# IN THE SUPREME COURT OF GUAM

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

**v.**

**CARMELO A.Q. MENDIOLA,**
Defendant-Appellant.

Supreme Court Case No.: CRA08-008
Superior Court Case No.: CF0196-07

## OPINION

**Cite as: 2010 Guam 5**

Appeal from the Superior Court of Guam
Argued and submitted on March 19, 2009
Hagåtña, Guam

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

**MARAMAN, J.:**

**[1]** Defendant-Appellant Carmelo A.Q. Mendiola appeals from a judgment convicting him of First Degree Criminal Sexual Conduct (As a First Degree Felony), Family Violence (As a Misdemeanor), and Child Abuse (As a Misdemeanor). Mendiola argues that the conviction should be reversed and a new trial ordered because of prosecutorial misconduct and ineffective assistance of his trial counsel.

**[2]** Because we find that prosecutorial misconduct during opening statements and closing arguments affected the jury's fair consideration of the witnesses' credibility, thereby denying Mendiola his right to a fair trial, we reverse and remand for a new trial.

## I. PROCEDURAL BACKGROUND

**[3]** Mendiola was indicted by the grand jury on May 15, 2007, for First Degree Criminal Sexual Conduct (As a First Degree Felony), Second Degree Criminal Sexual Conduct (As a First Degree Felony), Assault with Intent to Commit Criminal Sexual Conduct (As a Third Degree Felony), Assault (As a Misdemeanor), Family Violence (As a Misdemeanor), and Child Abuse (As a Misdemeanor). At trial, Mendiola was represented by the Alternate Public Defender's Office. Jury selection commenced on September 19, 2007, and the jury returned a verdict of guilty as to all charges on September 28, 2007, some of which were lesser-included offenses. Sentencing was scheduled for December 4, 2007.

**[4]** On November 20, 2007, before sentencing, the Alternate Public Defender filed a motion to withdraw as counsel for Mendiola. The motion indicated that Mendiola wished to raise the issue of ineffective assistance of counsel because of counsel's failure to call certain witnesses on

his behalf at trial.[1] The Government filed an opposition to the motion on November 20, 2007, but withdrew the opposition the following day.

**[5]** On December 13, 2007, the trial court appointed new counsel to represent Mendiola at his sentencing hearing. On May 15, 2008, Mendiola was sentenced to: (1) twenty-five years imprisonment for the First Degree Criminal Sexual Conduct charge; (2) one year for the Family Violence charge (to run concurrently); and (3) one year for the Child Abuse charge (to run concurrently). Judgment was filed on July 1, 2008. Mendiola timely filed his Notice of Appeal.

## II. FACTUAL BACKGROUND

**[6]** During trial, the Government presented the following evidence: Sometime in November 2006, Mendiola picked up his niece, K.M., from school after she had reported to the nurse's office complaining of an earache. While Mendiola and K.M. were home alone, Mendiola called K.M. into a room and told her that the nurse had told him to check K.M. for bruises. He then instructed K.M. to remove her shirt. She complied. After examining her, Mendiola told K.M. to put her shirt back on and to remove her pants and panty. After K.M. complied, Mendiola further instructed K.M. to lie on the bed, after which point he placed a pillow over her face. K.M. testified that she then felt Mendiola put "something hard" that felt like "skin" in her "private." Supplemental Excerpts of Record ("SER"), tab 22 at 97-98 (Transcript ("Tr."), Jury Trial – Day 2, Sept. 25, 2007). She testified that it hurt a little.

**[7]** In addition to K.M.'s testimony, the jury heard from several of K.M.'s family members, who testified as to what K.M. told them about the incident six months after it took place. Apparently, while K.M. and her siblings were living at an aunt's home, K.M. was caught on top of her younger cousin "doing the nasty." SER, tab 13 at 30 (Tr., Jury Trial – Day 1, Sept. 24,

[1] This is not the basis for Mendiola's current ineffective assistance claim.

2007). Upset, her aunt asked K.M.'s brother to talk to K.M. to find out why she had done that. K.M.'s brother asked K.M. if anyone had ever touched her. She responded by telling her brother about the incident with Mendiola in November.

**[8]** After reporting the incident to the police, K.M. was brought to the Healing Hearts Center for an examination. At trial, Nurse Ann Rios from the Healing Hearts Center testified as the Government's expert witness. Rios testified that K.M.'s results were normal, meaning that there were no signs of penetration or sexual abuse, but that such results were inconclusive given the period of time that had elapsed since the incident. Rios testified that studies have shown that certain tissues that may be damaged during an assault, such as the hymen, can heal themselves so that normal results from an examination done months after an alleged assault neither proves nor disproves that an assault occurred.

**[9]** During opening and closing arguments, Mendiola asserts, the prosecutor made several improper statements:

Opening Statement (Alleged Vouching)

(A) "Ladies and gentlemen, all it takes to convict is to believe [K.M.]. There's absolutely no legitimate reason for this child, [K.M.], to make it up. Thank you." Excerpts of Record ("ER") at 5-6 (Tr., Jury Trial – Day 1, Sept. 24, 2007).

Closing Argument (Alleged Vouching)

(B) "We've learned from the evidence that it's true, [K.M.] was nine years old." ER at 82 (Tr., Cont. Jury Trial, Sept. 26, 2007).

(C) "We learned that from the evidence. And that's true that in November of 2006, [K.M.] was living with the Defendant and his wife and their children . . . . And it's also true from the evidence, the evidence has clearly shown beyond a reasonable doubt that they were living in Dededo, Astumbo . . . ." ER at 82 (Tr., Cont. Jury Trial).

(D) ". . . the Defendant, known as Uncle Carl to [K.M.], picked her up from school because she had an ear infection or complained of an ear infection,

complained that she wasn't feeling well. The evidence shows that that's true." ER at 82 (Tr., Cont. Jury Trial).

(E) "And that on that day when she was taken home, the evidence also is true that they were home alone. Now, it's also true, as I stated in my opening statement, the People have been open about that, there was and is no physical evidence." ER at 82 (Tr., Cont. Jury Trial).

(F) "The People and the evidence have been open and honest as have been our witnesses." ER at 82 (Tr., Cont. Jury Trial).

(G) "Because [K.M.] behaved inappropriately in a sexual way. The evidence is true. They show that on April 29, 2007, it's a Sunday, the kids are playing." ER at 83 (Tr., Cont. Jury Trial).

(H) "Well, the evidence is also clear and true that [K.M.] and her brothers and sisters, it seems like they're bounced around. It is true, their parents; their mother and father are divorced." ER at 83 (Tr., Cont. Jury Trial).

(I) "The evidence clearly shows and truly shows that the grandma – But eventually, sometime after Christmas . . . ." ER at 84 (Tr., Cont. Jury Trial).

(J) "And between this late December 2006, all the way as of yesterday, we know from the evidence truly and clearly that [K.M.] and her brothers and sisters are still living with Auntie Rachel Trinidad." ER at 84 (Tr., Cont. Jury Trial).

(K) "So you learned from her, the evidence is true and clear that she contacted a friend who happens to be a lawyer and he told her he'd report it to the authorities." ER at 85 (Tr., Cont. Jury Trial).

(L) "You had a chance to observe [K.M.] on the stand. Let's think back. It wasn't just a day ago. Little [K.M.] is up there, I'm asking her questions leading up to the event. What was her demeanor like? She had a hard time. She started from sitting there like this open, to where she was starting to close and shut down because she's in the pressure cooker portion of the criminal justice system. She has to tell us the truth about what had happened. ER at 86 (Tr., Cont. Jury Trial).

(M) "And you heard me examine her about knowing the difference between the truth and a lie, and she answered it properly. She knew the difference. She knew that she had to tell the truth here 'cause if she didn't, it's a bad thing and you get in trouble. But as the triers of facts, you not only get to hear the testimony, read the evidence, see the evidence, but you get to judge the credibility of the witnesses . . . ." ER at 86 (Tr., Cont. Jury Trial).

(N) "She understood the oath that she had to tell the truth even though she was young. And if you think about it, the oath not only gave her the incentive to tell the truth, but it also provides no incentive for her to lie 'cause she has all these people looking at her; the Judge, the Prosecutor, the Defense Counsel, you folks, that she has to tell the truth, that she should not make this up." ER at 87-88 (Tr., Cont. Jury Trial).

(O) "And I asked her again, 'Is this something you made up' and her answer was, 'No.' I mean, think about it, ladies and gentlemen, it can't be fun for a little nine year old girl to be up here talking about and accusing her uncle of having molested her. It can't be. It's got to be difficult. If anything, the pressure of it all may make her want to recant, but she didn't along the way, when she got into the criminal justice system. And we've been up front about the fact that children can lie, but you also agreed with me that children don't lie for fun, they lie for a reason and it's usually about small things. But she's been consistent. I mean, think about it; why would you go through all of this and still be wanting to tell the truth? Because she knew she had to tell the truth." ER at 88 (Tr., Cont. Jury Trial).

(P) "And you all agreed with me when we talked about that children could – that children do lie, but we also know that we could tell when they're lying. We also know that they are poor liars; that they're not sophisticated liars. That she didn't – [K.M.] didn't have this grand plan to make up these accusations against Carmelo Mendiola, her uncle, wait six months, act out inappropriately, then get – then be asked what happens. No, ladies and gentlemen. No. Coaching – There's no coaching here. There's no evidence of coaching. I mean, if – and the reason why we know kids – we could tell when kids are lying is 'cause sometimes they exaggerate and get it all – major points mixed up. We don't have any of that here." ER at 88 (Tr., Cont. Jury Trial).

(Q) "And I know there is going to be some issues about the sexual penetration, but it all comes down to, do you believe [K.M.]? [K.M.] her trust in us to have a fair trial, give the Defendant a fair trial, to give her a fair judgment of her credibility. And so, I ask you, ladies and gentlemen, all you have to do to convict is to believe [K.M.]. There's no evidence or reason – legitimate reason for her to make this up." ER at 90 (Tr., Cont. Jury Trial).

<u>Rebuttal Argument (Alleged Vouching & Appealing to Passion of the Jury)</u>

(R) "The People and [K.M.], a little nine year old girl, and the Defendant, we're putting your trust, and your commonsense and your experience, and your commitment that you will weigh the evidence carefully, and that you know that based on the facts and the evidence, that [K.M.] told you the truth, that she did not make this up, it happened. Her trust has been violated. Let's not violate her trust." ER at 91 (Tr., Cont. Jury Trial).

At trial, defense counsel did not object to any of these statements.[2]

## III. JURISDICTION

**[10]** This court has jurisdiction over appeals from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (West Supp. 2009); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA § 130.15(a) (2005).

## IV. STANDARD OF REVIEW

**[11]** Because Mendiola did not object to the prosecutor's comments at trial, we review those comments for plain error. *People v. Moses*, 2007 Guam 5 ¶ 8 (citing *People v. Ueki*, 1999 Guam 4 ¶ 17).

## V. ANALYSIS

### A. Prosecutorial Misconduct

**[12]** To succeed on a claim of prosecutorial misconduct, a petitioner must demonstrate that the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *People v. Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)) (internal quotation marks omitted).

**[13]** Prosecutorial comments objected to by defense counsel are subject to a harmless error standard of review. *Moses*, 2007 Guam 5 ¶ 7 (citing *Evaristo*, 1999 Guam 22 ¶ 18). When, however, a defendant fails to object to prosecutorial comments at trial, we review only for plain error. *Id.* ¶ 8 (citing *Ueki*, 1999 Guam 4 ¶ 17).

**[14]** "Plain error is highly prejudicial error." *People v. Quitugua*, 2009 Guam 10 ¶ 11. Reversal under the plain error standard is warranted when the errors seriously affect the fairness, integrity or public reputation of judicial proceedings. *Evaristo*, 1999 Guam 22 ¶ 23. To find

[2] Throughout the opinion, we refer to these statements as "Statement A," "Statement B," etc.

plain error, the defendant must demonstrate that (1) there was an error; (2) the error was clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is required to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Quitugua*, 2009 Guam 10 ¶ 11 (citing *People v. Campbell*, 2006 Guam 14 ¶ 11; *People v. Jones*, 2006 Guam 13 ¶ 24); *see also* 8 GCA § 130.50(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

**1. Whether there was error that was clear or obvious under current law**

**[15]** We conclude that the prosecutor's conduct during opening statement and closing argument constituted error that was clear or obvious under current law. The law is clear that, while a prosecutor has the freedom at trial to argue reasonable inferences from the evidence, he cannot vouch for his witnesses' credibility.

**[16]** Improper "[v]ouching occurs when the government places the prestige of the government behind the witnesses through personal assurances of their veracity . . . ." *Moses*, 2007 Guam 5 ¶ 16 (quoting *Ueki*, 1999 Guam 4 ¶ 19) (internal quotation marks omitted). "Vouching of that sort is dangerous precisely because a jury 'may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.'" *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005) (quoting *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985)).

**[17]** First, we find that Statement F constituted direct vouching for the credibility of the Government's witnesses. It was clearly improper for the prosecutor to tell the jury that "[t]he People and the evidence have been open and honest as have been our witnesses." ER at 82 (Tr., Cont. Jury Trial). Such a statement undeniably vouches for the veracity of the Government's witnesses. While the prosecutor did not directly state that it was his opinion that the witnesses

were credible, he certainly gave that impression. The statement is especially problematic because it suggests to the jury that the Government's credibility is also an issue in the case, so that if the jury were to disbelieve the evidence presented by the Government, it would in essence be discrediting the Government's honesty. The prosecutor lent the Government's credibility to its witnesses. This interfered with the jury's independent evaluation of the veracity of each witness.

**[18]** Additionally, we find that Statements A and Q also constitute improper vouching. Instead of leaving the determination of whether or not K.M. fabricated her allegation of sexual assault to the jury, the prosecutor told the jury that there was "absolutely no legitimate reason for [K.M.]" to make the story up. ER at 6 (Tr., Jury Trial – Day 1). These statements bolstered K.M.'s credibility and were improper.

**[19]** Several courts have found statements like Statements F, A, and Q to be misconduct. *See, e.g.*, *United States v. Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) (prosecutor's statement that witnesses were "very, very credible" was impermissible *per se*); *Weatherspoon*, 410 F.3d at 1146 (clearly improper for prosecutor to argue that witnesses "had no reason to come in here and not tell you the truth. And they took the stand and they told you the truth."); *United States v. Carroll*, 26 F.3d 1380, 1387-89 (6th Cir. 1994) (prosecutor's declaration that witnesses had no reason to lie and that they are credible witnesses was inexcusable); *United States v. Dandy*, 998 F.2d 1344, 1353 (6th Cir. 1993) (improper for prosecutor to state that witness is honest); *United States v. Krebs*, 788 F.2d 1166, 1176-77 (6th Cir. 1986) (statement that witness was telling the truth because she had no reason to lie was improper vouching); *Dysthe v. State*, 63 P.3d 875, 886 (Wyo. 2003) (telling the jury that the witnesses had no reason to lie was improper); *Moses*, 2007 Guam 5 ¶ 22 (prosecutor's statements that one witness is honest and that another told the truth

are clearly improper vouching); *Ueki*, 1999 Guam 4 ¶¶ 21-22 (prosecutor's statements that witness' testimony at trial was the truth constituted inappropriate vouching which establishes plain error).

**[20]** Finally, we find that the prosecutor improperly vouched for K.M.'s credibility when he made Statements O and P. These statements were similar to those made by the prosecutor in *State v. Alexander*, 755 A.2d 868 (Conn. 2000). In that case, the Supreme Court of Connecticut held that the state's closing argument amounted to prosecutorial misconduct depriving defendant of a fair trial where the prosecutor argued:

> Just because we have a twelve year old victim, who was eight at the time the incident occurred, recalling what happened to her when she was eight and nine in front of a room full of strangers, doesn't mean we can't depend on her word. Because we should depend on her word. And, why? I'll tell you why. Common sense tells you that no one – no one would put herself through such an ordeal if nothing happened. . . . [The victim] knew when she came to court she had to tell the truth. *And that's what she did.* . . . Remember [the victim] said, "I think it happened in the Fall. I was eight." And, how does she remember she was eight? "[B]ecause I didn't know him when I was seven." *That's how little kids think. They can't make this up.* . . . Nor did she exaggerate. Nor did she have any motive to lie. . . . There's no motive for her to lie. . . . [Y]ou're supposed to believe that as a result of that comment [the victim] fabricated this whole incident to get back at him. *I don't know of that many eight or nine year olds that are that sophisticated to fabricate a story involving sexual abuse.* . . . [The victim] suffered a lot of negative things after she disclosed. And, if she was lying, she would have changed her story. . . . And, why didn't she do it? *Because she told the truth.*

*Id.* at 875 (emphases in original). The court determined that these statements constituted improper vouching because it implied that the victim testified truthfully because she is young and therefore honest, and that no child would possibly make up a story regarding sexual abuse. *Id.* at 877. The court also concluded that the prosecutor improperly commented on facts not in evidence:

> In the present case, the prosecutor did not confine herself to the record. She explained to the jury, "[t]hat's how little kids think," without any evidence to support this assertion. She stated that children "can't make this up. . . ." The summation suggested that a [sic] eight year old is not "sophisticated" enough to conjure up a story of sexual abuse, without any evidence supporting that contention. These are the principal issues set forth for the jury to determine on their own. It was, therefore, wholly improper for the prosecutor to insinuate the truthfulness of certain claims, thereby inducing the jury to review the case by means of facts not in evidence.

*Id.* at 878 (omission in original).

**[21]** In the instant case, the prosecutor similarly vouched for K.M.'s credibility when he argued:

> And I asked her again, 'Is this something you made up' and her answer was, 'No.' I mean, think about it, ladies and gentlemen, it can't be fun for a little nine year old girl to be up here talking about and accusing her uncle of having molested her. It can't be. It's got to be difficult. If anything, the pressure of it all may make her want to recant, but she didn't along the way, when she got into the criminal justice system. And we've been up front about the fact that children can lie, but you also agreed with me that children don't lie for fun, they lie for a reason and it's usually about small things. But she's been consistent. I mean, think about it; why would you go through all of this and still be wanting to tell the truth? Because she knew she had to tell the truth. . . . And you all agreed with me when we talked about that children could – that children do lie, but we also know that we could tell when they're lying. We also know that they are poor liars; that they're not sophisticated liars. That she didn't – [K.M.] didn't have this grand plan to make up these accusations against Carmelo Mendiola, her uncle, wait six months, act out inappropriately, then get – then be asked what happens. No, ladies and gentlemen. No. Coaching – There's no coaching here. There's no evidence of coaching. I mean, if – and the reason why we know kids – we could tell when kids are lying is 'cause sometimes they exaggerate and get it all – major points mixed up. We don't have any of that here.

ER at 88-89 (Tr., Cont. Jury Trial).

**[22]** Like the prosecutor in *Alexander*, the prosecutor in this case improperly vouched for K.M.'s credibility when he implied that K.M. testified truthfully because a child her age would not put herself through the difficult ordeal of testifying about sexual abuse if the abuse never happened. Moreover, the prosecutor in the instant case improperly commented on facts not in

evidence. The jury in this case was not presented with any evidence regarding the sophistication of children when it comes to lying. No evidence was presented to support the prosecutor's assertion that children are "poor liars" who "don't lie for fun," and when they do lie, it is "usually about small things" and they get all "major points mixed up." ER at 88 (Tr., Cont. Jury Trial). The prosecutor insinuated that because the charges against the defendant were grave rather than a "small thing," and because K.M. did not appear to get all of the major points of her story mixed up, she must have told the truth.

**[23]** The jury's determination of whether K.M.'s testimony was credible should have been made without the prosecutor's suggestions as to the proper methods of ascertaining when a child is or is not lying. The Government's contention that this statement was not improper because it simply referred to statements made during voir dire does not resolve the impropriety of the statement, as statements made during voir dire are not evidence. The statement interfered with the jury's independent evaluation of K.M.'s credibility, constituting clear error.[3]

**2. Whether the misconduct affected Mendiola's substantial rights and warrants reversal of his conviction.**

**[24]** Mere vouching is insufficient to warrant a new trial. Once a clear error has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case). *Evaristo*, 1999 Guam 22 ¶ 26. We review the prosecutorial comments' potential for prejudicial effect in the context of the record as a whole. *See Ueki*, 1999 Guam 4 ¶ 23; *Weatherspoon*, 410 F.3d at 1151 (citing *United States v. Young*, 470 U.S. 1, 16 (1985)). "Where 'upon review of the record, it would appear that the jury was free to judge for

[3] Because we find these statements to be sufficiently egregious to warrant a new trial, *infra*, we do not address the propriety of the remaining statements alleged to be error. We do note, however, that the prosecutor's consistent use of the word "true" when characterizing the evidence (i.e., Statements B-E and G-K) was, at the very least, an inept and arguably improper method of argument. In the future, it would be wise for prosecutors to refrain from such language if they wish to avoid a finding of improper vouching.

itself the weight of the evidence presented and the credibility of the testifying witnesses,' then there is no error affecting substantial rights." *Moses*, 2007 Guam 5 ¶ 21 (quoting *Evaristo*, 1999 Guam 22 ¶ 34).

**[25]** Previously, we have stated that we consider the following factors in determining the prejudicial effect of prosecutorial vouching: "(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." *Moses*, 2007 Guam 5 ¶ 21; *Evaristo*, 1999 Guam 22 ¶ 32; *see also Ueki*, 1999 Guam 4 ¶ 24 (citing *United States v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993)). To the extent that our previous cases may intimate that we are limited to considering these four factors, we clarify that this list is not exhaustive.[4] In determining whether the prosecutor's misconduct affected the outcome of the case, courts consider a number of factors, the common denominators being: (1) the nature and seriousness of the misconduct; (2) the context in which it occurred; (3) whether the trial judge gave any curative instructions and the likely effect of such instructions; and (4) the strength of the evidence against the defendant.

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[4] Other factors that have been considered by courts and which we now list for future reference include: whether the prosecutor misstated the evidence; how much the vouching implies that the prosecutor has the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the timing of the vouching; the extent to which the witness's credibility was attacked; whether the statement was deliberately or accidentally placed before the jury; the specificity and timing of a curative instruction; whether the statement was invited by the conduct of defense counsel; whether the defense could counter the improper statement through rebuttal; and the importance of the witness's testimony to the case overall. *See, e.g.*, *United States v. Myers*, 569 F.3d 794, 799 (7th Cir. 2009); *United States v. DeSilva*, 505 F.3d 711, 719 (7th Cir. 2007); *United States v. Jackson*, 473 F.3d 660, 670 (6th Cir. 2007); *United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994); *United States v. Necoechea*, 986 F.2d 1273, 1278 (9th Cir. 1993).

**[26]** Mendiola asserts that the errors were prejudicial because his conviction rested solely on the testimony, and, thereby, the credibility, of the alleged victim, K.M.[5] To support his claim, Mendiola relies primarily on *United States v. Weatherspoon*, where the Ninth Circuit reversed the defendant's conviction and remanded the case for a new trial on the basis of prosecutorial misconduct. 410 F.3d at 1152. During closing arguments, the prosecutor made several statements that were found to be improper vouching. *Id.* at 1146-47. Defense counsel objected to some of these statements but not to others. *Id.* at 1151.

**[27]** The *Weatherspoon* court found that the prosecutor's statements required reversal even under the more restrictive plain error standard. *Id.* The court focused on two factors: the substance of any curative instructions, and the strength of the case against a defendant. *Id.* As to the instructions, the court found that the failure to correct the improper statements at the time they were made could not "be salvaged by the later generalized jury instruction reminding jurors that a lawyer's statements during closing argument [did] not constitute evidence." *Id.* The court concluded that the instructions "did not neutralize the harm of the improper statements because they did not mention the specific statements of the prosecutor and were not given immediately after the damage was done." *Id.* (quoting *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992)) (internal quotation marks omitted).

**[28]** As to how the strength of the evidence against the defendant contributes to the prejudicial effect of improper statements, the court explained:

> When the case is particularly strong, the likelihood that prosecutorial misconduct will affect the defendant's substantial rights is lessened because the jury's

[5] The Government, in its opposition brief, asserts that even if the court determines that the statements in question constituted improper vouching, Mendiola did not provide any information to demonstrate that the errors were prejudicial, and therefore, he failed to meet his burden. Whether or not Mendiola clearly asserted in his opening brief the prejudicial effect of the prosecutor's comments, we find that he provided sufficient allegations of prejudice in his reply brief.

> deliberations are less apt to be influenced. But as the case becomes progressively weaker, the possibility of prejudicial effect grows correspondingly. *Moreover, the possibility of prejudicial effect stemming from vouching is increased in cases where credibility is of particular importance.*

*Id.* (emphasis added) (citation omitted). Finding that the case against Weatherspoon was not particularly strong and depended in large measure on witness credibility, the court concluded that the prosecutorial misconduct in that case presented a strong possibility of prejudicial effect. *Id.*

**[29]** Other courts have reversed convictions where witness credibility played a crucial role in light of the overall strength of the government's case against the defendant. *See, e.g.*, *Gracia*, 522 F.3d at 604 (although court's general instructions did moderately serve to reduce degree of prejudice, prosecutor's statements prejudicially affected defendant's substantial rights because other than vouched-for agents' testimony, there was no other evidence of defendant's guilt); *Kerr*, 981 F.2d at 1054 (improper vouching constituted reversible error where testimony of vouched witnesses was crucial to government's case, and court's general instructions were ineffective in neutralizing the harm because they did not mention specific statements and were not given immediately after damage was done); *Anderson v. State*, 118 P.3d 184, 187-88 (Nev. 2005) (error affected defendant's substantial rights, thus compelling reversal, where improper arguments composed the heart of the state's views of the case and the defendant; where the evidence, though sufficient to sustain a conviction, was not overwhelming; and where the prosecutor's remarks changed the focus of the case to his personal views, not the evidence); *Condra v. State*, 100 P.3d 386, 391 (Wyo. 2004) (because evidence of defendant's guilt was not overwhelming and defendant presented plausible defense to the charges, reasonable probability existed that but for prosecutor's comments, verdict might have been more favorable to defendant); *Dysthe*, 63 P.3d at 886 (prosecutor's misconduct affected defendant's right to a fair

trial because state's case depended entirely on the jury finding its witnesses credible, and it is impossible to know whether conviction resulted from jury's independent evaluation of evidence or from jury's having been swayed by prosecutor's improper arguments); *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996) (where verdict hinged on who jury found more credible, improper vouching denied defendant a fair trial).

**[30]** The Government asserts that Mendiola's reliance on *Weatherspoon* is improper because this court has issued controlling case law on the issue of improper vouching. In *People v. Moses*, the court found that certain statements made by the prosecutor were clearly vouching because they constituted a statement by the government that the witness in question was telling the truth.[6] 2007 Guam 5 ¶ 22. However, because defense counsel did not object to the vouching, the court then had to determine whether the vouching affected Moses' substantial rights under the plain error standard (i.e., "whether the prosecutor's vouching affected the outcome of this case."). *Id.* The court decided that despite the improper vouching, there was enough evidence for the jury to have found Moses guilty without the government's vouching for its witnesses:

> 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

[6] Moses had asserted that the following statements, made by the prosecutor in closing argument, were improper:

> (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."
>
> (5) Referring to witness Roxanne Rain: "That is a girl [who] told you the 100 percent truth."

*Moses*, 2007 Guam 5 ¶ 13.

> 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.

*Id.* ¶ 23.

**[31]** We are not persuaded by the Government's contention that our decision in *Moses* calls for a finding that there was no reversible error in the instant case. Instead, we find that our previous decisions are consistent with a holding of reversal in this case. In all of our previous cases dealing with this issue, our decision not to reverse turned on the fact that even without the testimony of the vouched witnesses, the evidence of the defendant's guilt was strong if not overwhelming. *See id.*; *Ueki*, 1999 Guam 4 (although vouching for alleged victim's testimony was improper, no prejudice to defendant where there was other direct evidence that linked defendant to the crime, including physical evidence). This has been the determinative factor in other courts' decisions to find no reversible error. *See, e.g.*, *United States v. Myers*, 569 F.3d 794, 799-800 (7th Cir. 2009) (defendant not prejudiced by improper remarks because the point was tangential to thrust of government's case, weight of the evidence was against defendant, and defendant invited the remark in his closing argument); *Krebs*, 788 F.2d at 1177 (although prosecutor's conduct was inexcusable, reversal not warranted given the substantial evidence of defendant's guilt and the efforts of the trial court to take corrective measures to eliminate the resulting prejudice).

**[32]** In the instant case, the only evidence that tended to prove Mendiola's guilt was the testimony of K.M. and her family members (who simply reiterated what they were told by K.M. about the alleged incident six months after it allegedly occurred). The testimony of the Government's expert witness neither proved nor disproved that K.M. had been sexually assaulted.[7] Whereas in *Moses* there was overwhelming evidence of the defendant's guilt – the testimonies of the victim and her family members, who were informed of the rape as soon as it occurred, as well as corroborating physical evidence of penetration – here, the only way the jury could have found Mendiola guilty was by finding K.M. credible. Thus, the prosecutor's vouching for K.M.'s credibility was highly prejudicial because it very likely tipped the scales in the Government's favor.

**[33]** We acknowledge that, more often than not, courts have held instances of prosecutorial vouching to be error but have gone on to find that such error did not warrant reversal of the defendant's conviction. We are persuaded, however, by *Weatherspoon* and those other cases in which courts have found vouching to constitute reversible error where witness credibility was crucial to the government's case and the evidence of the defendant's guilt was not particularly strong. As Mendiola could not have been convicted without the testimony of K.M., we cannot conclude that the prosecutor's vouching and other misconduct constituted an unprofessional but non-prejudicial error.

**[34]** The jury's determination of Mendiola's guilt or innocence hinged entirely on the credibility of the Government's witnesses. The prosecutor's improper statements may have led the jury to substitute the Government's credibility assessment of its own witnesses for the jurors'

[7] The testimony of the school nurse that K.M. had been sent home from school for an earache was the only other evidence to corroborate K.M.'s testimony.

independent credibility call, thereby casting serious doubt on Mendiola's guilty verdict. Furthermore, the court's general instruction reminding jurors that closing argument was not evidence did little to neutralize the harm in this case, because it was not made immediately after the damage was done, and it did not specify the statements to be ignored.[8] We are convinced that, under the particular facts of this case, the prosecutor's remarks affected Mendiola's substantial rights, so that reversal of his conviction is necessary both to prevent a miscarriage of justice and to maintain the integrity of the judicial process.

**B. Ineffective Assistance of Counsel**

**[35]** Because we find reversible error due to prosecutorial misconduct, we need not address the other issue on appeal, whether Mendiola was deprived the effective assistance of trial counsel.

## VI. CONCLUSION

**[36]** As the people's representative in our system of justice, a prosecutor must adhere to the rules and principles that ensure that a jury determines a defendant's guilt based on the evidence before it.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

[8] Though the defendant failed to object to the prosecutor's misconduct, the trial court certainly could have intervened even without an objection. *See Weatherspoon*, 410 F.3d at 1151 ("[E]ven in the absence of objections by defense counsel, a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate." (citation and internal quotation marks omitted)).

*Berger v. United States*, 295 U.S. 78, 88 (1935). In a comparatively close case such as this, where the verdict hinged entirely on witness credibility, a prosecutor must be especially careful to stay within the bounds of proper conduct. In that context, prosecutorial statements that vouch for the credibility of witnesses pose a real danger to the defendant's right to a fair trial. Because that danger was not effectively mitigated by curative instructions from the trial judge, we conclude that the prosecutorial misconduct here affected the jury's ability to consider the totality of the evidence fairly. We therefore **REVERSE** for plain error and **REMAND** for a new trial.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice