflects the motion was withdrawn, the trial court indicated it "had forgotten . . . [b]ecause [it] was ready to grant the motion" because it "found sufficient grounds" to grant the motion, and "inadvertently remembered" that it had granted the motion based upon finding those sufficient grounds. Transcripts ("Tr.") at 175, 177 (Jury Trial, Dec. 1, 2014). Cruz's defense counsel orally moved

[1] The minutes of the November 14, 2014 *In Limine* motion hearing provide no information regarding what was discussed with respect to the motions, and states only that "housekeeping issues on the record" were discussed. Record on Appeal ("RA"), tab 74 (Mins., In Limine Mot. Hr'g, Nov. 14, 2014). Later minutes note that the prosecution withdrew the motion to exclude. RA, tab 76 (Mins., Jury Selection, Nov. 24, 2014).

for a mistrial, urging that locking the courtroom was "a violation of [Cruz's] Sixth Amendment right[s]," but the motion was denied. *Id.* at 177.

**[7]** Officer Marvin Desamito testified regarding a text message that Cruz sent his brother, J.C.R.'s father, stating "*[b]ecause of what happened, would like to see you and [the victim's mother] will call later. Still in shock. I need to be alone for a while*." Tr. at 49, 99 (Jury Trial, Dec. 1, 2014). Following Desamito's testimony, J.C.R.'s father verified the content of the text.

**[8]** J.C.R.'s boyfriend also testified that he received a text from J.C.R. indicating she was "scared" and that "her uncle was touching her." Tr. at 11, 16 (Jury Trial, Dec. 2, 2014). Following the boyfriend's testimony, J.C.R.'s mother testified she received a text from J.C.R. stating "*I was sexually abused . . . [b]y Uncle Greg.*" *Id.* at 20, 33.

**[9]** After the evidence was concluded, the trial court provided instructions regarding the People's "burden of proving each and every element of the charge or charges beyond a reasonable doubt." Tr. at 77 (Jury Trial, Dec. 2, 2014). The jury was previously instructed that the burden does not shift to the defense, and "the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence." *Id.* at 78-79. Furthermore, the jury was instructed that "[q]uestions, statements, objections, and arguments by the lawyers are not evidence." *Id.*

**[10]** During the People's closing argument, the prosecutor made several statements Cruz found objectionable. The first statement followed the prosecutor's recounting of J.C.R.'s testimony regarding the sexual contact. The prosecutor emphasized that J.C.R. presented "uncontroverted testimony, there [was] no contradictory testimony that this happened" and "want[ed] to reinforce that." *Id.* at 101. Following the prosecution's argument that all elements

of Second Degree CSC were met, the prosecutor indicated he "would submit to [the jury] that the elements are here, and they're uncontroverted." *Id.* at 102.

**[11]** The prosecutor next commented that the victim had no motive to lie, in particular that there was "no evidence of any type of motive at all for [J.C.R.] to lie about this crime, none. None." *Id.* at 104. Following the statement regarding J.C.R.'s credibility, the prosecution stated:

> [J.C.R.] is not on trial here, . . . Cruz is on trial. And it's why [Cruz] does not have to testify, that is his right that . . . Cruz is pleading not guilty, and there's an implication there, and you can consider that implication. You can also consider, as I've said over and over again, that the People's evidence has not been rebutted, there's been no contradictory evidence.

*Id.* After this statement, defense counsel asked to approach the bench, but the trial court expressed that any objections could be addressed at the conclusion of the prosecution's closing argument.

**[12]** The prosecution continued: "[a]s I was saying, there's no evidence that [J.C.R.] has been lying. There's no evidence controverting her testimony." *Id.* at 105. The prosecution closed with the question of whether the jury believed J.C.R., and posing the hypothetical of "[w]hat alternate set of facts do you have to believe if you don't believe [J.C.R.]?" *Id.* at 106.

**[13]** Once the prosecution's summation concluded, the trial court invited counsel to approach the bench to address defense counsel's concerns. Cruz moved for a mistrial, stating:

> [A]t this time I want to move for a mistrial based on prosecutorial misconduct. The Government, for whatever reason, chose to bring out the fact that the Defendant didn't testify, and then go on in to establishing that he didn't present any evidence. The implication is he didn't present any evidence to contradict their evidence, and he did that in a manner that he is in violation of [Cruz's] Fifth Amendment right not to testify.

*Id.* at 108. The prosecutor responded that "nothing [he] said was a violation of [Cruz's] Fifth Amendment rights. There is an implication when a person pleads not guilty that they didn't

commit the crime, and that's the implication. And I told the jury that he doesn't have an obligation to testify . . . ." *Id.*

**[14]** The trial court denied Cruz's motion for mistrial, but provided curative instructions reiterating relevant principles from its prior charge, including:

> [T]hat the Defendant does not have to testify or present any evidence to prove innocence. The Government of Guam has the burden of proving each and every element of the charge beyond a reasonable doubt.
>
> And as I stated before, a defendant in a criminal case has the constitutional right not to testify. You may not draw any inference of any kind from the fact that the Defendant did not testify. Furthermore, you must neither discuss this matter, nor permit it to enter your deliberations in any way.
>
> In deciding whether or not to testify a defendant may choose to rely on the state of the evidence, and whether he believes the Government proved it [sic] beyond a reasonable doubt each and every essential element of the charges against him. No lack of testimony on the Defendant's part will replace the Government's duty to prove the charges against the Defendant beyond a reasonable doubt.

*Id.* at 109-10.

## II. JURISDICTION

**[15]** This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-115 (2015)); 7 GCA §§ 3105, 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

## III. STANDARD OF REVIEW

**[16]** "An alleged violation of the Fifth Amendment is reviewed de novo." *People v. Muritok*, 2003 Guam 21 ¶ 10 (citing *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991)). A conviction should be affirmed if the reviewing court concludes that, on the whole record, a constitutional error was harmless beyond a reasonable doubt. *United States v. Hasting*, 461 U.S.

499, 499-500 (1983). It is the reviewing court's duty to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. *Id.* at 499-500.

**[17]** If no objections to jury instructions are made at the time of trial, the standard of review is plain error. *People v. Perry*, 2009 Guam 4 ¶ 9. "Plain error is highly prejudicial error." *People v. Quitugua*, 2009 Guam 10 ¶ 11. Thus, "[w]e will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.*

**[18]** An alleged violation of the Sixth Amendment is reviewed *de novo*. *United States v. Yazzie*, 743 F.3d 1278, 1288 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 227 (2014) (citing *United States v. Ivester*, 316 F.3d 955, 958 (9th Cir. 2003)); *see also People v. Flores*, 2009 Guam 22 ¶ 9 (citing *People v. Mendiola*, 1999 Guam 8 ¶ 22) (reviewing a Sixth Amendment speedy trial claim *de novo*).

## IV. ANALYSIS

### A. Whether the Prosecutor's Comments Regarding Cruz's Choice to not Testify and the Lack of Evidence Controverting the Victim's Testimony Violated Cruz's Constitutional and Statutory Rights against Self-incrimination

**[19]** "The Fifth Amendment to the United States Constitution provides that "'[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *Muritok*, 2003 Guam 21 ¶ 11 (quoting U.S. Const. amend. V (Westlaw through Pub. L. 114-115 (2015)).[2] A "[d]irect

[2] Guam codified the right against self-incrimination for criminal cases. *See* 8 GCA § 1.11(d) (2005) ("In any criminal action, the defendant is entitled . . . [t]o be exempt from being called to testify and from testifying against himself."); *see also* 8 GCA § 1.11(e) (2005) (Failure to testify "shall not be construed as evidence against [a defendant]; but if he does so testify, he may be cross-examined in the same manner as other witnesses."); 8 GCA § 75.60 (2005) (a criminal defendant "cannot be compelled to be a witness against himself," but is subject to cross-

comment on a defendant's failure to testify is forbidden by the Fifth Amendment." *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996) (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)).[3] Likewise, indirect commentary by the prosecution can violate the defendant's right not to testify if the prosecutor states the People's evidence is "uncontradicted," "undenied," "unrebutted," or "undisputed," when "the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself." *Id.* (citations and internal quotation marks omitted); *Raper v. Mintzes*, 706 F.2d 161, 163 (6th Cir. 1983) (prosecution's comments regarding "uncontradicted or unrefuted testimony" unconstitutionally referenced the defendant's failure to testify when "he was the only person who could have contradicted" the testimony at issue, resulting in reversible error that was not harmless beyond a reasonable doubt). In other words, a criminal defendant's "right against self-incrimination is violated only when '1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence.'" *Cotnam*, 88 F.3d at 497 (citations omitted).

**[20]** The comments in this case were improper because they either directly commented on Cruz's failure to testify and the implication the jury could draw from that silence, or involved comments only Cruz could contradict or refute as there were no eyewitnesses to the incident between him and J.C.R. Cruz believes these comments violated his constitutional and statutory rights, denied him a fair trial, and amount to reversible error. Appellant's Br. at 17. The People

examination if he testifies, although "[h]is 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.").

[3] Just as the Fifth Amendment extends to the States through the Fourteenth Amendment, *Griffin*, 380 U.S. at 615, this right extends to Guam through the Organic Act, 48 U.S.C.A. § 1421b(d), (u) (Westlaw through Pub. L. 114-115 (2015)) (No person shall . . . be compelled in any criminal case to be a witness against himself.").

do not dispute that a *Griffin* error occurred, but maintain the prosecution's "in-artful and inarticulately stated" statements were harmless. Appellee's Br. at 13-14, 17-18.

**1. Constitutional Harmless Error**

**[21]** A trial court's *Griffin* error is not a *per se* error requiring automatic reversal. *Hasting*, 461 U.S. at 508 (citing *Chapman v. California*, 386 U.S. 18, 22-23 (1967)) (error not harmless when prosecutor and judge instructed the jury that inferences could be drawn from defendant's failure to testify). Instead, "a conviction should be affirmed if the reviewing court concludes that, on the whole record, the error was harmless beyond a reasonable doubt. It is the reviewing court's duty to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *Id.* at 499-500.

**[22]** When reviewing such comments, it must be determined that "absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the victims' testimony, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict." *Id.* at 501, 510-11 (1983) (citations omitted); *see also Flores*, 2009 Guam 22 ¶ 112 (citing *Neder v. United States*, 527 U.S. 1, 15 (1999)). This court considers three factors when determining whether comment on the "defendant's silence is harmless," including: "'(1) the extent of the comments made; (2) whether an inference of guilt from silence was stressed to the jury; (3) the extent of other evidence suggesting the defendant's guilt.'" *Muritok*, 2003 Guam 21 ¶ 24 (quoting *United States v. Pino-Noriega*, 189 F.3d 1089, 1099 (9th Cir. 1999)).[4] Each factor is addressed below.

[4] The People suggest we adopt factors considered by the Eighth Circuit in assessing prejudice: "(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the trial court." Appellee's Br. at 16-17 (citing *United States v. Triplett*, 195 F.3d 990, 996-97 (8th Cir. 1999)). We are not persuaded that our test adopted in *Muritok* needs to be modified as the *Triplett* factors fall within the *Muritok* framework. *Compare Muritok*, 2003 Guam 21 ¶¶ 24, 50, *with Triplett*, 195 F.3d 990, 996-97.

**a. The extent of the comments made**

**[23]** The first factor considers the extent of the comments made. *Id.* ¶ 24 (citation omitted). This is not a case in which a single improper comment was made. *See People v. Blas*, 2015 Guam 30 ¶¶ 36-40 (declining to reverse conviction despite a single improper statement by prosecutor that was unlikely to impact the verdict when viewed in context of the trial); *see also United States v. Tarazon*, 989 F.2d 1045, 1052 (9th Cir. 1993) (citations omitted) ("We will not reverse when a prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as the basis of conviction, and is followed by a curative instruction."). Instead, the prosecution made several objectionable statements during closing argument. The first statement followed the prosecutor's recounting of J.C.R.'s testimony regarding the sexual contact. Tr. at 101 (Jury Trial, Dec. 2, 2014). The prosecutor "reinforce[d]" that J.C.R. presented "uncontroverted testimony, there [was] no contradictory testimony that this happened." *Id.* The prosecutor also asserted that all elements of Second Degree Criminal Sexual Conduct were met, and that they were "uncontroverted." *Id.* at 102. The next objectionable comment stated that there was "no evidence of any type of motive at all for [J.C.R.] to lie about this crime, none. None." *Id.* at 104.

**[24]** Most troubling, however, is the prosecution's statement suggesting the jury could consider the "implication" of Cruz's failure to testify:

> [J.C.R.] is not on trial here, . . . Cruz is on trial. And it's why *[Cruz] does not have to testify, that is his right that . . . Cruz is pleading not guilty, and there's an implication there, and you can consider that implication.* You can also consider, as I've said over and over again, that the People's evidence has not been rebutted, there's been no contradictory evidence.

*Id.* at 104 (emphasis added).[5] The prosecution continued: "[a]s I was saying, there's no evidence that [J.C.R.] has been lying. There's no evidence controverting her testimony." *Id.* at 105. The prosecution closed with the question of whether the jury believed J.C.R., and posing the hypothetical of "[w]hat alternate set of facts do you have to believe if you don't believe [J.C.R.]?" *Id.* at 106. Taken together, the improper comments were extensive, and this factor weighs against a finding of harmless error.

**b. Whether an inference of guilt was stressed to the jury**

**[25]** The second factor considers whether an inference of guilt from silence was stressed to the jury. *Muritok*, 2003 Guam 21 ¶ 24 (citation omitted). Thorough curative instructions can weigh in favor of finding harmless error, even where such comments do not "immediately interrupt argument to admonish the prosecutor and instruct the jury." *Lussier v. Gunter*, 552 F.2d 385, 389-90 (1st Cir. 1977) (footnote omitted). Yet some courts have found error despite a curative instruction.

**[26]** In *Berryman v. Colbert*, the prosecutor's improper comments were sufficient to grant a habeas petition with respect to the petitioner's murder conviction even though a limiting instruction was provided. 538 F.2d 1247, 1249-50 (6th Cir. 1976). There were five objectionable statements, including: (1) a comment that nobody the prosecution could "get to testify" saw the offense, (2) a comment that the defendants witnessed the crime, but the people could not get them to testify, and that inferences must be drawn from physical facts, (3) a statement commenting on the credibility of a witness based on her profession as a prostitute, (4)

[5] From the statements made by the prosecutor during the sidebar discussion after his closing, the prosecutor appears to suggest that the implication he referred to was the implication that when one pleads "not guilty," he is impliedly innocent of the crime. Tr. at 108 (Jury Trial, Dec. 2, 2014). However, in the context of his closing, that is likely not the implication the jurors would have gleaned from the argument.

a second statement commenting on the credibility of a witness, and (5) a statement that no serious alternative theory was suggested by the defense and that none was available. *Id.* The second comment was considered particularly egregious by the court. *Id.* at 1250. The court determined the prosecutorial misconduct was not harmless beyond a reasonable doubt even though "an appropriate cautionary instruction on the right of the defendant to remain silent was given" because the court felt it could not have "cured the effect of the prejudicial and improper comment above as to the murder charge." *Id.* Furthermore, the court noted the evidence was weak. *Id.* The only evidence of the murder was testimony from a witness stating the petitioner said he "did something wrong . . . but I can't tell you what it is." *Id.* at 1249.

**[27]** In another case, *United States v. Handman*, the court sustained an objection to the prosecutor's statements that vouched for a witness, and others referencing the "uncontradicted" and "unchallenged" nature of the evidence. 447 F.2d 853, 856 (7th Cir. 1971). Even though the court instructed the jury to disregard the remarks, the court determined the error was not harmless. *Id.* at 854-56. The prosecution's case was not "overwhelming" for receipt of trafficked marijuana because it was based entirely on the account of the defendant's classmate who testified the defendant told him a package of marijuana was coming in the mail. *Id.* at 854-56.

**[28]** The People contend the trial court took adequate curative actions in this case. Appellee's Br. at 16-18; Tr. at 77-80, 109-10 (Jury Trial, Dec. 2, 2014). After the evidence was concluded, the trial court provided instructions regarding the People's burden of proof, the lack of the defense's burden, and that arguments by lawyers are not evidence. *See* Tr. at 77-79 (Jury Trial, Dec. 2, 2014). The prosecution proceeded to make its improper comments, but upon Cruz's

objection, the court informed him that any objections could be addressed at the conclusion of the prosecution's closing argument. *Id.* at 105. Following the prosecution's improper statements, the trial court denied Cruz's motion for mistrial, and provided curative instructions reiterating relevant principles from its prior charge, highlighting the prosecution's burden to prove each element of the charge beyond a reasonable doubt. *Id.* at 109-10.[6]

**[29]** As in *Berryman* and *Handman*, the existence of the curative instructions is not dispositive. An inference of guilt was stressed to the jury. Drawing an inference from Cruz's failure to testify, or his failure to present contradictory evidence that only he could rebut, was a thematic mantra of the prosecution's summation. If the court had addressed Cruz's objection at the time it was raised, perhaps this factor would weigh in favor of finding harmless error. However, the trial court's decision to defer addressing the objection is problematic in this case and it is possible the lay-jury inferred the comments were not problematic due to this decision to delay. Thus, this factor weighs against harmless error.

**c. The extent of other evidence suggesting Cruz's guilt**

**[30]** The third factor of Guam's test and the Ninth Circuit's test considers the extent of other evidence suggesting defendant's guilt. *Muritok*, 2003 Guam 21 ¶ 24 (citation omitted).

**[31]** The evidence in this case is not as strong as that in *Hasting*, in which the Supreme Court found an error harmless when there was overwhelming evidence of guilt in the form of neutral eye-witnesses corroborating key components of the victim's testimony in a sexual assault case. 461 U.S. at 501, 510-11 (citations omitted).

[6] Due to the court's instruction to Cruz to address objections following conclusion of the People's summation, we conclude a harmless error rather than plain error analysis is appropriate. *See* Tr. at 105 (Jury Trial, Dec. 2, 2014).

**[32]** Although not required to sustain a conviction, very little evidence introduced at trial corroborated J.C.R.'s testimony with respect to Cruz's conviction of Count One.[7] First, Officer Desamito testified Cruz sent a text to J.C.R.'s father, stating "*[b]ecause of what happened, would like to see you and [the victim's mother] will call later. Still in shock. I need to be alone for a while*." Tr. at 49, 99 (Jury Trial, Dec. 1, 2014); *see also* People's Exhibit 8. Second, J.C.R.'s father verified the content of the text. Tr. at 108, 113-17 (Jury Trial, Dec. 1, 2014). The contents of the text are capable of multiple meanings, and are not strong evidence of Cruz's guilt. Moreover, the testimony of J.C.R.'s boyfriend and mother regarding the content of the texts each received by J.C.R. are merely reiterations of J.C.R.'s own out of court statements.

**[33]** Although a curative instruction coupled with strong evidence of guilt may be sufficient to result in harmless error in some cases, the evidence is not extensive enough to overcome error in this case. The prosecution resorted to improper comments multiple times throughout his summation, and the trial court delayed a curative instruction. Therefore, we determine Cruz's constitutional and statutory rights against self-incrimination were violated because we cannot say the errors were harmless beyond a reasonable doubt.

### B. Whether the Trial Court Erred in Failing to Preliminarily Instruct the Jury Regarding Certain Principles of Criminal Law

**[34]** Cruz's final claim of error is that the trial court erred in failing to preliminarily instruct the jury, *sua sponte*, on certain principles of criminal law, including the People's burden of proof, the defendant's presumption of innocence, the defendant's right not to testify and the fact

[7] The People appear to concede there was not significant corroborating evidence with respect to Count Two. Appellee's Br. at 14.

that the indictment is not evidence of guilt. Appellant's Br. at 17. He argues that such preliminary instructions are required under Guam law. *Id.* at 18.

**[35]** As no objection was made to the jury instructions at the time of trial, we review this claim for plain error. *See People v. Damian*, 2016 Guam 8 ¶ 13 (citations omitted). "Plain error is highly prejudicial error." *Quitugua*, 2009 Guam 10 ¶ 11. Thus, we reverse only if: "(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." *Damian*, 2016 Guam 8 ¶ 13 (citations omitted).

**[36]** As we stated in *Damian*, "we are aware of no authority in any jurisdiction finding error for failing to give preliminary instructions," such as those sought by Cruz. 2016 Guam 8 ¶ 18. Accordingly, Cruz's claim of instructional error fails under the first prong of the plain error standard of review, and we need not address the remaining prongs.

### C. Whether the Trial Court's Closure of the Courtroom During the Minor Victim's Testimony Violated Cruz's Right to a Public Trial

**[37]** As we vacate the trial court's judgment and remand the case for a new trial, the issue regarding the courtroom closure is now moot. *See People v. Kim*, 2015 Guam 25 ¶ 28. We decline to exercise our discretion to invoke any applicable exceptions to the mootness doctrine in light of this reversal and remand.

## V. CONCLUSION

**[38]** We conclude that the prosecutor's improper comments violated Cruz's constitutional and statutory rights against self-incrimination. However, the trial court did not err in failing to *sua sponte* provide the preliminary instructions suggested on appeal. Finally, the issue of whether the trial court abused its discretion in closing the courtroom is moot and need not be addressed.

For the foregoing reasons, we **AFFIRM** in part, **REVERSE** in part, **VACATE** the judgment, and **REMAND** for a new trial.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice