FILED

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

GERHART MOSES,
Defendant-Appellant.

Supreme Court Case No.: CRA04-006
Superior Court Case No.: CF0489-02

AMENDED OPINION

Cite as: 2007 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on October 12, 2006
Hagåtña, Guam

Appearing for Plaintiff-Appellee:
Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
General Crimes Division
287 W. O'Brien Dr.
Hagåtña, Guam 96910

Appearing for the Defendant-Appellant:
Ana Maria C. Gayle, *Esq.*
Assistant Alternate Public Defender
Alternate Public Defender
Suite 902 Pacific News Bldg.
238 Archbishop F.C. Flores St.
Hagåtña, GU 96910

20072190

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; RAMONA V. MANGLONA, Justice *Pro Tempore*.

TORRES, J.:

[1] Defendant-Appellant Gerhart Moses ("Moses") was convicted after a jury trial in the Superior Court of the charges of First Degree Criminal Sexual Conduct (As a 1st Degree Felony) and Second Degree Criminal Sexual Conduct (As a 1st Degree Felony). He was sentenced to life imprisonment. Moses appeals the conviction and sentence on the basis of prosecutorial misconduct and ineffective assistance of counsel. He further argues that the sentence imposed for Second Degree Criminal Sexual Conduct is illegal. We affirm the conviction of both charges. We also affirm the sentence imposed for his conviction of First Degree Criminal Sexual Conduct; however, we remand for re-sentencing on the Second Degree Criminal Sexual Conduct.

I.

[2] Moses and his longtime companion, Bekonia Daity, lived in an extended family home in Yigo with their six children. Bekonia's two sisters, Katina Rain[1] and Katalina Pangelinan also lived in the other extensions of the same home with their families including A.R., Katina's 11-year old daughter. On the afternoon of October 22, 2002, A.R. came home from school and looked for her cousin, G.M., to play basketball. While A.R. was in G.M.'s part of the home, G.M.'s father and A.R.'s uncle, Moses, called A.R. into his room and told G.M. to leave. As soon as G.M. left, Moses allegedly pulled up A.R.'s skirt, pushed her legs open, pushed her underwear aside, penetrated her with his penis, and threatened to kill her aunt if she moved. Moses stopped shortly thereafter when A.R. started to cry, and he let her go. A.R. went to her

[1] Katina is sometimes alternatively referred to as "Kintina."

Aunt Katalina's room in another part of the house and told her two aunts, Aunt Bekonia and Aunt Katalina, everything that had happened. Bekonia told A.R. not to tell Katina, A.R.'s mother. Transcript ("Tr.") IV, pp. 43-56 (Trial, June 17, 2004).

[3] Moses was later indicted for First Degree Criminal Sexual Conduct (As a 1st Degree Felony) ("First Degree CSC"), and Second Degree Criminal Sexual Conduct (As a 1st Degree Felony) ("Second Degree CSC"). After a jury trial, Moses was convicted as charged.

[4] Moses then filed a Motion for a New Trial on the basis of newly discovered evidence. The court held a hearing on Moses' motion. The newly discovered evidence was a declaration containing testimony of Moses' girlfriend Bekonia that A.R. said that she did not know that "Uncle Gerhart" was going away for the rest of his life and she lied about the incident. At the hearing, Bekonia testified that A.R. told her A.R. lied about the incident. Bekonia also said that A.R. confessed to lying after the trial because she "don't know that . . . he's going to stay there forever." Tr., pp. 7-8 (Motion for a New Trial, Nov. 12, 2004). A.R.'s sister, Roxanne, also filed a Declaration saying that A.R. had told Roxanne it was all a lie, but at the hearing Roxanne told the judge she signed the Declaration from "peer pressure," Tr., p. 19 (Motion for a New Trial, Nov. 12, 2004), and that her Declaration was not true. Tr., p.21 (Motion for a New Trial, Nov. 12, 2004). At the hearing, A.R. testified again that she never recanted and she never told any relative it was a lie. Tr., p. 49 (Motion for a New Trial, Nov. 12, 2004). The trial court ultimately denied the Motion for a New Trial.

[5] Moses was sentenced to life imprisonment for the First Degree CSC, and to a concurrent unspecified term of imprisonment for the Second Degree CSC. The Judgment stated, "as to the charge of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony), the Defendant's penalty shall *run concurrent with the life in prison sentence imposed in paragraph a . . . .*"

Appellant's Excerpts of Record ("ER"), p. 20 (Judgment) (emphasis added). Moses timely filed an appeal claiming prosecutorial misconduct based on alleged improper vouching and inflammatory statements made by the prosecutor. He also argued that he received ineffective assistance of counsel and that the judge imposed an illegal sentence.

II.

[6] This court has jurisdiction over this appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw current through Pub. L. 110-27 (2007)); 7 GCA § 3107(b) (2005) and § 3108(a); 8 GCA § 130.15(a) (2005) (permitting defendant's appeal from a final judgment of conviction).

III.

[7] Any comment objected to by defense counsel is subject to a harmless error standard, and will not be reversed unless it is more likely than not that the comment affected the jury's verdict. *Evaristo*, 1999 Guam 22 ¶ 18. The comment must taint the underlying fairness of the proceedings. *Id.*

[8] Where defense counsel does not object to the conduct, then the standard of review is plain error. *People v. Ueki*, 1999 Guam 4 ¶ 17 (citing *United States v. Young*, 470 U.S. 1, 14-16 (1985)). Reversal for plain error is warranted if the defendant shows "(1) there was an error; (2) the error [was] clear or obvious under current law; (3) the error affected substantial rights, and (4) a miscarriage of justice would otherwise occur." *People v. Campbell,* 2006 Guam 14 ¶ 11; *Evaristo,* 1999 Guam 22 ¶ 24 (citing *United States v. Olano,* 507 U.S. 725, 732 (1993)).

[9] "Ineffective assistance of counsel claims are questions of law which this court reviews *de novo*." *People v. Ueki*, 1999 Guam 4 ¶ 5 and may be heard on direct appeal but is more properly entertained in a collateral proceeding. *Id.*, citing *People v. Perez*, 1999 Guam 2 ¶ 33. This is

"because such claims generally require evidentiary inquiry and the record is often insufficiently complete to make a proper finding." *Id.* We will review such claims, however, where "the record is sufficiently complete to make a proper finding. *People v. Leon Guerrero*, 2001 Guam 19 ¶ 12.

[10] Finally, we review the legality of a sentence *de novo*. *United States v. Fine*, 975 F.2d 596, 599 (9th Cir. 1992). Although defense counsel did not object in the record to the sentence, since it is a matter of law, the standard of review remains *de novo.*

IV.

A. Prosecutorial Misconduct

[11] Moses complains the government committed prosecutorial misconduct by vouching for its witnesses and by making inflammatory statements to the jury. This Opinion discusses several instances of alleged misconduct, including statements made in the opening statement and closing argument of the prosecutor, some of which were objected to by defense counsel. The incidents of prosecutor vouching and inflammatory language are presented here generally in the order in which they were made during the trial.[2]

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[2] The specific statements made are numbered sequentially and are found in the trial transcripts as follows:

(1) Tr., Vol. III, p. 167 (Trial, June 16, 2004).

(2) Tr., Vol. III, p. 170 (Trial, June 16, 2004).

(3) Tr., Vol. III, p. 174 (Trial, June 16, 2004).

(4) Tr., Vol. VII, p. 31 (Trial, June 22, 2004).

(5) Tr., Vol. VII, p. 38 (Trial, June 22, 2004).

(6) Tr., Vol. VII, pp. 38-40 (Trial, June 22, 2004).

(7) Tr., Vol. VII, p. 67 (Trial, June 22, 2004).

(8) Tr., Vol. VII, pp. 67-70 (Trial, June 22, 2004).

(9) (a) Tr., Vol. VII, p. 29, (b) Vol. VII, p. 29, and (c) Vol. VII p. 37-68 (Trial, June 22, 2004).

This numeric reference will be referred to for convenience throughout this opinion.

[12] The following comments were made by the prosecutor in his opening statement. Defense counsel objected to the first two statements, however the trial court denied the objections.[3]

(1) "[T]his is one of those cases . . . I am disgusted with." (inflammatory).

(2) "And he did it! Okay. And he'll pay the price for it at the end of this trial, I hope." (vouching).

(3) Use of the word "God": "God knows she did not ask to be placed in the position she's in." (inflammatory).

[13] Moses next asserts in his appeal that the following statements, made in closing argument, were improper:[4]

(4) Referring to witness Katina Rain: "that woman, I would submit to you is as honest as the day is long. That is a woman of pride . . . who's done nothing but sacrifice for others all her life." (vouching - not objected to).

(5) Referring to witness Roxanne Rain: "That is a girl [who] told you the 100 percent truth." (vouching - not objected to).

(6) Concerning witness A.M., daughter of defendant, who testified against her father at trial and corroborated A.R.'s story that A.R. was crying after coming out of Moses' room: "I knew, ladies and gentlemen, that the words that she was gonna say to you would be different; okay? – In terms of her willingness to say those things as it was when I sat down with her privately in my office, after I told her mom and her auntie to leave and it was just me and her and one other person who were talking to her. I knew when she got into the courtroom it would be incredibly difficult. And I didn't even know if she'd say anything at all" (vouching - not objected to).

(7) "If I sound outraged, it's because I am, it's 'cause I've gotten to know [A.R., the victim], and I've gotten to know her more." (inflammatory - objected to).

(8) "No, not here. . . . [T]hrough your actions you are literally going to be able to know that you protected our kids from him, because just as A.R. wasn't the first, . . . they won't be the last unless you say to him 'No' and I know you will, and then you will know, you know what? - - Yeah, it's true, he's right, children do come first." (inflammatory - objected to).

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[3] See note 2 *supra*.

[4] See note 2 *supra*.

(9) Use of the word "God" three times: (inflammatory - not objected to)

(a) "God knows that they know."

(b) "And as God as my witness[.]"

(c) "[A]s God as my witness[.]"

[14] Defense counsel objected to two of the statements made during closing arguments on the basis that these statements were either inflammatory or involved improper vouching, and also lodged a general objection that the prosecutor's telling the jury what it was like to be a victim of crime as inflammatory. The trial court denied all objections made.

[15] We now examine each of the prosecutor's statements to determine if they were improper and affected the jury's verdict.

1. Vouching

[16] Vouching occurs when the government places the "prestige of the government behind the witnesses through personal assurances of their veracity" and is improper. *Ueki*, 1999 Guam 4 ¶ 19. In *Ueki*, the defendant challenged certain statements made by the prosecutor: "what [the witness] said on that stand, I submit to you is the truth. She told you the truth on that stand. And if she said things when she was drunk or unconscious or confused, I submit they were wrong. But what she said here was the truth." *Id.* ¶ 21. In *Ueki*, in finding improper vouching by the prosecutor, we stated:

> Clearly, the prosecutor was attempting to bolster the credibility of the victim. The prosecutor's conduct amounts to the same type of "improper expression of personal opinion" that was present in the *Young* case. *Young*, 470 U.S. at 17, 105 S.Ct. at 1047. She presented her beliefs, as a representative of the government, as to the credibility and veracity of the victim's testimony before the jury. This conduct can be misleading to a jury. Accordingly, the court finds that the prosecutor's statements constituted inappropriate vouching which establishes an error that is plain; therefore, satisfying the first two requirements under the plain error standard.

Ueki, 1999 Guam 4 ¶ 22.[5]

[17] The People in this case argue that the prosecutor's comments were not, in fact, vouching. When viewed in context, the People contend that the comments lent no "prestige" to the witnesses and adding government prestige is necessary for vouching. Even if these instances constituted vouching, the People assert that none of the prosecutor's comments rose to the level of either harmless error or plain error.

[18] The prosecutor's statements which were objected to by the defense are reviewed for harmless error. *Evaristo*, 1999 Guam 22 ¶ 18. "Reversal under the harmless error standard is warranted when it is more probable than not that the misconduct affected the jury's verdict." *Id.* The issue is whether it is likely that the jury would have come to a different verdict if the prosecutor had not said: "And he did it. And he'll pay the price for it at the end of this trial, I hope." Tr., Vol. III, p. 170 (Trial, June 16, 2004).

[19] The prosecutor's saying that Moses "did it" during opening statements is permissible because he was promising what the evidence would show. Indeed, the evidence showed that Moses penetrated A.R. The statement that "he'll pay the price for it" is gratuitous and goes beyond showing the state of the evidence. But this comment is not vouching because it does not lend the prestige of the government behind the witnesses. Moreover, the fact remains that A.R. never recanted. A.R.'s story remained consistent. Given the weight of evidence in this case, we do not think the prosecutor's statement that "he'll pay the price for it" lent any prestige to the government's case, or contributed toward a finding of guilt.

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[5] In *Ueki*, 1999 Guam 4, truthfulness was a more critical issue, because the victim in that case had been raped while in a state of alcohol-induced unconsciousness. So when the prosecutor told the jury that "if she said things when she was drunk or unconscious or confused, I submit they were wrong," he was practically testifying. *Id.* ¶ 21. This is more blatant than simple vouching. But on appeal, the government in *Ueki* acknowledged it was improper and simply argued it did not affect the outcome of the trial. So, the statement in *Ueki* can be distinguished from the statements in this case because the prosecutor in this case did not tell the jury which version to believe.

[20] We now review the statements made by the prosecutor which allegedly constituted vouching and to which the defendant did not object. These statements are subject to a plain error analysis. *Ueki*, 1999 Guam 4 ¶ 17. To find plain error, the defendant "must demonstrate that there was an 'error,' which occurs 'when there has been a violation of a legal rule, not waived by a defendant, during court proceedings, despite a failure to make a timely objection.'" *People v. Chung*, 2004 Guam 2 ¶ 9. The error must also be "'plain' in that it is 'clear' or 'obvious'" under current law. *Id.* Finally, the "error must affect [defendant's] substantial rights," *id.*, and if not reversed that a miscarriage of justice would otherwise occur.

[21] As we said in *Evaristo*, "if the court decides that these types of comments bordered on vouching, and therefore were improper, the court then must consider whether such an error affected substantial rights." *Evaristo*, 1999 Guam 22 ¶ 31. In determining whether the prosecutor's vouching affected the outcome of the case, we consider the following factors: "(1) the form of the vouching; (2) the extent of the personal opinion asserted; (3) the extent to which a prosecutor's statements exhibited extra record knowledge supporting a witness' veracity; and (4) the testimony's import viewed in the context of the case as a whole." *Ueki,* 1999 Guam 4 ¶ 24 (citation omitted). Where "[u]pon review of the record, it would appear that the jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses," then there is no error affecting substantial rights. *Evaristo*, 1999 Guam 22 ¶ 34.

[22] The statements not objected to, which the defense claims constituted vouching, are statements four (4), five (5) and six (6) above. Statement number four (4), that the victim's mother Katina is honest, and statement number five (5), that the sister Roxanne told the truth, are clearly vouching. They each constitute a statement by the government that the witness in question was telling the truth. Although we conclude that those two statements constitute improper vouching, the vouching must affect Moses' substantial rights in order to be plain error

because defense counsel did not object. We therefore must decide whether the prosecutor's vouching affected the outcome of this case.

[23] The victim, A.R., testified regarding the sexual assault by Moses. In addition, the prosecutor presented testimony from the victim's sister, Roxanne, that A.R. was crying the day of the incident. The allegation of penetration was corroborated by the expert physician from the rape crisis center, Dr. Ellen Bez, who testified that a sexual penetration had taken place although she could not identify a specific time. Defense counsel put on their own expert, Dr. Farrell Cole, but he never personally examined the victim and was not a forensic rape expert. Dr. Cole testified only that penetration of a certain size was less likely than not, but he did not rule out penetration. The testimony of family members also corroborated A.R.'s account placing Moses in the time and place to have perpetrated the act. Moses' longtime companion Bekonia testified that A.R. came running out of Moses's room and told Bekonia that Moses had sex with her. We recognize that Bekonia also testified that she inspected A.R.'s genital area, as well as Moses's genital area, and found both to be dry, no semen or blood on either – but it remained undisputed that Moses stopped having sex with A.R. shortly after the first penetration. Even without the testimony of the two witnesses for whom the government vouched (A.R.'s mother Katina, and A.R.'s sister Roxanne), the jury could have judged for itself on the basis of the evidence presented at the trial that Moses committed the crime charged therein. There was sufficient evidence for the jury to have based its verdicts without an assurance from the government that Katina and Roxanne were telling the truth. The two vouching comments are therefore not sufficient to constitute plain error.

[24] With respect to statement number six (6) about Moses' daughter A.M., a different analysis is required. The prosecutor's statement referred to the fact that apparently, A.M. met with the prosecutor before the trial and told him that she witnessed A.R. coming out of her

father's room crying. At trial, A.M. was unable to testify to anything, and withdrew any previous statements made. Moses complains that, while addressing A.M.'s refusal to testify against her father, the prosecutor referred in closing argument to facts that were not in evidence. Specifically, the prosecutor mentioned that he had met with A.M. prior to the trial to go over her testimony and she had told him a different story.

[25] During the trial, the prosecutor did present evidence to the jury of a prior meeting with A.M. When A.M. was on the stand, the prosecutor asked several questions regarding their prior meeting. Defense counsel objected only on the basis of hearsay, preventing A.M. from testifying to what A.R. said. While defense counsel was able to keep the prosecutor from asking A.M. what A.R. said on the basis of hearsay, counsel did not object to the impeachment evidence that A.M. had previously met with the prosecutor. The testimony and objections occurred in the following manner:

> Q: (by Prosecutor): Do you remember when you came to this building like four days ago and you came upstairs and I met you and I met your mom and I met your auntie, and we sat together in a room and we talked for a little bit?
>
> A: (by A.M.): Yes.
>
> . . . .
>
> Q: Do you remember when I asked you about what happened with [A.R.] that day and your dad after school? Do you remember when we sat and talked about that?
>
> A: Yes.
>
> Q: And can you tell the jury – that's these ladies and gentlemen here, okay – can you tell us what you told me when I asked you –
>
> [At this point defense counsel objected on the basis of hearsay and the prosecutor withdrew and rephrased the question].
>
> . . . .

Q: [A.M.] can you tell us what you saw that day after school when –

A: I forgot.

Q: You forgot?

A: Yeah.

Q: Do you remember that you said that you saw your dad in the room?

A: I forgot.

. . . .

Q: Do you remember a few days ago when you told me that your dad was in the room and [A.R.] was in the room too?

A: (No response).

Q: You don't remember telling me that?

A: I don't remember.

Q: Do you remember when you told me that after you left your dad was alone with [A.R.]?

A: No, I forgot.

. . . .

[Defense counsel objected again on the basis of hearsay; objection sustained.]

. . . .

Q: [A.M.], do you remember when you told me about seeing [A.R.] leaving that room, crying?

A: I forgot.

. . . .

Q: Did you tell me the truth, or was it not the truth, when you told me that they were in the room together? Was that the truth or did you lie to me?

A: I lied to you.

Tr., Vol. V, pp. 42-46, 52 (Trial, June 18, 2004).

[26] The difficulty with Moses' argument on appeal is that A.M. made a prior inconsistent statement to the prosecutor which *was* in evidence. In trying to examine A.M. on the stand, the prosecutor's leading questions quite clearly suggested that she told him something different. Defense counsel did not object on the basis of leading. The prosecutor introduced the evidence that A.M. had changed her story by means of impeachment only, but it was nonetheless clearly entered into evidence.

[27] Therefore, there was competent evidence before the jury that the prosecutor expected different testimony from A.M., and did not get what he expected. The prosecutor was trying to explain why she was unable to testify when called to the stand. Moses complains of the prosecutor's apology for A.M.'s testimony, but it is not vouching because he did nothing to bolster her statement, and her statement was not inculpatory in any event.

[28] Since the prosecutor's remarks were not vouching, but merely commenting on evidence that had already been presented to the jury, we do not find them improper. However, even assuming that the statements were intended to vouch for the candor (or lack thereof) of his own witnesses, "[t]he jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses," and therefore, there was no plain error. *Ueki*, 1999 Guam 4 ¶ 30. We have previously spelled out the evidence presented which supports the jury's verdict, specifically that the victim, A.R., testified to the sexual assault of that day; the victim's sister, Roxanne, testified that A.R. was crying the day of the incident; penetration was corroborated by the rape crisis center; family members placed Moses at the time and place corroborating the victim's story; Moses' companion Bekonia testified that A.R. came running out of Moses' room and told her that Moses had sex with her. The jurors could have judged for themselves, based on

the evidence presented at trial, whether Moses committed the crime charged therein, without the prosecutor's awkward and unnecessary explanation for why the defendant's own daughter A.M. froze on the stand. The prosecutor's statements concerning A.M.'s meeting with the prosecutor and her refusal to testify did not affect the outcome of the case and are not sufficient to constitute plain error.

2. Inflammatory prosecutorial comments

[29] Moses also alleges the prosecutor engaged in prosecutorial misconduct by making statements calculated to inflame the passions or prejudices of the jury. In order for Moses to succeed on a claim of prosecutorial misconduct, he must show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnell v. DeChristoforo*, 416 U.S. 637 (1974)). "The fact that the prosecutor's remarks to a jury may have been 'undesirable or even universally condemned' is not tantamount to a constitutional violation." *Evaristo*, 1999 Guam 22 ¶ 20.

[30] Any comment objected to by defense counsel is subject to a harmless error standard, and will not be reversed unless it is more likely than not that the comment affected the jury's verdict. *Evaristo*, 1999 Guam 22 ¶ 18. A comment to which defense counsel did not object is subject to a plain error review, which requires more than just a likelihood that the comment affected the jury. *Ueki*, 1999 Guam 4 ¶ 17. It requires that the comment taint the underlying fairness of the proceedings. The supposed inflammatory remarks made by the prosecution that were objected to by the defense are numbers one (1), seven (7) and eight (8). Since the objections were overruled by the trial court, we examine the remarks within the context of the entire trial to determine whether it is more probable than not that the allegedly improper remarks materially

affected the verdict. *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986).[6] Specifically, "the inquiry is whether allegedly improper behavior, considered in the context of the entire trial, . . . affected the jury's ability to judge the evidence fairly." *Id.*

[31] The prosecutor clearly expressed his disgust and outrage with the case. While it is true that "a prosecutor has no business telling the jury his individual impressions of the evidence," *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992), the issue is whether these otherwise improper comments affected the jury's verdict. We believe they did not.

[32] It is unfortunate that the prosecutor shared his irrelevant impressions of the evidence with the jury, since the jurors are required to form their own impression of the evidence. But reading the transcript of the victim's testimony, the expert's testimony, and the family members' corroborating testimony, it is highly unlikely that the prosecutor's personal opinions were the determining factor in the jury's verdicts. The evidence standing alone more than amply supports the verdict. Despite the inflammatory remarks, "sufficient evidence was presented to the jury to support and uphold the conviction" for first and second degree criminal sexual conduct. *Ueki*, 1999 Guam 4 ¶ 27.

[33] Specifically, the statements by the prosecutor were: (1) "This is one of those cases I am disgusted with"; (7) "If I sound outraged, it's because I am, it's 'cause I've gotten to know [the victim], and I've gotten to know her more"; and (8) "Through your actions you are literally going to be able to know that you protected our kids from him, because just as A.R. wasn't the first, . . . they won't be the last unless you say to him 'No' and I know you will, you know what? Yeah, it's true, he's right, children do come first." Normally, comments such as these are only

[6] If it is clear that the trial court gave appropriate curative instructions to the jury which promptly neutralized any harm, we do not need to reach the question of whether a comment was improper. *Endicott*, 803 F.2d at 513.

prejudicial when they are specifically designed to inflame the sentiments of the community. "An appeal to the jury to be the conscience of the community is not impermissible unless it is specifically designed to inflame the jury." *United States v. Koon*, 34 F.3d 1416, 1444 (9th Cir. 1994) (internal quote omitted). This court has, when faced with a prosecutor's explicit comments, previously found that references to gore ("slashed," "gushing blood," "bleeding," and "stabbing the door with a knife") were not inflammatory because they were all words or terms that had been used in testimony. *Evaristo*, 1999 Guam 22 ¶ 25.

[34] The prosecutor's statement that, "you protected our kids . . . children do come first" is not explicit and does not outrageously inflame the sensibilities of a jury. Tr., Vol. VII, pp. 66-67 (Trial, June 22, 2004). This statement was not based on any evidence, and therefore was an unsuitable plea to the jury to convict the defendant by making emotional references to children in the community. Therefore, we find the remarks to be inflammatory. Yet given the evidence in this case, this inflammatory comment, standing alone, does not tip the scales toward a miscarriage of justice and justify reversal.

[35] As far as the inflammatory comments made by the prosecution that were not objected to, reversal is warranted when these comments not only affect the jury, but taint the underlying fairness of the proceeding. The prosecutorial remarks to which the defendant did not object include statement numbers three (3) and nine (9) above, containing references to God. Moses argues these comments were intended to play on the religious passions of the jurors.

[36] Because defense counsel did not object, these statements are reviewed under a plain error standard and the insertion of the comment must amount to a "miscarriage of justice." *United States v. Young*, 470 U.S. 1, 14-16 (1985). This court has held that a miscarriage of justice occurs when "the court, 'after an examination of the entire cause, including the evidence,' is of

the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *People v. Aguirre*, 2004 Guam 21 ¶ 29 (quoting *People v. Watson,* 299 P.2d 243, 254 (Cal. 1956)).

[37] The prosecutor defends these statements as mere figures of speech. Close examination reveals that the prosecutor's four references to "God" do not bring the issue of divinity to the trial and do not appear designed to suggest that God was supporting the government's case. In fact, two of the expressions, "God knows" and "As God as my witness" are figures of speech, commonly used in media and conversation.

[38] Moses was convicted based on the evidence, not the improper statements of the prosecutor. The testimony was more than sufficient to convict Moses, though prosecutors must always be mindful of their duty of restraint.

B. Ineffective Assistance of Counsel

[39] Moses next argues on appeal that he was deprived of effective assistance of counsel because his trial counsel failed to object to the vouching and several inflammatory statements made by the prosecution and failed to object to the vagueness or illegality of the sentence imposed as a result of his conviction on Second Degree CSC. Moses believes his counsel's performance was further deficient by the failure to inquire as to the aggravating factors considered by the court in its decision to sentence Moses to the maximum sentence possible on First Degree CSC and by the failure to specify any grounds to support the motion for acquittal.

[40] Whether Moses "received ineffective assistance of counsel is a mixed question of law and fact and review is de novo." *Aguirre*, 2004 Guam 21 ¶ 35. This court will review this claim if the "record is sufficiently complete to make a proper finding." *Ueki*, 1999 Guam 4 ¶ 5. *See also People v. Root*, 1999 Guam 25 ¶ 14. While an ineffective assistance of counsel claim may

be heard on direct appeal, this court has previously ruled that it is more properly brought as a writ of habeas corpus because the trial record often lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what, if any, prejudice resulted. *Campbell*, 2006 Guam 14 ¶ 47. However, none of Moses' arguments regarding ineffective assistance require the court to look beyond the record of the trial in this case. Because the record is complete with regard to Moses' arguments, this court can address the ineffective assistance claims.

[41] To establish a claim of ineffective assistance of counsel, the convicted defendant must first "show that counsel's performance was deficient," and second, that the "deficient performance . . . prejudiced the defendant so as to result in the denial of a fair trial." *Root*, 1999 Guam 25 ¶ 12; *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The alleged deficiencies here are counsel's failure to: (1) object to repeated instances of prosecutorial misconduct; (2) articulate any arguments in support of judgment of acquittal; (3) move for judgment of acquittal at the close of evidence; (4) object to, or seek clarification regarding, the court's imposition of a vague or illegal sentence for the First Degree CSC (because the judge did not state whether the life sentence was with or without the possibility of parole) and a concurrent life sentence for the second charge, and (5) inquire as to the aggravating factors considered by the court in sentencing.

1. Failure to Object

[42] High deference is given when reviewing an attorney's performance. *Leon Guerrero*, 2001 Guam 19 ¶ 11 ("[T]he decisions of trial counsel are accorded much deference."). "[T]here are no specific rules to govern counsel's conduct and [] much deference must be given when such conduct is reviewed." *Angoco v. Bitanga*, 2001 Guam 17 ¶ 9.

[43] We address the first alleged deficiency, the failure to object to the prosecutor's inflammatory and improper statements. A defendant is not denied effective assistance of counsel when his counsel fails to object to a prosecutor's improper comments, because the "defendant must show prejudice by his counsel's failure to object" or more specifically, that the outcome would have been affected. *People v. Nitz*, 572 N.E.2d 895, 907 (Ill. 1991). The court in *Nitz* rejected the ineffective assistance of counsel claim on the basis of counsel's failure to objection, stating: "We do not believe that defense counsel's failure to object affected the outcome of the trial . . . [because] the evidence in this case was not closely balanced." *Id. See also Holmes v. State*, 543 S.E.2d 688, 692 (Ga. 2001) (holding that it was not ineffective assistance of counsel not to object during a prosecutor's closing argument, as "[a] decision by trial counsel not to object to a portion of closing argument may indeed fall within the ambit of trial strategy."). Defense counsel here was not ineffective for failing to object to every questionable statement made by the prosecutor. In light of the testimony that came into evidence against Moses, even if defense counsel had objected, the objection would not have affected the outcome of the trial. We have found that the testimony and evidence, not the prosecutor's statements, convicted Moses in this case; therefore, his ineffective assistance of counsel claim on this ground cannot stand.

2. Motion for Judgment of Acquittal

[44] As to the second and third grounds for ineffective assistance of counsel, that defense counsel failed to articulate any grounds for the motion for judgment of acquittal made after the prosecution's case and the failure to move for acquittal at the close of evidence, we find that counsel was not ineffective.

[45] The defendant in a criminal trial is permitted to make a motion for a judgment of acquittal either at the close of the government's case, or at the close of all the evidence. 8 GCA

§ 100.10 (2005). In this case, defense counsel made the motion at the close of the government's case, which was denied. Though she did not present any argument, the transcript reveals that none was invited. Although defense counsel could have, with all due respect to the trial court, delineated the grounds for the motion for acquittal in order to preserve her grounds for the record, her failure not to do so was not an egregious shortcoming on her part. There is no requirement that counsel make the motion for acquittal in the first place, and her motion was competent.

[46] Both the court and counsel are presumed to understand that the purpose of making a motion for a judgment of acquittal is to preserve the objection in case the conviction will be appealed on the basis of insufficient evidence. *See People v. Maysho*, 2005 Guam 4 ¶ 6. A review of the trial transcript does not reveal that there was insufficient evidence, and there is no appeal on that basis. Defense counsel made a perfunctory motion for judgment of acquittal, and the trial judge declined to grant it under the standards for granting motions for acquittal.

[47] Moreover, the failure to make a second motion for acquittal at the conclusion of the defense's case is similarly inconsequential. The elements of the offense of First Degree CSC are sexual penetration of a person under 14 years of age. 9 GCA § 25.15. The elements of the offense of Second Degree CSC are sexual contact with a person under 14 years of age. 9 GCA § 25.20. The trial transcript reveals that the government presented a *prima facie* case of both offenses. The defense presented three witnesses, but as none provided an affirmative defense such as to negate one of the elements of the offense, another motion for judgment of acquittal would not have been fruitful. Defense counsel's treatment of the motion for acquittal was not ineffective. The motion would not have been well-grounded in the record. This failure did not affect the fairness of the trial and does not meet either ground under *Strickland.*

3. Vague and/or Illegal Sentence

[48] Another basis advanced by Moses for ineffective assistance of counsel is that defense counsel did not object to the vague and/or illegal sentence imposed by the trial court. Moses sentenced on the first count of conviction of First Degree CSC to "life in prison at the Department of Corrections." ER, p. 21 (Judgment). He was sentenced on the second count of conviction of Second Degree CSC as follows: "the Defendant's penalty shall run concurrent with the life in prison sentence imposed above in paragraph ([]a[])." ER, p. 21 (Judgment).

[49] Moses complains that the sentence on the First Degree CSC was vague or illegal because the sentence does not state whether the life imprisonment is with or without the possibility of parole. Under Guam law, a sentence of imprisonment always has a possibility of parole, unless the sentence specifically states that it is a sentence without the possibility of parole. 9 GCA § 80.72 (2005). Title 9 GCA § 80.72(a) provides expressly:

> Unless otherwise provided by law, every person confined in a Guam penal or correctional institution shall be eligible for release on parole at any time after the service of two-thirds (2/3) of his or her fixed sentence or after a greater time set by the Court, which shall state reasons therefor, provided that in the case of an offender sentenced to a term of imprisonment for the commission of a violent crime, such offender may be released conditionally on parole upon completion of eighty-five percent (85%) of his or her fixed sentence or after a greater time set by the Court, which shall state reasons therefor, or in the case of a person sentenced to life imprisonment, after such person has been confined for twenty-five (25) years. Nothing in this Section shall be construed as limiting or mitigating in any fashion the discretionary or mandatory imposition of a sentence of life imprisonment without parole for any offense, as may be detailed elsewhere in this Title or the laws of Guam.

[50] Unless a defendant is explicitly sentenced to life without the possibility of parole, that person is eligible for release after 25 years. 9 GCA § 80.72. The trial court imposed a sentence of life imprisonment. Because the sentencing judge did not state "without the possibility of parole," we interpret that the sentence to include the possibility of parole. "[T]he possibility of

parole inhere[s] in any prison sentence." *Johnson v. United States*, 529 U.S. 694, 712 n.12 (2000). The court in that case interpreted the defendant's sentencing statute (18 U.S.C. § 4205(a) (1982))[7] as providing an inherent right of parole since it is not stated otherwise, stating "[w]henever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term." *Johnson*, 529 U.S. at 725-726. The sentence of life imprisonment on the First Degree CSC was not vague, but carried with it, by statute, a possibility of parole. Defense counsel was not required to seek clarification on this issue. Counsel was not ineffective for failing to object to the sentence on First Degree CSC.

[51] We next review whether the sentence on the Second Degree CSC count is legal. Moses argues that the sentence for his conviction is clearly invalid because it is either vague or in excess of the statutory maximum. The statutory maximum for Second Degree CSC (As a First Degree Felony) is between five and twenty years. 9 GCA § 80.30.[8] This sentence is dictated by the terms of the statute defining Second Degree CSC, 9 GCA § 25.20(b), which provides that "Criminal sexual conduct in the second degree is a felony in the first degree. . . ." 9 GCA § 25.20(b) (2005).

[52] Moses argues the sentence for his conviction of Second Degree CSC is invalid because it is either vague or in excess of the statutory maximum. According to the general sentencing statute, 9 GCA § 80.30(a), in a conviction "of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years." However, 9 GCA § 25.15(b) imposes a statutory mandatory minimum sentence for a conviction of First

[7] We recognize that in sentences in federal courts, there is no longer an inherent right to parole because parole was abolished in all federal sentences by the Sentencing Reform Act of 1984, U.S. Pub. L. 98-473, Oct. 12, 1984.

[8] Title 9 GCA § 80.30 (2005) provides: "A person who has been convicted of a felony may be sentenced to imprisonment as follows: (a) In the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years . . ."

Degree CSC (As a First Degree Felony). Section 25.15(b) provides: "Criminal sexual conduct in the first degree is a felony in the first degree. Any person convicted of criminal sexual conduct under § 25.15(a) shall be sentenced to a minimum of fifteen (15) years imprisonment, and *may be sentenced to a maximum of life imprisonment without the possibility of parole*." (Emphasis added.) Therefore, the sentencing range available to the court is controlled by the statutory mandatory minimum of section 25.15, rather than the general sentencing provision of section 80.30. *See United States v. McCabe,* 270 F.3d 588, 590 (8th Cir. 2001) (statutory minimum controls over sentencing guideline range).

[53] The trial court sentenced Moses to the statutory maximum for First Degree CSC. However, the sentence on the Second Degree CSC was ordered to "run concurrent with the life in prison sentence imposed" for the First Degree CSC. ER, p. 21 (Judgment). This sentence is either not determinable or is in excess of the statutory maximum of twenty years. It is plain error to sentence a defendant to a term that exceeds the statutory maximum. *See United States v. Guzman-Bruno*, 27 F.3d 420, 423 (9th Cir. 1994). We review the legality of a sentence *de novo* and even though defense counsel did not object, it was an error of law to sentence in excess of the statutory maximum. Therefore the matter must be remanded to the trial court to re-sentence Moses for the conviction on Second Degree CSC.

[54] Delineation of the sentence for each charge of conviction is also necessary. This becomes particularly important in case the conviction for the greater charge is vacated or pardoned for reasons that cannot be predicted. The exact length of the sentence on Second Degree CSC as imposed is either vague or in excess of the statutory maximum. Obviously defense counsel should have objected to the vagueness of the sentence, but Moses has not shown in his arguments that this failure has prejudiced him. Unless counsel's deficient performance

prejudiced the defendant, there has been no ineffective assistance of counsel. Moses had to serve a life sentence on First Degree CSC, so the vagueness of the sentence on the Second Degree CSC did not operate any harm on him, though the case must be remanded for re-sentencing. The trial court can correct an illegal sentence at any time. 8 GCA § 120.46 (2005). Because the sentence is corrected by this appeal, there is no basis to say that there was ineffective assistance of counsel.

[55] Finally, in a footnote, defense counsel alleges ineffective assistance of counsel because of defense counsel's failure "to inquire, at least for record purposes, what exactly were the aggravating factors that led the judge to impose a life sentence for First Degree CSC." Appellant's Opening Brief, p. 23 n.3 (July 10, 2006). However, Moses presents no legal authority that his defense counsel was under a duty to inquire as to those aggravating factors. The statutory range puts the sentencing decision in the hands of the trial judge. The judge's consideration of unspecified aggravating factors does not render the sentence an illegal one.

C. Cumulative Effect of Errors

[56] Finally, relying on *United States v. Wallace*, 848 F.2d. 1464 (9th Cir. 1988), Moses urges reversal of his convictions because of the cumulative effect of the many small errors by counsel and the repeated instances where the prosecutor engaged in improper vouching or made inflammatory remarks. Moses argues that "[a]lthough each individual instance of prosecutorial errors or misconduct may not in and of itself rise to the level of reversible error, their cumulative effect may be so prejudicial as to warrant a reversal." Appellant's Brief, pp. 16-17 (July 10, 2006). Moses further argues that, "[e]ven if no single error [of counsel] were [sufficiently] prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Appellant's Brief, p. 24 (July 10, 2006) (citing *Alcala v.*

substantive errors can add up to result in a fundamentally unfair trial requiring reversal. *Calderon v. Coleman*, 525 U.S. 141 (1998). However, we have found that counsel's performance was not ineffective and none of the complained-of grounds constituted error. Here, Moses relies on *Alcaca*, where defense counsel failed utterly to put on several exonerating witnesses and when asked why not, he responded that he could not recall why he did not put the exculpatory witnesses on. *Alcaca*, 334 F.3d at 871. This case does not resemble the *Alcaca* case.

[60] Moses' argument as a whole is that between the inflammatory statements and vouching by the prosecutor, and the instances in which defense counsel did not stand up for her client, this trial was fundamentally unfair. Though containing small missteps by otherwise competent counsel throughout, as in most trials, the court is left with the impression that the fundamental fairness of the trial was maintained. Moses was convicted by competent admissible evidence and there is no reason to disturb the verdicts of guilt herein, save the issue of the correction of the sentence on Second Degree CSC.

IV.

[61] We conclude that Moses was convicted by the evidence, not by the inflammatory remarks of the prosecutor. The prosecutor made some improper statements, vouched for two of the witnesses, and appealed to the emotions of the jury in part of his closing argument. However, we find that his comments do not rise to a level that they would have changed the jury's verdict, given the evidence in this case. The evidence presented more than amply supports the conviction.

[62] Moses has also not established ineffective assistance of counsel, because counsel's performance was either not deficient, or if deficient, such deficient conduct did not prejudice

Moses. Counsel's errors were not so serious as to deprive Moses of a fair trial, a trial whose result is reliable. With respect to the sentences imposed by the trial judge, the sentence on First Degree CSC is not vague because Guam statutes make all sentences eligible for parole absent a specific statement by the judge to the contrary. The sentence for Second Degree CSC, however, is either vague or in excess of the statutory maximum and cannot stand. This case must be remanded for re-sentencing on this charge.

[63] Therefore, we **AFFIRM** the convictions on First Degree CSC and Second Degree CSC, **AFFIRM** the sentence First Degree CSC, and **REMAND** for re-sentencing on Second Degree CSC.

ROBERT J. TORRES

ROBERT J. TORRES, JR.
Associate Justice

RAMONA V. MANGLONA

RAMONA V. MANGLONA
Justice *Pro Tempore*

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Chief Justice