IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

ANTHONY DUENAS SANTOS,
Defendant-Appellant.

Supreme Court Case No.: CRA00-006
Superior Court Case No.: CF0576-99

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 12, 2002
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice.

CARBULLIDO, J.:

[1] This appeal arises out of the disappearance of Herman August Pangelinan Santos (hereinafter "Hermie"). In relation to Hermie's disappearance, a jury convicted Defendant-Appellant Anthony Duenas Santos (hereinafter "Santos") of two charges of Aggravated Murder and three charges of Special Allegation of possession and use of a deadly weapon in the commission of a felony. Santos enumerates the following arguments on appeal, *to wit*: (1) that the trial court erred in denying Santos' motion for the appointment of a forensic pathologist; (2) that the trial court erred in curtailing the cross-examination of a government witness and in not *sua sponte* providing the jury with an informer instruction; (3) that the trial court erred in admitting statements that Santos made to the police; and, (4) that the trial court erred in denying Santos' motion for a change of venue and in commenting to the jury about why they were being sequestered. We find that none of the enumerated arguments warrants a reversal. Accordingly, we affirm the convictions.

I.

[2] On September 2, 1999, eleven year-old Hermie was reported missing. He was last seen playing around his residence located in Naki Street, Ordot around 4 P.M. that day. His bicycle was found near a water drainage about 20 feet from his home. Daisy Pangelinan (hereinafter "Pangelinan"), Hermie's mother, testified at trial that she had last seen her son riding besides Santos in a gold pick-up truck that belonged to her father.[1] On or about September 3, 1999 through September 4, 1999, police questioned Santos about the missing person report at the Hagåtña precinct for approximately nineteen hours and thirty minutes. During one of the three interviews that Santos had with the officers, one of the special agents transcribed a nine-page statement from Santos.

[3] The police and family called out to the public for information on Hermie's whereabouts and received tips that witnesses had seen the boy around the Dededo vicinity. On September 8, 1999,

[1] Santos was Pangelinan's boyfriend during Hermie's disappearance, but was not Hermie's natural father.

police found charred remains in a pit located on an abandoned ranch on remote Never Mind Road, Dededo. The police could not readily ascertain whether the remains were human or those of an animal. Consequently, Dr. Aurelio Espinola (hereinafter "Dr. Espinola"), the Chief Medical Examiner, took possession of the remains for analysis.

[4] Santos' family owned a ranch within two miles from the area where the remains were found. Neighbors in the area said that, around September 6, 1999, they had seen, "someone . . . burning what they assumed was trash in the old ranch . . . ." Appellant's Excerpts of Record, tab B, Exhibit 5. Some of the witnesses were also able to positively identify Santos as the individual who they saw was burning "something." Santos did not deny burning "something" in the pit; however, he claimed that he was burning chicken and dog bones that he found around the area.

[5] Police questioned a Joey Arnaiz (hereinafter "Arnaiz"), a conservation officer and a nephew of Santos.[2] Transcript, vol. XII of XXV, pp. 26-27 (Trial, April 25, 2000). Initially, Arnaiz denied any involvement in the crime, but acknowledged on a police sketch that the area where the remains were found was owned by his family.[3] Arnaiz also admitted that Santos knew where the ranch was located.

[6] On September 13, 1999, in an unrelated drug case, police raided a business managed by Santos' brother, Ricky Duenas Santos, in Piti. Santos was present during the raid. Although the police planned to interview Santos at the Hagåtña precinct, Santos complained of physical ailments and was brought to the Guam Memorial Hospital. After receiving treatment, Santos was brought to the precinct for questioning. Santos was in the precinct for approximately thirty-five hours.

[7] On September 14, 1999, Dr. Espinola stated that, "he will never be able to say whether [the] charred skeletal human remains" were that of Hermie's. Dr. Espinola, however, concluded that the charred body was that of a pre-pubescent child between eight and fifteen years-old. Judging from the lack of new plant growth in the pit, Dr. Espinola also concluded that the burning occurred before September 8, 1999. Because the severity of the charring left no tissues or bone marrow, Dr.

[2] Arnaiz's mother and Santos are siblings. Transcript, vol. XII of XXV, p. 26 (Trial, April 25, 2000).

[3] The ranch was owned by the Arnaiz family and not by the Santos family. Transcript, vol. XII of XXV, pp. 81-82 (Trial, April 25, 2000).

Espinola also determined that DNA testing and dental records analysis would not be possible. Although Dr. Espinola could not establish the sex of the burned body, he testified that the victim most likely died from two stab wounds to the chest area.

[8] On September 16, 1999 through September 17, 1999, police again questioned Santos. During that time, Santos participated in a video reenactment. In the reenactment, Santos explained the time when he was burning the chicken and dog bones in the Nevermind Road pit area. Moreover, Santos also expressed how he was freely participating in the reenactment. Santos was released around 3:30 A.M. on September 17, 1999. Later in the evening, around 8:30 P.M., Santos was formally arrested. He was magistrated in the late afternoon of September 18, 1999.

[9] On September 28, 2002, Santos was indicted on the following charges:

Charge 1:	Aggravated Murder Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony)
Charge 2 (2 counts):	Aggravated Murder Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony).

[10] Santos filed a motion with the trial court for the appointment of an independent forensic pathologist, which was denied.[4] Santos also filed a motion for a change of venue or in the alternative for the sequestration of the jury. The motion for a change of venue was denied, but the jury was eventually sequestered before deliberation. Additionally, Santos filed a motion to suppress the following statements:

1. Santos' statements made on September 4, 1999.
2. Santos' statements made on September 13, 1999 and September 14, 1999.
3. Santos' statements made on September 16, 1999.
4. All of Santos' statements made after September 4, 1999.

After a hearing, the motion to suppress was denied on March 28, 2000.

[11] A jury trial was held and on May 23, 2000, the jury found Santos guilty of two charges of Aggravated Murder and three charges of the Special Allegation of possession and use of a deadly

[4] In conjunction with this motion, Santos also filed the following motions for the appointments of experts from the following fields: Motion for Expert on Methamphetamine and its effect (granted); Motion for a Fire and Arson Expert (denied); Motion for a Chamorro Language Translator (granted-limited to translate the conversation between victim's grandmother and alleged tipper); and, Motion for Disclosure of Criminal, Juvenile, Arrest, Parole, and Probation Records (a hearing was held on February 29, 2000 regarding this motion, but it was rendered moot).

weapon in the commission of a felony. For the Aggravated Murder conviction, Santos was sentenced to life imprisonment without the possibility of parole and was fined $10,000.00. For the Special Allegation of possession and used of a deadly weapon in the commission of a felony, Santos was sentenced to an additional twenty-five years imprisonment and fined another $5,000.00.

[12] Santos filed a timely notice of appeal on September 8, 2000. In this appeal, Santos seeks a reversal of his conviction based on several grounds.

II.

[13] We have jurisdiction over this appeal pursuant to Title 7 GCA §§ 3107 and 3108 (1994) and Title 8 GCA § 130.60 (1993).

III.

[14] On appeal, Santos challenges his convictions by arguing that the trial court erred: (1) in denying his motion for the appointment of a forensic pathologist; (2) in curtailing the cross-examination of Arnaiz and in not *sua sponte* providing the jury with an informer instruction; (3) in admitting the statements he made to the police; and, (4) in denying his motion for a change of venue and in commenting to the jury about the reason why they were being sequestered.

A. Appointment of a Forensic Pathologist

[15] The first issue that we address is whether the trial court erred in denying Santos' motion for the appointment of a forensic pathologist. We review the denial of a "request for public funds to hire an expert" for an abuse of discretion. *United States. v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) (citations omitted). The defendant "must show that the lack of an expert deprived him of effective assistance of counsel. . . . [by] demonstrat[ing] *both* that reasonably competent counsel would have required the assistance of the requested expert for a paying client, *and* that he was prejudiced by the lack of expert assistance." *Labansat*, 94 F.3d at 530 (citations omitted) (emphasis added). "Prejudice must be shown by clear and convincing evidence." *Id*.

[16] Because this matter is one of first impression for our court, we comprehensively set out the principles surrounding this area. Our starting point is the Guam statutes, which address the

appointment of an expert witness for an indigent defendant in Title 8 GCA § 75.15 (1993). Section 75.15 provides in pertinent part:

> The court shall order at any time that a subpoena be issued for service on a named witness upon the ex parte application of a defendant and *a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense*. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed [sic] in behalf of the government.

8 GCA § 75.15 (emphasis added). At the federal level, there is a parallel provision, Title 18 USC § 3006A(e)(1) (2001), which addresses an indigent defendant's right to a public funded expert witness. That provision provides in relevant part:

> Counsel for a person who is *financially unable* to obtain investigative, *expert*, or other services *necessary for adequate representation* may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are *necessary and that the person is financially unable to obtain them*, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 USC § 3006A(e)(1) (emphasis added).[5]

[17] The analytical framework that we extract from both the Guam and federal statutes is that in order for a defendant to have a right to an expert witness paid with public funds, the defendant must prove that he is (1) financially unable to obtain the witness, and (2) that the witness is *necessary* to the defendant's representation or defense. Because Santos' indigent status is not in dispute, we confine our examination to the remaining issue of whether Santos' request for an expert pathologist was necessary for his defense. In this regard, we are aided by the seminal case of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985), amply cited by both parties.

[18] In *Ake*, the United States Supreme Court held that "when a defendant demonstrates . . . that his sanity at the time of the offense is to be a significant factor at trial, the State must . . . assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096.

[5] Both the Guam and Federal statutes are noted because federal case law is rich in cases, which interpret this statute and address this issue.

In determining whether a defendant has established the necessity for the appointment of an expert, the *Ake* court focused on the following three factors:

> The *first* is the private interest that will be affected by the action of the State. The *second* is the governmental interest that will be affected if the safeguard is to be provided. The *third* is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 77, 105 S. Ct. at 1093 (emphasis added).

[19] Although *Ake* addressed a defendant's access to a psychiatrist, Santos' brief correctly notes that the *Ake* analysis has been extended in subsequent cases, which have held that the defendant had the right to the appointment of other types of expert witnesses. However, there have also been several cases, which have similarly embraced the *Ake* analysis but have contrarily held that the trial court did not abuse its discretion when it denied the defendant's request for an expert witness. *See Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984) (defendant was not prejudiced by the non-appointment of a defense serologist); *Smith v. Commonwealth*, 734 S.W.2d 437, 448 (Ky. 1987) (defendant was not entitled to a *pathologist* or ballistic expert); *Simmons v. Commonwealth*, 746 S.W.2d 393, 395 (Ky. 1988) (defendant was not entitled to the appointment of two independent psychiatrist, two independent psychologist, and one licensed clinical social worker); *Moore v. Johnson*, 225 F.3d 495, 502-03 (5th Cir. 2000) (defendant was not entitled to both a state-provided expert assistance in jury selection or in the development of the mitigation evidence). Additionally, there are also a number of cases where a trial court's denial of a defendant's request for an independent investigator were upheld. *See United States v. Smith*, 893 F.2d 1573, 1580-81 (9th Cir. 1990); *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980); *United States v. Davis*, 582 F.2d 947, 951-52 (5th Cir. 1978); *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir. 1974).

[20] In the case at bar, Santos requested a government-paid forensic pathologist. The trial court denied the request because it found that Santos did not make an adequate showing of reasonableness, necessity, and benefit to warrant the appointment of another forensic pathologist, especially when Santos' counsel was able to freely examine Dr. Espinola's findings and question him during interviews and cross-examination. The trial court was also unconvinced by Santos' claim that Dr. Espinola should automatically be considered biased based on his status as a government employee.

We agree with the trial court and hold that it did not abuse its discretion when it denied Santos' request. We base our holding on the following two rationales.

[21] First, Santos fails to demonstrate how "he was prejudiced by the lack of expert assistance." *Labansat*, 94 F.3d at 530 (citations omitted). In the *Labansat* case, repeatedly cited by Santos, the court upheld the trial court's denial of a defendant's motion for the appointment of an expert witness. The *Labansat* court not only held that the defendant must show "by clear and convincing evidence that he was prejudiced by the lack of expert testimony," but also that the lack of the expert witness "deprived [the defendant]. . . of effective assistance of counsel." *Id*. The record before us does not establish that the trial court's denial of Santos' motion prejudiced Santos' case. Instead, we find that Santos' counsel was able to effectively challenge Dr. Espinola's findings and conclusions without the appointment of another pathologist. *See State v. Newton*, 347 S.E.2d 81, 83-84 (N.C. Ct. App. 1986) (noting that "[t]here are usually other methods by which defense counsel himself, without the use of investigators or experts, can uncover information or educate himself regarding a particular scientific discipline."). In fact, the record reflects that Santos' counsel was able to consult with other types of experts, who may have aided him in addressing issues that arise in the identification of charred remains. *See* Transcript, vol. I of XXV, p. 33 (Motions Hearing, February 29, 2000) (defense counsel noting consultation with other experts such as firefighters); Transcript, vol. I of XXV, p. 37 (Motions Hearing, February 29, 2000) (defense counsel noting, "We've also consulted with other experts in this case and they don't believe that that's a proper identification.").

[22] Moreover, we find this case factually distinguishable from *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992), cited by Santos, wherein the defendant was bombarded by the state's *six* expert witnesses, who were uncooperative towards the defendant. *Id*. at 884-85. In the instant case, the government's expert witness with respect to this issue was the Chief Medical Examiner of Guam, whom Santos was able to freely question and interview, as he would his own witness. Neither the transcripts below, nor Santos' brief indicates that Dr. Espinola was uncooperative during any interview or cross-examination. *See State v. Swallow*, 405 N.W.2d 29, 42 (S.D. 1987) ("[Defendant] does not cite a single example where his cross-examination was inhibited by a failure

to consult with an expert.").

[23] Second, Santos has not established that he was deprived of an effective defense. Santos' defense counsel's extensive cross-examination of Dr. Espinola regarding his findings and how they were derived demonstrates that the non-appointment of another pathologist did not deprive Santos of an effective defense. The defense counsel's effectiveness was illustrated with Dr. Espinola's admission during cross-examination that he was unable to determine that the body was really Hermie's. Transcript, vol. XX of XXV, p. 102 (Trial, May 8, 2000); *see also Woodard v. State*, 743 P.2d 662, 664 (Okla. Crim. App. 1987) (finding that defendant was not deprived of the "basic tools" of his defense because defense counsel was able to effectively attack the expert's conclusions during the extensive cross-examination).

[24] Additionally, although Santos contends that the purpose of the appointment of another pathologist was to establish the existence of chicken and dog bones, the record reveals that such an issue was closely explored during trial by the government counsel. Transcript, vol. XX of XXV, pp. 28-41, 49-59 (Trial, May 8, 2000). The government counsel consistently scrutinized Dr. Espinola about the existence of dog or chicken bones, or the bones of perhaps another person in the pit. Consequently, Santos was not precluded from developing this specific defense theory during trial. In this respect, we find the case cited by Santos, *State v. Pierce*, 488 S.E.2d 576 (N.C. 1997), dispositive, where the court affirmed the trial court's denial of defendant's request for an independent psychiatrist, independent *pathologist*, and medical expert in a child abuse murder case. In *Pierce*, the defendant requested that the court appoint an independent pathologist to review the state's pathologist report, to inform defense counsel of "any possible defenses," and to assist counsel in determining how the victim's injuries were inflicted. *Pierce*, 488 S.E.2d at 583. In affirming the trial court's denial, the court reasoned that:

> The *[m]ere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance*. . . . Similarly, undeveloped assertions that the requested expert assistance would be beneficial or even essential to the preparing of an adequate defense are insufficient to satisfy this threshold requirement.

Id. at 583-84 (alteration in original) (internal quotations and citations omitted) (emphasis added).

[25] In view of the above, Santos has failed to demonstrate that the trial court abused its discretion when it denied his motion for the appointment of another forensic pathologist. Santos has not proffered any evidence that his defense counsel could not effectively challenge Dr. Espinola's findings through effective interview or cross-examination. *See Moore*, 225 F.3d at 503 ("[A] defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access to the raw materials integral to the building of an effective defense.' Most of those raw materials come . . . in the form of his court-appointed lawyer--in his expert knowledge about how to negotiate the rules of court, how to mount an effective defense, and so forth."). Accordingly, we hold that the trial court did not abuse its discretion when it denied Santos' request for the appointment of a forensic pathologist.

B. Arnaiz's Testimony

[26] The second set of issues we address relates to Arnaiz's testimony. Santos asserts that the trial court erred in curtailing the defense counsel's cross-examination of Arnaiz, and in failing to *sua sponte* provide an informer instruction to the jury.

1. Curtailment of Cross-Examination

[27] Santos contends that the trial court erred when it curtailed the defense counsel's cross-examination of Arnaiz during trial. We disagree. The Government properly argues that Arnaiz had already been subjected to an extremely vigorous cross-examination for several days, and that the jurors already had sufficient time to evaluate Arnaiz's credibility.

[28] "The scope of cross-examination lies in the discretion of the trial court and will not be disturbed unless there is a manifest abuse of discretion." *State v. Carol M.D.*, 948 P.2d 837, 846 (Wash. Ct. App. 1997) (quoting *State v. Campbell*, 691 P.2d 929, 940 (Wash. 1984)); *see also United States v. Noti*, 731 F.2d 610, 612 (9th Cir 1984). The trial court's broad discretion to "preclude repetitive and unduly harassing interrogation," *Davis v. Alaska,* 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974), is reflected in section 611 of the Guam Rules of Evidence, which provides in relevant part:

> **Mode and Order of Interrogation and Presentation.**
>
> **(a) Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> **(b) Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Title 6 GCA §§ 611(a), (b) (1994). However, because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis*, 415 U.S. at 316, 94 S. Ct. at 1110, in the exercise of their discretion, "the court may not prejudice a defendant's constitutional right to confront the witnesses against him." *Carol*, 948 P.2d at 846. The court should also not preclude the defendant from developing his defense. *See United States v. Lopez-Alvarez*, 970 F.2d 583, 588-89 (9th Cir. 1992).

[29] In the instant appeal, Santos lists the following four instances when the trial court erred in curtailing defense counsel's cross-examination of Arnaiz: (1) Arnaiz's drug use; (2) Arnaiz's attempt to get a plea agreement for his uncle, Ricky Santos; (3) Arnaiz's outstanding warrant for a traffic violation; and, (4) Arnaiz's admission to Officer Nueva regarding his attempt to hide from the police when they were investigating the case. Upon close examination of Santos' arguments, however, we are convinced that Santos has only properly brought before us the first instance, the alleged curtailment of questioning with respect to Arnaiz's drug use. In light of the abuse of discretion's high standard[6] and Santos' failure to substantiate his allegation, we will summarily dispose of the other three instances.

a. Drug Use

[30] Santos maintains that the trial court erred when it curtailed his defense counsel's impeachment of Arnaiz's character during cross-examination of his alleged drug use. The questions

[6] "In the context of an evidentiary ruling, abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made regarding admission of evidence. However, even if a mistake has been made, a new trial will not be granted unless the evidence would have caused a different outcome at trial." *Polk v. Yellow Freight Sys., Inc.*, 876 F.2d 527, 532 (6th Cir. 1989) (citations omitted); *see People v. Fisher*, 2001 Guam 2, ¶¶ 7, 19.

regarding Arnaiz's drug use arose during defense counsel's cross-examination about why Arnaiz was placed on administrative duty status. Transcript, vol. XIV of XXV, p. 45 (Trial, April 27, 2000). Although the Government argued that Arnaiz was placed on administrative duty for his prior family violence case, defense counsel argued that Arnaiz's administrative duty status was a result of his drug problem and was, therefore, admissible as a bad act. Transcript, vol. XIV of XXV, p. 45 (Trial, April 27, 2000). After excusing the jury and listening to both counsels' arguments, the trial court limited cross-examination of Arnaiz's drug use to the effects on his memory, but not with respect to his truthfulness. We find that the trial court did not abuse its discretion in this regard.

[31] Evidence impeaching a witness' character may be admitted pursuant to Title 6 GCA §§ 607, 608, and 609. Title 6 GCA § 404(a)(3) (1995). "The credibility of a witness may be attacked by any party . . . ." Title 6 GCA § 607 (1994). Because Arnaiz's alleged drug use did not result in any conviction, Title 6 GCA § 609, entitled Impeachment by Evidence of Convictions of Crime, is inapposite. In construing the admissibility of Arnaiz's drug use, Title 6 GCA § 608(b), however, is relevant and provides:

> **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on *cross-examination of the witness* (1) concerning his character for *truthfulness* or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Title 6 GCA § 608(b) (1994) (emphasis added). In determining whether section 608(b) applies to this case, we must inquire whether Arnaiz's drug use is relevant to his truthfulness or lack of truthfulness.

[32] The case of *United States v. Clemons*, 32 F.3d 1504 (11th Cir. 1994), noted by the trial court during its deliberation on this matter, is instructive to our inquiry. In *Clemons*, the court concluded that a question regarding a witness' drug use was inadmissible for two reasons. First, the court could not find the relevance in admitting such evidence except for attacking the character of the

witness. *Clemons*, 32 F.3d at 1511. Second, the court has "long adhered to the proposition that a witness' use of drugs may not be used to attack his general credibility, but only his ability to perceive the underlying events and to testify lucidly at trial." *Id.* (citing *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990)). Moreover, in *United States v. Robinson*, 956 F.2d 1388 (7th Cir. 1992), the court also noted that the "district court may bar cross-examination about a witness' illegal drug use when it is used 'for the sole purpose of making a general character attack.'" *Id.* at 1397 (citations omitted).

[33] Because there is a general concern that "evidence that a witness [who] has used illegal drugs may so prejudice the jury that it will excessively discount the witness'[] testimony," cross-examination regarding a witness' drug use has been limited to impeachment of the witness' perception and memory, but not on the witness' ability to tell the truth. *United States v. Neely*, 980 F.2d 1074, 1081 (7th Cir.1992). Accordingly, section 608(b) did not render Arnaiz's drug use admissible since it is not relevant for his truthfulness. Therefore, we hold that the trial court did not abuse its discretion when it limited defense counsel's cross-examination of Arnaiz's drug use to the effect on his memory.

b. Plea Agreement for Arnaiz's uncle, Ricky Santos; Outstanding Warrant; Hiding from Police

[34] As we expressed above, Santos identifies three other instances during cross-examination where the trial court allegedly erred in curtailing Arnaiz's cross-examination. Given the "high degree of deference" we accord "to the trial court's decision to suppress or admit evidence," we "will not find error absent a clear abuse of discretion resulting in prejudice." *Cassibry v. Schlautman*, 816 So. 2d 398, 403 (Miss. Ct. App. 2001); *see People v. Fisher*, 2001 Guam 2 at ¶ 7. We follow the reasoning of *Loncar v. Gray*, which expressed, "[t]o prevail on [the] appeal of the trial court's evidentiary decisions, [defendant] *must show that those decisions were erroneous and had a substantial influence on the outcome of the case*." *Loncar v. Gray*, 28 P.3d 928, 930 (Alaska 2001) (emphasis added). Here, we are unable to find that the trial court abused its discretion during the three instances that Santos outlines because Santos has failed to demonstrate how the trial court's alleged error resulted in prejudice.

[35] First, Santos claims that the trial court should have allowed questions pertaining to Arnaiz's alleged attempt to get a plea agreement for Arnaiz's other uncle and Santos' brother, Ricky. Transcript, vol. XIV of XXV, p. 75 (Trial, April 27, 2000). According to the trial transcripts, the defense counsel's purpose in presenting this evidence was to reveal a potential bias in Arnaiz's testimony. Transcript, vol. XIV of XXV, p. 73 (Trial, April 27, 2000). Although Santos contends the trial court erred by precluding such evidence, he fails to explain how the trial court's exclusion of this evidence affected his right to a fair trial. Additionally, Santos does not present any arguments why the trial court erred when it sustained the Government counsel's objection based on 6 GCA § 403 grounds.

[36] Next, Santos alleges that the trial court erred when it limited questions regarding Arnaiz's warrant for a traffic violation. Transcript, vol. XIV of XXV, p. 80 (Trial, April 27, 2000). Although defense counsel at trial acknowledged that Arnaiz already paid the fine and that there was no conviction, he wanted to introduce it as a prior bad act. As explained above, pursuant to 6 GCA § 608(b), a witness can only be impeached by evidence of a prior bad act if that evidence pertains to the witness' truthfulness or untruthfulness. As argued by the Government's counsel at trial, the traffic violation is not only irrelevant to the matter, but does not touch on the veracity of the witness. More importantly, Santos again fails to present to this court how Santos' overall defense was adversely impacted because of this matter.

[37] Lastly, Santos contends that the trial court erred when it precluded the admission of Arnaiz's statement to Officer Nueva regarding his attempt to hide from the police when they were investigating this case. Transcript, vol. XIV of XXV, pp. 81-91 (Trial, April 27, 2000). The trial court ruled the evidence inadmissible based on hearsay. During trial, defense counsel argued that Arnaiz's statement to the officer was admissible pursuant to 6 GCA § 801(d)(1).[7] Transcript, vol. XIV of XXV, p. 87 (Trial, April 27, 2000). We agree with the trial court's ruling. Section 801(d)(1) provides in relevant part:

[7] It is undisputed that Arnaiz's alleged statement to Officer Nueva was made out of court and was being used to prove the truth of the matter asserted. *See* Title 6 GCA § 801(c) (1994).

> **Statements which are not hearsay.** A statement is not hearsay if--
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

Title 6 GCA § 801(d)(1) (1994). We find that Arnaiz's alleged statement to the officer did not fall under the scope of section 801(d)(1) because the statement was neither an inconsistent statement made "under oath" nor a consistent statement "offered to rebut" a recent fabrication. Therefore, section 801(d)(1) did not provide the exclusion that would make the statement non-hearsay. Consequently, the trial court did not abuse its discretion when it precluded the admissibility of the statement.

[38] In sum, although we uphold a defendant's right "to be confronted with the witnesses against him," and to an "opportunity for effective cross-examination," we similarly recognize that a defendant does not have the right to "cross-examination that is effective in *whatever way*, and *to whatever extent*, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986) (emphasis added) (quotations omitted). A review of Arnaiz's testimony, especially focusing on the instances that Santos points to during cross-examination, does not demonstrate that Santos' right to an effective confrontation of the witness was curtailed. Accordingly, we hold that the trial court did not abuse its discretion during Arnaiz's cross-examination.

2. Informer Instructions

[39] Santos next challenges his conviction based on his contention that the trial court erred by not *sua sponte* providing an informer instruction to the jury.[8] Santos contends that Arnaiz's testimony was so "problematic" that the trial court should have provided an informer instruction notwithstanding defense counsel's failure to request for one during trial. We disagree.

[8] The Government asserts that the informer instruction was not necessary and that the trial court did not need to raise the issue *sua sponte*. Contrary to Santos' contention, Arnaiz's testimony was corroborated by other witnesses such as Anthony Concepcion. The Government further argues that the instructions at the end of trial, which discussed the credibility of witnesses, impeachment, and factors to consider in proving eyewitness testimony were sufficient.

[40] We review a trial court's failure to *sua sponte* provide a jury instruction for plain error. *People v. Camacho*, 1999 Guam 27, ¶ 15 (citing Title 8 GCA §§ 90.19, 130.50 (1993)). Plain error is defined as "[a]ny error, defect, irregularity or variance which does not affect substantial rights . . . ." Title 8 GCA § 130.50(a) (1993). For the following two reasons, we find that the trial court did not err when it failed to *sua sponte* provide an informer instruction to the jury.

[41] First, Arnaiz's status as an informer was not fully established. In *United States v. Monzon-Valenzuela*, 186 F.3d 1181 (9th Cir. 1999), the court expressed that "[t]he informant instruction applies only to witnesses 'who provide evidence against a defendant for some personal advantage or vindication, as well as for pay or immunity.'" *Id.* 186 F.3d at 1183 (quoting *Guam v. Dela Rosa*, 644 F.2d 1257, 1259 (9th Cir. 1980)). The mere implication that Arnaiz may have received some incentive for his testimony against Santos is insufficient to confer upon him informer status. *Id*.

[42] Second, assuming *arguendo* that Arnaiz was an informer, the failure to provide an informer instruction is not reversible error if the court provided alternative instructions regarding the credibility of a witness. This principle is articulated in *United States v. Brown*, 454 F.2d 397 (9th Cir. 1972), where the court reasoned:

> While a specific accomplice instruction would have provided more guidance, the trial judge did instruct the jury with care regarding the credibility of witnesses, telling them to carefully scrutinize the testimony given, and in so doing, consider all the circumstances under which any witness has testified . . . [including the] relation [of] the Government, or the defendant to the witness; and the manner in which he or she might be affected by the verdict; and the extent of contradiction or corroboration by other evidence, if any . . . .

Brown, 454 F.2d at 399 (alterations in original) (internal quotations and citations omitted); s*ee also United States v. McSweaney*, 507 F.2d 298, 301 (9th Cir. 1974) (finding appellant's contention that the conviction should be reversed because the district court did not give an accomplice instruction *sua sponte* to be without merit because the court instructed the jury to "carefully scrutinize the testimony given," and in doing so to consider, inter alia, "the extent of contradiction or corroboration by other evidence.")

[43] In the instant matter, the jury was instructed on how to properly assess the credibility of the witnesses as denoted in Jury Instruction No. 4D, Credibility of Witness, which provides in pertinent part:

> In deciding what the facts are, you must consider all the evidence. In doing this, you must decide what testimony to believe and what testimony not to believe. *You may disbelieve all or part of any witness' testimony*. In making that decision, you may take into account a number of factors, including the following:
> . . .
> 3. What was the witness' manner while testifying?
> 4. *Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the ca*se?
> 5. How reasonable was the witness' testimony considered in light of all the evidence in the case?
> 6. Was the witness' testimony contradicted by what that witness had said or done at another time, or by the testimony of other witnesses, or by other evidence?

Appellee's Excerpts of Record, tab 10, p. 32 (Jury Instruction 4D). Additionally, a jury instruction was also provided regarding a government witness' potential bias and hostility, as stated in Jury Instruction No. 4I, Bias and Hostility, which provides:

> In connection with your evaluation of the credibility of the witness, you should specifically consider evidence of resentment or anger with some *government witnesses* may have towards the defendant.
> Evidence that a witness is *biased, prejudiced or hostile* toward the defendant requires you to view that witness' testimony with caution, to weigh with care, and subject it to close and searching scrutiny.

Appellee's Excerpts of Record, tab 13, p. 38 (Jury Instruction 4I) (emphasis added). As reflected from the jury instructions that were given, the jury was fully apprised of issues and factors pertaining to a witness' credibility and their potential bias and hostility. Consequently, we find that the trial court did not err by failing to *sua sponte* provide for a more specific informer instruction.

C. Motion to Suppress

[44] We next address the denial of Santos' motions to suppress the statements he made to the police on various dates. We examine whether the trial court erred in not suppressing Santos' statements based on the *Miranda* doctrine, the *McNabb-Mallory* rule, and the fruits of the poisonous tree principle.

1. *Miranda*

[45] We review a motion to suppress *de novo*. *People v. Sangalang*, 2001 Guam 18, ¶ 10 (citing *People v. Hualde*, 1999 Guam 3, ¶ 19).[9] "The Fifth Amendment of the United States Constitution

[9] Additionally, we review "the voluntariness of a waiver of *Miranda* rights" *de novo*." *Sangalang*, 2001 Guam 18 at ¶ 10. The determination of whether a "waiver was knowing and intelligent is reviewed for clear error." *Id.*

provides that no person shall be compelled in any criminal case to be a witness against himself." *Hualde*, 1999 Guam 3 at ¶ 20 (internal quotations and citations omitted). "To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination," the United States Supreme Court held in *Miranda* that "suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation." *Thompson v. Keohane*, 516 U.S. 99, 107, 116 S. Ct. 457, 462 (1995) (citations omitted). However, "police officers are not required to administer *Miranda* warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977). "Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Id*. "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id*.

a. Statements made between September 3, 1999 to September 4, 1999.

[46] The first statement that Santos seeks to suppress based on *Miranda* violations stems from Santos' contact with the police that started at 2:15 A.M. on September 3, 1999 and ended at 9:30 P.M. on September 4, 1999. Santos' contact with the police was triggered after Captain Paul Suba's (hereinafter "Suba") interview with Pangelinan, who claimed that she had last seen her son with Santos. Transcript, vol. II of XXV, pp. 10, 13 (Motions Hearing, March 14, 2000). After contacting Santos on September 3, 1999, the police brought him to the precinct in a marked vehicle and without handcuffs. Transcript, vol. II of XXV, p. 19 (Motions Hearing, March 14, 2000). Suba testified and Santos does not dispute that he voluntarily went to the precinct. Transcript, vol. II of XXV, p. 17 (Motions Hearing, March 14, 2000); Transcript, vol. IV of XXV, p. 44 (Trial, March 16, 2000). Inside the precinct, Santos was placed in an interview room, which contained no windows, one entrance, a single doorknob, and a latch on the exterior of the door. Transcript, vol. II of XXV, p. 49 (Motions Hearing, March 14, 2000). Initially, Suba and another officer, Caliyo, interviewed Santos, however, they left after thirty minutes because Suba felt that, "it didn't seem like [Santos] wanted to say anything." Trial Transcripts, vol. II of XXV, p. 20 (Motions Hearing, March 14,

2000).

[47] Santos' second interview occurred in the early morning of September 4, 1999 with officers Anna Theresa Eustaquio (hereinafter "Eustaquio") and Sacha Hertlestt (hereinafter "Hertslet"). Transcript, vol. II of XXV, p. 49 (Motions Hearing, March 14, 2000). Because Santos claimed that his writing and grammar skills were poor, he asked if he could just dictate his statement. Transcript, vol. II of XXV, p. 49 (Motions Hearing, March 14, 2000). Santos was informed that "he wasn't under arrest," and responded affirmatively when asked by the officers, "if he's willing to help us out on the case." Transcript, vol. II of XXV, p. 49 (Motions Hearing, March 14, 2000). According to Hertslet, Santos responded that "he had really nothing else to do . . . [and] wasn't planning on going anywhere." Transcript, vol. II of XXV, p. 50 (Motions Hearing, March 14, 2000).

[48] Eustaquio transcribed Santos' detail of the events that transpired during and after Hermie's disappearance. Transcript, vol. II of XXV, pp. 49-52, 96-99 (Motions Hearing, March 14, 2000). During this time, Santos was able to make corrections to his statement and take breaks. Transcript, vol. II of XXV, p. 53 (Motions Hearing, March 14, 2000). At no time during the interview did he request to be taken back to his home. Transcript, vol. II of XXV, p. 100 (Motions Hearing, March 14, 2000). Santos signed each page of the statement, and on the first page of the Statement form, Santos initialed the crossed-out portion which read, "AFTER BEING ADVISED AND UNDERSTANDING MY CONSTITUTIONAL RIGHTS." The officers claimed that because Santos was not a suspect, they informed him that they crossed-out that portion of the form. Transcript, vol. II of XXV, p. 99 (Motions Hearing, March 14, 2000). Santos, however, initialed the following clause, which stated, "I AM GIVING THE FOLLOWING STATEMENT FREELY AND VOLUNTARILY."

[49] Shortly thereafter, Santos was taken to the Tiyan precinct to have his alibi verified by Arnaiz. Transcript, vol. II of XXV, p. 59 (Motions Hearing, March 14, 2000). At that time, Santos was provided breakfast, was placed in a room where he read the newspaper, and was free to go to the bathroom next door. Transcript, vol. II of XXV, pp. 60-61 (Motions Hearing, March 14, 2000). Around 7:50 A.M, Santos requested to go home, but he was not taken home until 9:30 A.M. because another interview with Sgt. Joseph G. Baleto (hereinafter "Baleto") was scheduled. Before the

interview, Santos was not read his rights because Baleto assumed that Santos was already *Mirandized*. Transcript, vol. II of XXV, p. 117 (Motions Hearing, March 14, 2000).

[50] In the case at bar, Santos asserts that he was unlawfully detained by police when he was held at the Tiyan precinct for nineteen hours and thirty minutes, and argues that he should have been read his *Miranda* rights before he was questioned. We agree. The admissibility of Santos' September 3, 1999 through September 4, 1999 statements is contingent on whether Santos was in custody. The issue of "whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review." *Thompson*, 516 U.S. at 102, 116 S. Ct. at 460.

[51] In determining whether or not a defendant was in custody for the purposes of *Miranda* rights, *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457 (1995) is instructive. In *Thompson*, the United States Supreme Court set forth two discrete inquiries to ascertain whether a person is "in custody." The first inquiry is, "what were the circumstances surrounding the interrogation." *Id*. at 112, 116 S. Ct. at 465. The second inquiry is, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.*; *see also Oregon v. Elstad*, 470 U.S. 298, 310, 105 S. Ct. 1285, 1293 (1985). After addressing the two inquiries, the court must then resolve "the ultimate inquiry," which is, "[was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465 (alteration in original). Based on the following two rationales, we disagree with the trial court's conclusion that Santos was not in custody and that the police were not required to read him his *Miranda* rights.

[52] First, when we consider that Santos was in the precinct for over nineteen hours and was interviewed by various officers at three separate times, it is difficult to conclude that a reasonable person in Santos' position would have felt free to leave. The United States Supreme Court in *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 (1980), found that, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 46 U.S. at 554, 100 S. Ct. at 1877. Here, Santos was brought by the police to the

precinct in the early hours of the morning and was shifted among various officers during questioning. Even Suba admitted that he stopped the interview because he felt that, "it didn't seem like [Santos] wanted to say anything." Transcript, vol. II of XXV, p. 20 (Motions Hearing, March 14, 2000).

[53] Second, although the officers claimed to have communicated to Santos that he was free to leave at anytime, as noted in *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526 (1994), the officers' "beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury*, 511 U.S. at 325, 114 S. Ct. at 1530 (internal quotations and citations omitted). Here, the officers insisted that Santos was free to leave. However, Santos was placed in a windowless room with one door, which could be locked from the outside. Additionally, Santos was brought to the other precinct so that Arnaiz could attest to Santos' alibi. More importantly, although Santos requested that he be taken home at 7:50 A.M., he was not taken home until two hours later and only after another officer interviewed him. This reflects that Santos was really not free to leave the precinct, and that if he had insisted on leaving he would have most likely been physically restrained. *See Dunaway v. New York*, 442 U.S. 200, 212, 99 S. Ct. 2248, 2256 (1979) (finding that the defendant was seized because, even though he was not told he was under arrest, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.); *see also Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877 (stating that an example of a circumstance that might indicate a seizure, even where the person did not attempt to leave, is the threatening presence of several officers .).

[54] In view of the above circumstances surrounding Santos' contact with police officers between September 3, 1999 and September 4, 1999, we find that Santos was in custody, and that the trial court erred in holding that the police were not required to read Santos his *Miranda* rights before the officers questioned him.[10]

[10] Because we find that Santos should have been read his *Miranda* rights, we need not address the issue of whether Santos' statement was freely given.

[55] However, notwithstanding our finding, we find that the trial court's error was harmless and was not fatal to the Government's case against Santos. Our finding of harmless error is based on two grounds. First, Santos' statements were exculpatory, not inculpatory. *Nova v. Bartlett*, 211 F.3d 705, 708 (2nd Cir. 2000) (affirming the trial court "solely on the ground that [defendant] did not make any inculpatory statements prior to receiving his *Miranda* warning and that his later, post-warning confessions were admissible at trial."). Santos did not confess or implicate himself in the commission of the crime during any of his September 3-4 statements. *See* Appellant's Opening Brief, p. 29 ("Mr. Santos never admitted complicity in the murder or disappearance of Hermie Santos. In fact, he always denied it."). This is also reflected in the fact that Santos was not formally arrested during this first encounter with the police.

[56] Second, and more importantly, Santos repeated the substance of the September 3-4 statements on at least two other occasions discussed below, wherein we find that the trial court correctly did not suppress Santos' statements. *See Pittman v. Tahash*, 170 N.W.2d 445, 448 (Minn. 1969) (finding that although defendant's first confession was made in absence of warnings, sufficient evidence supported lack of taint in the second confession made several hours later). Thus, even if we found any substantive information in Santos' September 3-4 statements, the information was ultimately and inevitably revealed to the police in later statements given by Santos. *Nix v. Williams*, 467 U.S. 431, 443-44, 104 S. Ct. 2501, 2508-09 (1984) (adopting the inevitable or ultimate discovery exception to the exclusionary rule). Accordingly, we hold the trial court's denial of Santos' Motion to suppress the September 3-4 statements was harmless error.

b. Statements made between September 13, 1999 and September 14, 1999.

[57] The second statement that Santos seeks to suppress based on *Miranda* arose from the execution of a search warrant at Ricky Santos' auto shop in Piti in an unrelated drug case. Transcript, vol. II of XXV, pp. 126-127 (Motions Hearing, March 14, 2000). Because Santos was in the shop during the execution of the search warrant, the police brought Santos to the precinct for more questioning. Santos was first taken to the hospital, however, because he complained of pains in the facial area. Transcript, vol. II of XXV, pp. 131-134 (Motions Hearing, March 14, 2000).

According to Officer J.S. Carbullido (hereinafter "Officer Carbullido"), when they finally arrived at the precinct, Santos was willing to talk and was even provided lunch. Transcript, vol. II of XXV, p. 134 (Motions Hearing, March 14, 2000). Santos was then read and provided the "GPD Constitutional rights form," which he signed at around 1:13 P.M., as noted in Appellee's Excerpts of Record, tab 2 (Custodial Interrogation, September 14, 1999), Transcript, vol. II of XXV, p. 134 (March 14, 2000).

[58] Officer Carbullido testified that Santos was free to leave the precinct at anytime, but ended up sleeping in the interview room because he did not ask to be taken home. Transcript, vol. II of XXV, pp. 143-145, 151 (Motions Hearing, March 14, 2000). On September 14, 1999, at around 7:18 A.M., Santos was again interviewed after being apprised of his *Miranda* rights. Transcript, vol. II of XXV, p. 149 (Motions Hearing, March 14, 2000). Santos was eventually taken back to Piti when he expressed that he wanted to get some clothes. Transcript, vol. II of XXV, p. 150 (Motions Hearing, March 14, 2000).

[59] In the present appeal, Santos argues that the September 13-14 statements he made to the police should have been suppressed. We disagree. Even if we were to incorporate our previous analysis with respect to the custody issue and find that Santos was in custody during this particular police encounter, we agree with the trial court's finding that Santos was apprised of and waived his *Miranda* rights as a result of him signing the waiver form. *See* Appellant's Excerpts of Record, Tab. F, p. 10 (Decision and Order, March 28, 2000); *see also Commonwealth v. Cook*, 644 N.E.2d 203, 209 (Mass. 1994) (finding that the signing of a waiver card was sufficient to constitute a waiver of Miranda rights); Appellee's Excerpts of Record, Tabs 2-4, (Custodial Interrogation, September 13, 1999 and September 14, 1999). "We give substantial deference to the judge's findings of fact in reviewing the denial of a motion to suppress" and "[i]n reviewing a . . . judge's determination that a voluntary waiver was made . . . ." *Cook*, 644 N.E.2d at 208-09 (omission in original) (quotations and citations omitted). We are unwilling to overturn the trial court's finding that Santos voluntarily waived his rights, especially when Santos' brief glosses over the existence of the signed waivers, and, therefore, fails to challenge their validity. Consequently, we hold that the trial court did not err in denying Santos' motion to suppress the September 13-14 statements.

2. *McNabb-Mallory* Rule.

a. September 16, 1999 statement

[60] The last statement that Santos claims should have been suppressed by the trial court stems from Santos' participation in a video reenactment of his visit to the Nevermind Road pit, where he claims he was burning chicken and dog bones. Santos argues that his video-taped statements should have been suppressed based on the *McNabb-Mallory* rule. The thrust of Santos' claim is that when he participated in the video reenactment at approximately 1:57 P.M. on September 16, 1999, the police already had sufficient probable cause to arrest him. Santos argues that his release after the reenactment and his formal arrest at 8:30 P.M. on September 17, 1999, violated the *McNabb-Mallory* rule. Santos also contends that the trial court "misses the point" when they held that the *McNabb-Mallory* rule was not violated because Santos was magistrated within twenty-four hours of his arrest. Appellant's brief, p. 44. We find Santos' argument unconvincing.

[61] "The *McNabb-Mallory* rule was formulated by the U.S. Supreme Court to enforce compliance with Rule 5(a) of the Federal Rules of Criminal Procedure." *Camacho*, 1999 Guam 27 at ¶ 29. Under the rule, "any evidence obtained by police during interrogation after arrest,[11] may not be used against that arrestee at trial where there was an unreasonable delay in bringing the arrestee before a magistrate for arraignment." *Id*. (citing *Mallory v. United States*, 354 U.S. 449, 77 S. Ct. 1356 (1957) and *McNabb v. United States*, 318 U.S. 332, 63 S. Ct. 608 (1943)) (footnote added). In resolving whether there has been an unreasonable delay from the time the defendant was arrested to the time he was magistrated, the twenty-four hour time limitation found in Title 8 GCA § 45.10 has been employed. Section 45.10 provides in pertinent part:

> Duty to Delivery Arrestee to Judge, or to Peace Officer.
>
> (a) An officer making an arrest under a warrant or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge of the Superior Court.
>
> . . . .

[11] Title 8 GCA § 20.10 (1993), provides that "an arrest is made by an actual restraint of the person, or by submission to the custody of the person making the arrest."

> (c) The person arrested shall in all cases be taken before the judge within twenty-four hours after the arrest, except that when the 24-hour period expires on a day when the Superior Court is not in session, the time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

Title 8 GCA § 45.10 (1993). Moreover, it is through Guam's adoption of section 45.10 that the *McNabb-Mallory* rule is applied on Guam "[d]espite [sic] Congress' limiting the effect of this rule upon federal law enforcement." *Camacho*, 1999 Guam 27 at ¶ 29.

[62] In the present case, Santos misapplies the *McNabb-Mallory* rule to support his contention that the statements contained on the September 16 video are inadmissible because at that time the statements were made, police had sufficient probable cause to arrest him. The focus of the *McNabb-Mallory* rule is on the unreasonable delay that occurs *after* a defendant's arrest and not on whether the police had sufficient probable cause to arrest the individual. *See* Title 8 GCA § 45.10; *see also Camacho*, 1999 Guam 27 at ¶¶ 29-34. Because Santos does not dispute the fact that he was arrested at 8:30 P.M. on September 17, 1999, and that four hours later he was magistrated, we do not find any unreasonable delay between the time of Santos' arrest and the time when he was magistrated. *See Camacho*, 1999 Guam, 27 at ¶ 34.

[63] Additionally, assuming *arguendo* that we were to adopt Santos' interpretation of the *McNabb-Mallory* rule and accept his assertion that at the time of the videotaping, police had probable cause for Santos' arrest, we are not compelled to find that the statements he made on the video should be suppressed.[12] Appellant's Opening Brief, p. 44. In *Camacho*, we cited to the case of *United States v. Jackson*, 712 F.2d 1283 (8th Cir. 1983), where the court noted that "[t]he fact that a statement is obtained in violation of *Mallory* does not . . . render it inadmissible *per se*." *Jackson*, 712 F.2d at 1286 (emphasis added). This is so because "delay in being taken before a magistrate has been only one factor to consider in determining whether a confession is involuntary . . . ." *Id.*; *see also Bey v. State*, 781 A.2d 952, 961 (Md. App. 2001) (finding that "the fact that the police did

[12] We note the oversight in Appellant's Opening Brief's presentation of facts describing this event. The Brief incorrectly states that the videotaping occurred at 12:30 P.M. on the 17th, approximately eight hours before Santos was arrested. Appellant's Opening Brief, p. 44. The video-taping actually occurred on September 16 at 1:57 P.M. Trial Transcripts, vol. XVII of XXV, p. 59 (Trial, May 3, 2000). In view of the fundamental importance of time and dates with respect to this issue and Santos' imprecision in this matter, Santos ineffectively argues precisely when the police had probable cause to arrest Santos, whether it was on the 17th or before the reenactment on the 16th.

not immediately bring appellant before a commissioner because they first wanted to question him, does not automatically lead to exclusion. Rather, we look to the totality of circumstances to determine if the confession was voluntarily given."). We also determine if the defendant executed a waiver of his rights. "The rationale underlying this waiver rule is that the fundamental concerns that led to the *Mallory* and *McNabb* decisions are adequately addressed by compliance with the requirements of *Miranda*, which was decided after *Mallory* and *McNabb*." *United States v. Bell*, 740 A.2d 958, 964 (D.C. 1999). Here, Santos does not dispute that before the reenactment, he "executed a waiver of his *Miranda* rights." Appellant's Opening Brief, p. 35; *see also* Appellee's Excerpts of Record, tab. 4 (Custodial Interrogation, September 16, 1999). The transcript of the reenactment clearly demonstrates that the officer reminded Santos of his constitutional right not to participate in the video, and that Santos voluntarily assented to participating. Transcript, vol. XVII of XXV, p. 59 (Trial, May 3, 2000). In light of Santos' waiver, we find that even if the police had sufficient probable cause before the reenactment, and therefore should have already arrested Santos, his "valid waiver of . . . [his] *Miranda* rights [was] also a waiver of his . . . right to presentment without unnecessary delay." *Bell*, 740 A.2d at 963 (internal quotations and citations omitted) (finding that "[t]he waiver is valid even if obtained during the period of unnecessary delay"). In sum, we hold that the trial court did not err in admitting the statements made by Santos during the reenactment.

3. Fruits of the Poisonous Tree Doctrine

[64] In a sweeping fashion, Santos argues that all of the statements that he made after September 4, 1999 should have been suppressed pursuant to the fruits of the poisonous tree doctrine. In *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963), the United States Supreme Court held that, "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *United States v. Ceccolini*, 435 U.S. 268, 275, 98 S. Ct. 1054, 1059 (1978) (reaffirming and quoting *Wong Sun v. United States*, 371 U.S. at 485, 83 S. Ct. at 416).

[65] In this appeal, Santos essentially argues that because the statement he made on September 4, 1999 was illegally obtained by police, then all subsequent statements made by him days later on September 13, 14, and 16, 1999 should also be suppressed. Santos' argument is unpersuasive and misconstrues the fruits of the poisonous tree doctrine. Although evidence subsequently obtained as the "fruit" of a prior illegality is suppressible, the court must initially resolve "whether the challenged evidence was come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura v. United States*, 468 U.S. 796, 804-05, 104 S. Ct. 3380, 3385 (1984) (alteration in original) (internal quotations and citations omitted). Subsequent statements made, even after an illegal arrest, are not automatically excluded if "intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint." *Elstad*, 470 U.S. at 306, 105 S. Ct. at 1291 (internal quotations and citations omitted). Here, the September 13, 14, and 16 statements were made almost two weeks after the statement Santos claims the police illegally obtained. Although we found that the September 4, 1999 statement was illegally obtained, the time frame between the first statement and the subsequent statements was sufficient to dissipate the effect of the original illegality on the subsequent statements. *See Dulier v. State*, 511 P.2d 1058, 1060 (Alaska 1973) (finding that "the lapse of time between the first and succeeding statements was such that we are satisfied that the first statement was not causative of the second."). As the United States Supreme Court noted, "[e]ven in such extreme cases . . . in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, *with time, be dissipated*." *Elstad*, 470 U.S. at 311-12, 105 S. Ct. at 1294 (emphasis added). Also, as earlier stated, the September 4, 1999 statements were exculpatory, not inculpatory. *See supra* p. 22, ¶¶ 55-56. Consequently, unless Santos provides a nexus between the first statement and the subsequent statements, and argues that the close to two-week time frame was insufficient to dissipate the effects of the "illegality" of the first statement, we hold that the statements made by Santos after September 4, 1999 were not rendered inadmissible as the "fruits of the poisonous tree."

D. Change of Venue and Trial Judge's Comment before Jury Sequestration

[66] The last issues we address pertain to the publicity that this case received and Santos' motion for a change of venue and the trial judge's comment to the jury explaining why they were being sequestered.

1. Change of Venue

[67] Santos argues that the trial court erred when it denied his motion for a change of venue.[13] We review a trial court's denial of a motion to change venue for an abuse of discretion. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988); *see State v. Barrera*, 22 P.3d 1177, 1181 (N.M. 2001); *Jensen v. State Farm Mut. Auto Ins. Co.*, 781 So. 2d 468, 469 (Fla. Dist. Ct. App. 2001).[14] "[T]he trial court's decision will not be disturbed if abuse cannot be demonstrated." *Jensen*, 781 So.2d at 469. *Stewart v. State*, 562 So. 2d 1365, 1369 (Ala. Crim. App. 1989). In analyzing the trial court's decision, the focus is "whether the trial court's venue determination is supported by substantial evidence in the record. Substantial evidence consists of relevant evidence that might be accepted by a reasonable mind as adequate to support a conclusion." *Barrera*, 22 P.3d at 1181 (internal quotations and citations omitted).

[68] The policy behind a change of venue is "to deny . . . probable prejudice" from pre-trial publicity and "to ensure that a defendant will be convicted upon the evidence properly admitted in court." *State v. Cunningham*, 620 P.2d 535, 539 (Wash. Ct. App. 1980) (Roe, J. concurring) (citations omitted); *see also Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S. Ct. 1507, 1516 (1966). "The standards governing a change of venue ultimately derive from the due process clause of the fourteenth amendment which safeguards a defendant's sixth amendment right to be tried by a panel of impartial, indifferent jurors." *Harris*, 885 F.2d at 1361 (internal quotations and citations omitted). If a trial court is "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere," then a defendant's motion for a change of venue should be

[13] We raise, but decline to discuss two underlying issues in a change of venue case. First, there is the pragmatic consideration of determining the location of the alternative venue. Second, the court must determine what statutory or legal basis exists on Guam, which confers upon the trial court the ability to order a change of venue. In light of the issues import, both parties should have properly addressed and briefed them.

[14] We take note that neither party has set forth the proper standard of review for the change of venue issue.

granted. *Id*. In determining whether pre-trial publicity was so prejudicial as to warrant a change of venue, we adopt the following two-step analytical framework:

> 1. [D]id publicity pervade the court proceedings to the extent that prejudice can be presumed?; if not, then
> 2. [D]id defendant show actual prejudice among members of the jury?

State v. Stokley, 898 P.2d 454, 462 (Ariz. 1995). Additionally, we embrace the Ninth Circuit's definition of presumed prejudice and actual prejudice as set forth in *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988). Presumed prejudice arises "when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Actual prejudice exists if the "jurors demonstrated actual partiality of hostility that cannot be laid aside." *Id*. at 1363.

[69] In the instant appeal, Santos argues that the trial court abused its discretion when it denied his pre-trial motion for a change of venue. Santos contends that the pre-trial publicity rose to the level of both presumed and actual prejudice. Applying the two-step analytical framework set forth above, we find no existence of either presumed or actual prejudice, and therefore, hold that the trial court did not abuse its discretion when it denied Santos' motion for a change of venue.

a. Presumed Prejudice

[70] We begin our analysis by determining whether the pre-trial publicity was inherently prejudicial. In our review of the record, we are unconvinced that prejudice from the publicity can be presumed. *See* Appellant's Excerpts of Record, tab B. Courts are hesitant in finding presumed prejudice because saturation occurs only in extreme circumstances. *See Harris*, 885 F.2d at 1361. Moreover, the defendant has the burden to show "pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality." *Stokley*, 898 P.2d at 462 (quoting *State v. Bible*, 858 P.2d 1152, 1166 (Ariz. 1993)). Here, Santos submits forty-one articles dated from September 5, 1999 to January 19, 2000. *See* Appellant's Excerpts of Record, tab B. The articles, however, do not demonstrate extreme saturation from the media. Although Hermie's disappearance generated extensive publicity in the beginning, a few months after the incident, the publicity waned. Several of the articles were simple one paragraph synopsis of the case. *See* Appellant's Excerpts of Record, tab B, Exhibits 27-30, 33. The news articles were mostly factual

in nature and focused on the investigation conducted by police. It is insufficient that Santos establishes to this court that the case received media coverage, which informed potential jurors of the case. Rather, Santos has to demonstrate how the publicity "resulted in a trial that was 'utterly corrupted.'" *Stokley*, 898 P.2d at 463 (quoting *Murphy v. Florida*, 421 U.S. 794, 798, 95 S. Ct. 2031, 2035 (1975)). We agree with the trial court's observation that, "[h]igh publicity cases do not necessarily mean that a court of competent jurisdiction is unable to select a fair and impartial jury . . . [t]his is evident in the high profile cases of John Delorean, Rodney King, O.J. Simpson, and Guam's Beau Bruneman child homicide case." Appellant's Excerpts of Record, tab E, p. 5.

[71] Additionally, we are unpersuaded by Santos' analogy of the facts of this case to cases he cites where the court overturned the defendant's conviction as a result of presumed prejudice because we find those cases distinguishable. For example, Santos cites to *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417 (1963), where the court held that it was "a denial of due process of law to refuse the request for a change of venue . . . ." *Rideau*, 373 U.S. at 726, 83 S. Ct. at 1419. In that case, however, the court held that the community "had been exposed repeatedly and in depth to the spectacle of [the defendant] personally confessing in detail to the crimes with which he was later to be charged" on television at least three times. *Id.* More importantly, three of the jurors who convicted the defendant admitted having seen the televised confession. *Id*. at 725, 83 S. Ct. at 1418. In contrast to the *Rideau* case, this case is more analogous to *Fetterly v. Paskett*, 163 F.3d 1144 (9th Cir. 1998), where the court found no presumed prejudice despite extensive publicity because the publicity occurred months before trial and focused on the facts. *Fetterly*, 163 F.3d at 1146. Therefore, we do not find the existence of presumed prejudice.

b. Actual Prejudice

[72] Because we are unable to find presumed prejudice as a result of the pre-trial publicity, we must then determine whether there was actual prejudice. "The relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors, not the fact of the publicity itself." *Stokley*, 898 P.2d at 463 (citing *Bible*, 858 P.2d at 1169). Therefore, in order for us to find actual prejudice, Santos must go beyond the forty-one articles that he provides to this court, and demonstrate that the "jurors had 'formed preconceived notions concerning the defendant's guilt and

that they [could not] lay those notions aside.'" *Id.* (alteration in original) (quoting *State v. Chaney*, 686 P.2d 1265, 1272 (Ariz. 1984)); s*ee also Dobbert v. Florida*, 432 U.S. 282, 303, 97 S. Ct. 2290, 2303 (1977). A key factor in ascertaining "jurors' assurances of impartiality" is the percentage of veniremen who "will admit to a disqualifying prejudice." *Murphy*, 421 U.S. at 803, 95 S. Ct. at 2037. Here, Santos has not presented any facts regarding the jurors' partiality displayed during voire dire or how his conviction was a result of that partiality. Consequently, we are unable to find, in the conditions presented in this case, that actual prejudice existed. In view of Santos' failure to demonstrate that the pre-trial publicity resulted in both presumed and actual prejudice, we hold that the trial court did not err when it denied Santos' motion for a change of venue.

2. Trial Judge's Comment before Jury Sequestration

[73] Lastly, Santos alleges that the trial court judge erred when he commented to the jury the reason why they were being sequestered.[15] We review a trial judge's comment at trial for plain error. *See United States v. Collins*, 78 F.3d 1021, 1033 (6th Cir. 2001). In evaluating the coercive effect that a trial judge's statement has on the jury, we "must consider the totality of circumstances surrounding the instruction and evaluate it in context." *United States v. Markey*, 693 F.2d 594, 597 (Mich. Ct. App. 1982) (citing to *Jenkins v. United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 1060 (1965)).

[74] In the present case, Santos made a motion to sequester the jury before deliberation, which was granted. In conjunction with the granting of the motion, the trial judge explained to the jurors the three reasons why he was ordering the sequestration: (1) extensive publicity the case had been receiving, which included an internet poll of Santos' guilt or innocence; (2) an anonymous call that the court received regarding when the jurors were going to deliberate and where they were going to lunch; and, (3) the presence of both of Santos' and the victim's family around the courthouse.

[15] We note that Santos' brief is misleading with respect to this issue. On page 46 of his brief, Santos couches the fourth argument as, "The court erred in denying the defendant's motion for change of venue and to sequester the jury." Appellant's Opening Brief, p. 46. This last argument, which begins on page 53, does not pertain to the trial court's pre-trial denial of defendant's motion to sequester the jury. Appellant's Opening Brief, p. 53. Instead, it pertains to the trial court's comment to the jury (after the court granted Santos' motion to sequester the jury before deliberation) about why they were being sequestered.

[75] Santos maintains that the trial judge's statement to the jury regarding why they were being sequestered "frightened" the jury and gave them the "heebee-jeebies." Appellant's Opening Brief, p. 54. Notwithstanding Santos' admission that the trial court judge did "his best to minimize the effects of publicity," Santos contends that the judge's statement tainted the verdict. Appellant's Opening Brief, p. 53. We disagree.

[76] In his brief, Santos cites to various cases where structural error resulted in a reversal of the verdict. While we wholly agree with the principle behind those cases that a defendant has a right to a fair trial, we find Santos' reliance on them futile in the face of his failure to demonstrate how the trial judge's statements prejudiced the jurors and therefore constituted a structural error. In essence, Santos must provide a nexus between the statement and the effect it had on the jurors' deliberation and verdict.

[77] In *Countryman v. Winnebago County*, 481 N.E.2d 1255 (Ill. App. Ct. 1985), for example, the court affirmed the trial court's decision not to call a mistrial despite the jurors' exposure to a newspaper article, wherein the Chief Justice of the court commented on the case. *Countryman*, 481 N.E.2d at 1260. In *Countryman*, the court reasoned that a defendant must *"demonstrate* actual prejudice as a result of an occurrence of such magnitude and character that [he] was deprived of a fair trial." *Id*. (citations omitted) (emphasis added). In order to accomplish this, the defendant must "show that one or more of the jurors was influenced or prejudiced to the extent that they were no longer fair and impartial." *Id*. Similarly, in the present case, Santos has failed to illustrate for this court how the trial judge's statement was so coercive it actually prejudiced the jurors so that they were no longer fair and impartial. The gist of Santos' argument hypothesizes on the possibility of prejudice, but fails to point out in the record how a specific juror was actually tainted from the statement.

[78] Moreover, as we denoted above, in analyzing whether or not the trial judge's comment to the jury resulted in actual prejudice, we must consider the totality of circumstances and take into consideration the context in which the statement was made. *Markey*, 693 F.2d at 597 (citations omitted). Our review of the trial judge's statement reveals that the judge was mainly concerned with helping the jurors understand why they were being sequestered. The statement contains no bias.

For example, the judge stated, "None of the lawyers, the Court, doesn't want to make it even harder for you." Appellant's Opening Brief, p. 54. Additionally, the judge displayed fairness when he stated that, "both . . . [Santos'] and [sic] victim's family were involved" and that "this case . . . it's important not only to the . . . [Santos] but also to the Government." Appellant's Opening Brief, p. 54. Accordingly, we find that the trial judge did not err in making such a statement in conjunction with the order to sequester.

IV.

[79] We hold that the trial court did not err in denying Santos' motion for the appointment of an independent pathologist, in denying Santos' motion for a change of venue, in denying Santos' motion to suppress the statements made between September 13, 1999 to September 14, 1999 based on *Miranda*, in denying Santos' motion to suppress Santos' September 16, 1999 statement based on the *McNabb-Mallory* rule, and in denying Santos' motion to suppress all statements made after September 4, 1999 based on the fruits of the poisonous tree doctrine. Additionally, we find that the trial court did not improperly curtail defense counsel's cross-examination of Arnaiz, that the trial court did not err in failing to *sua sponte* provide an informer instruction, and that the trial court did not err in commenting to the jury about why they were being sequestered. Moreover, although we find that the trial court erred when it found that Santos was not in custody during the September 3, 1999 to September 4, 1999 police encounter, we find that the error is harmless. Accordingly the trial court is **AFFIRMED**.

TYDINGCO-GATEWOOD, J., concurring:

[80] I concur with the majority's affirmance of the trial court. I write, only to add, that I agree with the majority's holding that the trial judge did not abuse his discretion in denying Santos' motion for the appointment of a forensic pathologist and that an examination of the record demonstrates that Santos was not prejudiced as a result of the trial court's denial. However, I find that the trial court's denial was approaching the level of an abuse of discretion. In the future, in circumstantial-evidence driven cases, such as the present, I strongly recommend that the trial court be more disposed to providing the defendant with the forensic pathologist expert they request, especially where identity of the remains was a crucial aspect of the trial. At the very least, the trial court should have afforded defense counsel with an expert consultant in the area of forensic pathology.