IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KEITH VAUGHN MESERAL,
Defendant-Appellant.

Supreme Court Case No. CRA10-005
Superior Court Case No. CM0444-09

OPINION

Cite as: 2014 Guam 13

Appeal from the Superior Court of Guam
Argued and submitted August 30, 2012
Hagåtña, Guam

Appearing for Defendant-Appellant:
Peter C. Perez, *Esq.*
Law Office of Peter C. Perez
DNA Bldg.
238 Archbishop Flores St., Ste. 309
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
590 S. Marine Corps Dr., Ste. 706
Tamuning, Guam 96913

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Keith Vaughn Meseral appeals his conviction of aggravated assault, reckless conduct, terrorizing, and misdemeanor assault. Meseral was sentenced to serve direct time of six years of imprisonment. On appeal, Meseral seeks reversal of his conviction, arguing that (1) he was deprived effective assistance of counsel based on numerous alleged errors committed by trial counsel; (2) the People engaged in prosecutorial misconduct during trial; and (3) the trial court committed numerous errors during trial and at the sentencing. For the reasons discussed below, we affirm in part and reverse in part.

I. PROCEDURAL BACKGROUND

[2] Defendant-Appellant Keith Vaughn Meseral was indicted by a grand jury on the following charges:

1. Aggravated Assault as a Second Degree Felony in violation of 9 GCA §§ 19.20(a)(1) and (b), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony (9 GCA § 80.37);

2. Aggravated Assault as a Third Degree Felony in violation of 9 GCA §§ 19.20(a)(3) and (b), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony (9 GCA § 80.37);

3. Reckless Conduct as a Misdemeanor in violation of 9 GCA §§ 19.40(a)(1) and (b);

4. Assault as a Misdemeanor in violation of 9 GCA §§ 19.30(a)(2) and (e);

5. Assault as a Misdemeanor in violation of 9 GCA §§ 19.30(a)(3) and (e);

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

6. Two Counts of Terrorizing as a Third Degree Felony in violation of 9 GCA § 19.60(a) and (b), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony (9 GCA § 80.37).

Record on Appeal ("RA"), tab 6 (Indictment, Sept. 11, 2009).

[3] After indictment and prior to trial, Meseral was represented by the Alternate Public Defender. Attorney Jeffrey Moots, a private practitioner, was appointed to represent Meseral, and a pre-trial conference was held three days after his appointment. Jury selection occurred three days later, and after the selection of the jury, trial commenced. The jury returned a guilty verdict on charges (1), (2), (3), (4), and (6) and the accompanying special allegations in charges (1), (2), and (6). *Id.* Meseral was acquitted of the fifth charge. That same day, the court ordered a presentence report and allowed counsels to file sentencing memoranda. After the filing of the presentence report, the People and Meseral each filed a sentencing memorandum. Meseral was sentenced to one year direct time for each of the five charges, running concurrently. In addition, Meseral was sentenced to serve the minimum of five years for the accompanying special allegations in charges (1), (2), and (6), running concurrently. All together, the trial court sentenced Meseral to serve direct time of six years of imprisonment.

[4] A judgment of conviction was entered, and Meseral timely filed this appeal. When he filed the notice of appeal, Meseral's trial counsel moved for the appointment of appellate counsel, and this court appointed Attorney Michael Phillips. Attorney Phillips later moved to withdraw as counsel and filed an *Anders* brief asserting that Meseral's conviction should be affirmed because there were no errors in Meseral's trial and there were no non-frivolous issues that would support an appeal. After examining the record and briefs filed,[2] this court determined

[2] On January 12, 2011, Meseral filed a *pro se* Supplemental Opening Brief to Raise an Issue. *See pro se* Supplemental Opening Brief to Raise an Issue (Jan. 12, 2011). In his *pro se* Supplemental Brief, Meseral indicated

that there were non-frivolous issues for appeal and Meseral's appeal should not be dismissed. *See* People v. Meseral, CRA10-005 (Order (Sept. 23, 2011)). Attorney Peter C. Perez was appointed as the new appellate counsel.

II. FACTUAL BACKGROUND

[5] The charges involve allegations that Meseral attempted to stab Dolores John with a knife following an argument at Dolores's residence. Meseral was also generally alleged to have communicated threats to kill Dolores and her son, Matthew John. At trial, the People presented the testimony of Dolores, the alleged victim; Lindsay Lasai Eyoel, Meseral's niece; and Otisis John, Dolores's son. The People also presented the testimony of Guam Police Department Officers Joseph Aguon and Duk Yi.

[6] Dolores testified that Meseral came to her residence drunk with another male individual known as Colin, and was looking for her son, Matthew. Dolores stated that Meseral claimed he was looking for Matthew because Matthew stole someone's marijuana plants. She further testified that Meseral threatened to kill her, and described how Colin pushed Meseral when he pulled out a knife from his pocket and attempted to stab her in the chest area. She also testified that she was afraid of Meseral.

[7] Lindsay was at Dolores's residence when the incident occurred and testified that while there, she saw Meseral pull out a knife and point it towards Dolores. Lindsay also testified she recognized the knife as the same knife used at the home where Meseral stayed because she at one time stayed in the same residence. Lindsay further testified that she heard Meseral state, "I'll kill you."

---

that "an appealable issue exist [sic] during the closing arguments when the trial court over-ruled Defendant [sic] Objection for the [G]overnment [sic] use of projector and slides at closing that showed jury instructions." *See id.*

[8] Otisis was also present at Dolores's residence when the incident occurred, and at trial he stated that he saw Meseral pull out a knife and attempt to stab Dolores around her chest area.

[9] Officer Joseph Aguon testified that when he arrived at the scene, he noticed that Dolores seemed frantic and scared. Officer Aguon also testified that a rowdy crowd of more than five individuals was present at the scene of the incident. According to Officer Aguon, the rowdy crowd grew mad at Dolores when she pointed out Meseral. Officer Aguon further testified that he was able to conduct only a quick sweep of the area because he believed that the rowdy crowd presented a threat to the officers and Dolores.

[10] Officer Duk Yi testified that when he arrived at Meseral's residence, Meseral appeared to be intoxicated because he could not keep his balance and his speech was heavily slurred, and Officer Yi smelled alcohol emitting from Meseral.

[11] Meseral was convicted on charges (1), (2), (3), (4), and (6) and the accompanying special allegations in charges (1), (2), and (6). Meseral was acquitted of the fifth charge. Before imposing Meseral's sentence, the trial court addressed both counsels and allowed them to present argument. Meseral's trial counsel argued for a suspended one-year sentence for the offenses of conviction and for a five-year sentence for the special allegation, for a total sentence of five years, noting that Meseral would be deported after serving his sentence. The trial court did not address Meseral personally or ask him whether he had anything to say before imposing the sentence.

III. JURISDICTION

[12] We have jurisdiction over an appeal from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-93 (2014)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA § 130.15(a) (2005).

IV. STANDARD OF REVIEW

[13] Ineffective assistance of counsel claims are mixed questions of law and fact, which we review *de novo*. *Angoco v. Bitanga*, 2001 Guam 17 ¶ 7 (quoting *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986)). "Although an ineffective assistance of counsel claim may be heard on direct appeal, it is more properly brought as a writ of habeas corpus." *People v. Ueki*, 1999 Guam 4 ¶ 5 (footnote omitted) (citing *People v. Perez*, 1999 Guam 2 ¶ 33; *United States v. Carr*, 18 F.3d 738, 741 (9th Cir. 1994)). "Courts will often decline to reach the merits of ineffective assistance of counsel claims because such claims are 'more appropriately addressed in a habeas corpus proceeding because it requires an evidentiary inquiry beyond the official record.'" *Id.* (quoting *Carr*, 18 F.3d at 741). This court reviews such claims, however, where "the record is sufficiently complete to make a proper finding." *People v. Moses*, 2007 Guam 5 ¶ 9 (quoting *People v. Leon Guerrero*, 2001 Guam 19 ¶ 12).

[14] "Prosecutorial comments objected to by defense counsel are subject to a harmless error standard of review," *People v. Mendiola*, 2010 Guam 5 ¶ 13 (citing *Moses*, 2007 Guam 5 ¶ 7), and "will not be reversed unless it is more likely than not that the comment affected the jury's verdict," *Moses*, 2007 Guam 5 ¶ 7 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 18). "The comment must taint the underlying fairness of the proceedings." *Id.* (citing *Evaristo*, 1999 Guam 22 ¶ 18). Where defense counsel does not object to the conduct, however, this court reviews such conduct for plain error. *Ueki*, 1999 Guam 4 ¶ 17 (citing *United States v. Young*, 470 U.S. 1, 14-16 (1985)).

[15] When considering an allocution error on appeal, we agree with a majority of jurisdictions that the right of allocution is subject to forfeiture and therefore to plain error review where no timely objection is made at the sentencing hearing. *See United States v. Rausch*, 638 F.3d 1296,

1299 & n.1 (10th Cir. 2011); *United States v. Luepke*, 495 F.3d 443, 446 (7th Cir. 2007); *United States v. Reyna*, 358 F.3d 344, 347-350 (5th Cir. 2004); *United States v. Adams*, 252 F.3d 276, 278-79 (3d Cir. 2001) (reviewing for plain error); *United States v. Cole*, 27 F.3d 996, 998 (4th Cir. 1994) (same).[3]

[16] On plain error review, we will not reverse unless "(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Quitugua*, 2009 Guam 10 ¶ 11 (citations omitted).

V. ANALYSIS

A. Prosecutorial Misconduct

[17] Meseral makes numerous claims of prosecutorial misconduct. He argues the People engaged in prosecutorial misconduct because (1) the prosecutor improperly argued that the jury could not hold the failure to present the knife at trial against the People, (2) the prosecutor's opening statements were argumentative, (3) the prosecutor repeatedly made statements calculated to inflame the passions and prejudices of the jury, and (4) the prosecutor engaged in improper vouching of several of the People's witnesses. We review each of these claims in turn.

[3] We note that the circuit courts are split on the appropriate standard of review for allocution errors. For instance, the Sixth and Eleventh Circuits review unpreserved allocution errors *de novo*, reasoning that these errors affect the legality of the sentencing process. *See United States v. Wolfe*, 71 F.3d 611, 614 (6th Cir. 1995) ("[B]ecause the right of the defendant and his counsel to allocute at sentencing is given in Fed. R. Crim. P. 32, when the defendant alleges he was denied this right he will usually be arguing that his sentencing procedures were *deficient as a matter of law*." (emphasis added) (citing *United States v. Sparrow*, 673 F.2d 862, 863-64 (5th Cir. 1982))); *United States v. Taylor*, 11 F.3d 149, 151 (11th Cir. 1994) ("We review questions involving the legality of a criminal sentence *de novo*." (citing *United States v. Giltner*, 972 F.2d 1563, 1564 (11th Cir. 1992))). The Ninth Circuit reviews for harmless error. *See United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994) ("We review the district court's failure to afford appellant his right of allocution for harmless error." (citing *United States v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993))).

1. People's Argument Regarding the Failure to Produce the Knife at Trial

[18] Meseral claims the People engaged in prosecutorial misconduct when the prosecutor improperly argued that the jury could not hold the failure to present the knife at trial against the People. Specifically, Meseral contends the prosecutor's argument misstated the People's burden and the jury's role as the trier of fact. Appellant's Br. at 26 (Feb. 13, 2012). Because no timely objection was made at trial, we review for plain error.

[19] The People counter that the prosecutor did not misstate the People's burden as to the evidence regarding the knife. Appellee's Br. at 34 (Mar. 15, 2012). The People contend that "[w]hen seeking an enhancement through a special allegation of possession and use of a deadly weapon, the government has no burden to produce evidence of a deadly weapon, but only to produce evidence that a weapon was used." *Id.* at 12-13.

[20] To support its claim, the People cite *In re M.M.S.*, where the court explained:

> Generally, the government may prove the use of a weapon in one of three ways. Ideally, a weapon is recovered and introduced in evidence as the one allegedly used by the assailant. Alternatively, in the absence of a weapon in evidence, witnesses may provide direct testimony that they had seen the defendant with a weapon. Finally, without direct evidence the government may prove the existence of a weapon by adequate circumstantial evidence.

691 A.2d 136, 138 (D.C. 1997) (citations omitted).

[21] The weapon in *In re M.M.S.* was not recovered by the police, and the victim, who was the only witness, testified that she did not see a weapon because she was struck from the back; thus, the government relied on circumstantial evidence to prove the weapon. *Id.* Because the witness did not testify she felt anything consistent with a weapon when she was struck, the court held that the government failed to elicit testimony that a weapon had been used, and the judgment was reversed. *Id.* at 138-39.

[22] In *United States v. Moore*, the defendants were charged with carrying firearms in connection with a bank robbery. 25 F.3d 563, 568 (7th Cir. 1994). The police did not recover the guns used, and no shots were fired. *Id.* At trial, multiple witnesses testified they saw the defendants carrying guns, and one witness testified that the robbers pointed their guns at her. *Id.* Additionally, a bank surveillance video showed that the objects were guns. *Id.* The court held that although the guns were never recovered, there was sufficient evidence from the video and the testimony of the witnesses for the jury to conclude that the defendants carried guns. *Id.*

[23] In this case, the knife was not produced, and the People relied on the testimony of Dolores, Otisis, and Lindsay to prove the use of the knife. Dolores testified that Meseral tried to stab her and even described how the knife looked and demonstrated to the jury how Meseral pulled the knife from his pocket and pointed it at her. Transcript ("Tr.") at 53-60 (Jury Trial, Feb. 3, 2010) ("He take [sic] out the -- the small knife, he want [sic] to stab me."). Otisis testified that he saw Meseral pull out a knife to try and stab Dolores, and he also demonstrated to the jury Meseral's actions that night. Tr. at 19-22 (Jury Trial, Feb. 4, 2010). Lindsay testified she saw Meseral pull out a knife, and, like the other witnesses, she demonstrated how Meseral used the knife. Tr. at 8-10 (Testimony of Lindsay Lasai Eyoel, Feb. 4, 2010). Lindsay also testified that she recognized the knife because it was the same knife used at the house when she stayed with Meseral. *Id.* at 10.

[24] Based on the testimony provided at trial, there was sufficient evidence for the jury to find that a knife was used. The People were not required to produce the knife at trial because there was other evidence in the record sufficient to show that Meseral had a knife when he assaulted Dolores. A review of the transcripts also reveals that the prosecutor did not misstate its burden of proof because the jury was instructed that the People must prove each and every element of

the charged offenses beyond a reasonable doubt, and counsel also stated this in his opening and closing statements. Tr. at 81-82 (Jury Trial, Feb. 5, 2010). On plain error review, we find no error.

2. Prosecutor's Opening Statement as Argumentative

[25] We next address Meseral's claim that the prosecutor's opening statement was improper because the prosecutor began his opening statement with argument. Because no timely objection was made at trial, the plain error standard applies.

[26] The alleged improper statement is:

> In the early morning hours on September 3, 2009, Dolores John was at her residence when an unwelcome drunken man paid her a visit. This man was accompanied by another male individual and demanded to know the whereabouts of Mrs. John's son Matthew. Now, when Mrs. John did not disclose where Matthew was at, this man -- this drunken man, he came by and (indiscernible).
>
> That same man subsequently pulled out a knife and tried to stab Mrs. John, who was both a mother and a grandmother. This was not enough. That same drunken man told Mrs. John that if she called the police, he was going to kill her, he was going to kill her son, Matthew, and he's going to kill another family member. Sitting in front of you, ladies and gentlemen, five feet in front of you today in the Defendant's chair is that same drunken man and that person is the Defendant, Keith Meseral.

Tr. at 14 (Jury Trial, Feb. 3, 2010).

[27] A prosecutor's opening statement is an explanation of the nature of the charge and a statement of facts which the government intends to prove at trial. *United States v. DeRosa*, 548 F.2d 464, 470 (3d Cir. 1977); *see also State v. Kirksey*, 658 S.W.2d 60, 61 (Mo. Ct. App. 1983) ("The primary purpose of the prosecution's opening statement is to apprise the jury and the defendant of the facts which the state expects to prove." (citation omitted)).

[28] As Chief Justice Burger explained in *United States v. Dinitz*:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to

> follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

[29] In this case, the prosecutor's opening statement provided the jury with a summary and explanation of what the People expected to prove at trial. Moreover, throughout the trial, several of the witnesses testified about the events of the alleged incident as outlined by the prosecutor. The opening statement was a fair statement of what the People intended to prove at trial. It was not error for the prosecutor to make the statements alleged to be improper because the statements were later supported by the proof at trial. We therefore find that the prosecutor's opening statement was proper.

3. Inflammatory Prosecutorial Comments

[30] Meseral also claims reversal is warranted because the prosecutor repeatedly made statements calculated to inflame the passions and prejudices of the jury, by referring to Meseral as a violent man who knew no boundaries, and by referring to Dolores as a person who reads the Bible. "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.'" *Mendiola*, 2010 Guam 5 ¶ 12 (quoting *Evaristo*, 1999 Guam 22 ¶ 20). "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. It requires that the comment taint the underlying fairness of the proceedings." *Moses*, 2007 Guam 5 ¶ 30 (citation omitted). Because trial counsel did not object when the prosecutor made the statement

that Meseral was a violent man who knew no boundaries, it is reviewed under a plain error standard, and the insertion of the comment must have affected Meseral's substantial rights such that reversal is necessary to prevent a miscarriage of justice. *See id.* ¶¶ 8, 36. We have 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." *Id.* ¶ 36 (quoting *People v. Aguirre*, 2004 Guam 21 ¶ 29) (internal quotation marks omitted).

[31] In *United States v. Pungitore*, the prosecutor in closing argument referred to one defendant as a "cold-blooded murderer," and to various other defendants as "mob killers." 910 F.2d 1084, 1127 (3d Cir. 1990). On appeal, the defendants claimed that the prosecution made prejudicial references to them. The court found no prosecutorial misconduct in the comments, agreeing with the district court that the statements were a fair comment on the evidence adduced at trial. *Id.* "A prosecutor's characterization of a defendant does not justify the granting of a new trial where the characterization is supported by the evidence and, in the context of the trial as a whole, produces no significant prejudice to the defendant." *United States v. Scarfo*, 711 F. Supp. 1315, 1327 (E.D. Pa. 1989) (citations omitted); *see also United States v. Williams*, 726 F.2d 661, 664 (10th Cir. 1984) (concluding that defendant was not denied a fair trial where prosecutor repeatedly characterized the defendant as a "drug smuggler" because the references were accurate based on the evidence presented); *United States v. Malatesta*, 583 F.2d 748, 759 (5th Cir. 1978) (holding that defendant was not denied a fair trial when counsel for co-defendant described defendant as a "con man" and "hoodlum" because the descriptions were supported by the evidence); *United States v. Taxe*, 540 F.2d 961, 967-68 (9th Cir. 1976) (holding that

prosecutor's characterization of defendant as a "scavenger," "parasite," "fraud," and "professional con man" was supported by the evidence and was not prejudicial).

[32] Here, the statement was supported by the record. Several witnesses testified that Meseral told Dolores he wanted to kill her. Dolores testified that if Colin did not interfere and push Meseral, she believed Meseral would have used the knife to stab her chest. Dolores also testified that she was afraid of Meseral. Other witnesses also testified about Meseral's violent acts on the night of the alleged incident. While "prosecutors must always be mindful of their duty of restraint," *Moses*, 2007 Guam 5 ¶ 38, we do not believe the prosecutor's characterization of Meseral in any way influenced the verdict, as the testimony from the witnesses supported the comment and was more than sufficient to convict Meseral.

[33] Similarly, the prosecutor's statement that Dolores was a person who reads the Bible was also supported by the record. At trial, Dolores described herself as a person who regularly attends church. Tr. at 24-25 (Jury Trial, Feb. 3, 2010). She also stated that she was reading the Bible when the incident occurred. *Id.* The statement by the prosecutor did not influence the verdict because Dolores's testimony supported the comment. Thus, Meseral has failed to show any error.

4. Improper Vouching of the People's Witnesses

[34] Meseral further claims the prosecutor engaged in improper vouching of several of the People's witnesses. Although Meseral does not provide a citation to the record to show where such alleged vouching occurred, a review of the transcripts show there may have been two instances in the prosecutor's rebuttal that Meseral may be referring to that could potentially constitute improper vouching:

> [Statement 1.] Do you recall during [defense counsel's] closing, when the discussion of Dolores came up in her testimony, if you recall he says, "You know,

> people that go to church, you know they lie." *Well, I ask you this, with your common sense, and your life experiences, why would a person that reads the Bible, a person that goes to church daily, what reason would [Dolores] have to lie?*
>
> . . . .
>
> [Statement 2.] Unlike what [defense counsel] was indicating in his closing, they weren't lying.

Tr. at 72-74 (Jury Trial, Feb. 5, 2010) (emphasis added). Each statement is addressed in turn.

a. Statement 1

[35] Improper vouching generally occurs in two situations: (1) the prosecutor "suggests that the government is aware of evidence not presented to the jury which would tend to support a particular witness' testimony;" or (2) the prosecutor "places the 'prestige of the government behind the witnesses through personal assurances of their veracity . . . .'" *Ueki*, 1999 Guam 4 ¶ 19 (quoting *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991)); *see also Evaristo*, 1999 Guam 22 ¶ 29. Statement 1 involves neither situation.

[36] In Statement 1, the prosecutor did not suggest that the government is aware of evidence not presented to the jury which would tend to support the witness' testimony. The prosecutor referred only to evidence that had already been presented to the jury. The facts purported in Statement 1 were testified to by the witnesses. Specifically, Dolores indicated that she was reading the Bible at the time of the incident. Dolores also indicated that she went to church every day. Tr. at 24-25 (Jury Trial, Feb. 3, 2010).

[37] Additionally, the prosecutor did not place the prestige of the government behind the witness through personal assurances of the witness' veracity. In *Ueki*, this court found that the prosecutor had improperly placed the prestige of the government behind a witness when the prosecutor "presented her beliefs, as a representative of the government, as to the credibility and

veracity of the [witness'] testimony before the jury." 1999 Guam 4 ¶ 22. Specifically, the prosecutor in *Ueki* stated: "[W]hat [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 on here was the truth." *Id.* Here, unlike in *Ueki*, the prosecutor did not give his personal assurances of Dolores' veracity when he stated during rebuttal:

> Do you recall during [defense counsel's] closing, when the discussion of Dolores came up in her testimony, if you recall he says, "You know, people that go to church, you know they lie." Well, I ask you this, with your common sense, and your life experiences, why would a person that reads the Bible, a person that goes to church daily, what reason would [Dolores] have to lie?

Tr. at 72-73 (Jury Trial, Feb. 5, 2010). Instead of impressing his own beliefs upon the jury as the prosecutor had in *Ueki*, the prosecutor here simply asked the jury to (1) consider what motive Dolores had to lie, and (2) use its common sense and experience to determine whether Dolores was testifying truthfully.

[38] *State v. Jose G.*, 929 A.2d 324 (Conn. App. Ct. 2007), suggests that a prosecutor may present a question to the jury to discuss a witness's lack of a motive to lie. In *Jose G.*, the Appellate Court of Connecticut stressed that a prosecutor may remark on the motives that a witness may have to lie, or not to lie. *Id.* at 334-35 (citations omitted). The court found: "The prosecutor's questions to the jury in this case, asking the jury to consider what motive these witnesses had for lying, were not improper." *Id.* at 335. Questions that ask the jury to consider what motive a witness would have for lying are not improper because they "properly call[] on the jury to use its common sense and experience to determine whether [the witness was] testifying truthfully." *Id.* (citation omitted); *see also United States v. Walker*, 155 F.3d 180, 188 (3d Cir. 1998) (holding that rhetorical question, "What motivation [would these witnesses have to lie]?",

is not vouching because "[i]t does not maintain the credibility of the two witnesses by referring to information outside the record, nor does it contain a personal assurance of veracity."). Accordingly, the prosecutor did not improperly vouch for Dolores' credibility in Statement 1, and we therefore find no error.[4]

b. Statement 2

[39] Meseral also complains that the prosecutor's statement that the witnesses were not lying also constituted improper vouching.[5] During trial counsel's closing argument, he contended that several of the government's witnesses—specifically, Dolores, Otisis, and Lindsay—were lying about what they reported to the police and what they testified to because the versions of their stories continued to change throughout the trial. Tr. at 48 (Jury Trial, Feb. 5, 2010) (in describing Dolores's testimony, trial counsel stated: "No reason to lie about that, but she did."); *id.* (as to Otisis and Lindsay, counsel stated: "Either there's two Matthews, or one of those two is lying to you . . . ."); *id.* at 49 ("So one of them is lying. You may not think it's important, but you can't trust them about that."); *id.* at 52 ("You've got to figure out what the truth is, and if you've got witnesses up here that can't tell you the truth, that's kind of hard for you . . . ."); *id.* at

[4] Even assuming *arguendo* that the prosecutor's statement was improper, Meseral was not prejudiced because his counsel invited the remark by commenting during closing argument that people who go to church are not incapable of lying. Tr. at 47 (Jury Trial, Feb. 5, 2010) ("Now [the prosecution] went to big lengths with Dolores to try to make her look honest by making a big deal about she's got kids, and she goes to church once a week. Okay? Well, I've got news for you, and I suspect you guys already know this, people who go to church tell lies."); *see also Mendiola*, 2010 Guam 5 ¶ 25 n.4 (listing "whether the statement was invited by the conduct of defense counsel" as a factor to consider when determining whether prosecutor's misconduct caused prejudice to defendant); *United States v. Myers*, 569 F.3d 794, 799-800 (7th Cir. 2009) (finding no prejudice where, *inter alia*, defendant's closing argument invited government's remark). Thus, on balance, Meseral was not prejudiced by the remark, as it was a fair response to his counsel's comments during closing.

[5] In its original brief on appeal addressing issues raised in the *Anders* brief, the People conceded that Statement 2 constituted improper vouching, but argued that the error did not warrant reversal. Appellee's Original Br. at 8-10 (Jan. 26, 2011). In the People's subsequent brief addressing the issues raised in Meseral's opening brief, the People deny any vouching on the part of the prosecutor. Appellee's Br. at 35 (Mar. 15, 2012).

60 ("But one thing we do know is that people from the John household, that came up here to testify to you . . . , they lied to you; about little things, about big things, about lots of things.").

[40] In his rebuttal summation, the prosecutor stated:

> You heard from [defense counsel] that the witnesses that testified for the Government -- Otisis John, Lindsay Eyoel, the victim, Dolores John -- they're all lying because there was [sic] inconsistencies with their statement. Well, I'll tell you this much, [defense counsel] overstepped his boundary. That's for you the jurors, the fact finders, to make the decision of whether you believe the witnesses were telling the truth or not.
>
> . . . .
>
> Let me ask you this, ladies and gentlemen. Do you know everything, in detail, that you did on September 3, 2010? Use your common sense.
>
> Unlike what [defense counsel] was indicating in his closing, they weren't lying. [Defense counsel] said that we haven't proven our case because we didn't have the knife during trial, we didn't have the defendant's pair of shorts.

Id. at 73-74.

[41] "Prosecutorial comments objected to by defense counsel are subject to a harmless error standard of review." *Mendiola*, 2010 Guam 5 ¶ 13 (citing *Moses*, 2007 Guam 5 ¶ 7). When the prosecutor began his rebuttal summation and was about to launch into what Meseral alleges was improper vouching, trial counsel objected to the prosecutor's comments, arguing that they constituted improper vouching. The trial court excused the jurors for lunch, and after hearing argument from both counsels, took the objection under advisement. In its ruling, the court cautioned the prosecutor to refrain from making statements that would ensure the veracity of any witnesses. Tr. at 68 (Jury Trial, Feb. 5, 2010). The jurors returned from lunch, and the prosecutor continued with his rebuttal summation and at that time made Statement 2. The statement "[u]nlike what [defense counsel] was indicating in his closing, they weren't lying" is improper vouching because it assured the jury that the witnesses were credible. The prosecutor

placed the "prestige of the government behind the witnesses through personal assurances of their veracity." *Ueki*, 1999 Guam 4 ¶ 19.

[42] We apply the harmless error standard because Meseral's counsel made a timely objection to the prosecutor's comments and did not need to continue objecting when the prosecutor made Statement 2. Under the harmless error test, the government bears the burden of persuasion regarding prejudice. *Quitugua*, 2009 Guam 10 ¶ 43 n.9. "Reversal under the harmless error standard is warranted when it is more probable than not that the misconduct affected the jury's verdict." *Evaristo*, 1999 Guam 22 ¶ 18 (citing *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1377-78 (9th Cir. 1988)). "[T]he test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Roten*, 2012 Guam 3 ¶ 41 (quoting *People v. Flores*, 2009 Guam 22 ¶ 112) (internal quotation marks omitted). We find that the improper vouching was harmless error.

[43] Although the prosecutor improperly vouched for the witnesses, the prosecutor carefully reminded the jury that as fact finders, it was their decision to determine whether the witnesses were telling the truth, and after summarizing the evidence presented at trial, concluded that the government's witnesses were not lying as suggested by trial counsel. Immediately prior to making the statement, the prosecutor asked the jurors if they were able to recall the details of what happened to them on September 3, 2010, and instructed the jurors to use their common sense. After closing arguments, the court informed the jury that they are the sole judges of the witnesses' credibility. The court also instructed the jury that they are to consider only the evidence presented at trial and that the closing statements of the attorneys are not evidence. Tr. at 80 (Jury Trial, Feb. 5, 2010). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed

in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Young*, 470 U.S. at 11. In context, Statement 2 can be viewed as the prosecutor simply suggesting that if the jury were to use its common sense, it would conclude that the witnesses were not lying. Under these circumstances, we hold that the improper statement had little, if any, prejudicial effect on Meseral because the jury was reminded immediately prior to the statement that it was up to them to determine witness credibility and that they should use their common sense in making this determination. The improper conduct therefore did not affect the jury's verdict.

B. Ineffective Assistance of Counsel

[44] Meseral also seeks reversal of his conviction based on ineffective assistance of counsel claims. "[A] claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*." *Angoco*, 2001 Guam 17 ¶ 7 (quoting *Birtle*, 792 F.2d at 847) (internal quotation marks omitted). "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) (internal quotation marks omitted). Counsel can deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance." *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)) (internal quotation marks omitted).

[45] The Supreme Court's two-part test in *Strickland* is employed to determine whether a defendant was denied the effective assistance of counsel. *Ueki*, 1999 Guam 4 ¶ 6 (citing *People v. Quintanilla*, 1998 Guam 17 ¶ 8). First, a defendant must establish that counsel's performance was deficient; then he must show that such deficiency prejudiced his defense so as to deprive

him of a fair trial.[6] *Strickland*, 466 U.S. at 687. "The benchmark for judging any claim of ineffectiveness [is] whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

[46] To fulfill the first prong of the *Strickland* test, Meseral must show that "the behavior complained of falls below prevailing professional norms." *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996) (citing *Strickland*, 466 U.S. at 689). To show deficient performance, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. An inquiry into counsel's conduct probes "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689; *see also Moses*, 2007 Guam 5 ¶ 42 ("High deference is given when reviewing an attorney's performance."). In engaging in such an inquiry, "[the] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

[47] To establish that he was prejudiced by counsel's ineffective assistance, Meseral "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Meseral must affirmatively prove prejudice in order to support his claim. *Id.* at 693.

---

[6] "[W]e need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Rather, if an ineffectiveness claim may be disposed of on the ground of lack of sufficient prejudice, that course should be followed." *People v. Campbell*, 2006 Guam 14 ¶ 49 (citing *Strickland*, 466 U.S. at 697).

[48] In his opening brief, Meseral provides a litany of ineffective assistance of counsel claims, which primarily stem from: trial counsel's failure to file specific motions before, during, and after trial; trial counsel's preparation for trial; trial counsel's conduct during trial; and trial counsel's conduct at sentencing. Because we address several of the alleged errors as part of Meseral's prosecutorial misconduct claims, we need not determine whether Meseral was deprived the effective assistance of trial counsel for those claims we held were not in error.

[49] In reviewing the record as to the other ineffective assistance of counsel claims, we conclude that, with the exception of the improper vouching in Statement 2 and the alleged sentencing errors, which we address below, each alleged action or inaction complained of requires an examination of facts, many of which are beyond the trial court record. While an ineffective assistance of counsel claim may be heard on direct appeal, we have previously held that it is more properly brought as a writ of habeas corpus because such a claim often requires an evidentiary inquiry beyond the official record. *People v. Root*, 1999 Guam 25 ¶ 14. We therefore decline to decide the claims of ineffective assistance of counsel which require an extra-record inquiry, and we address only the improper vouching in Statement 2 and the alleged sentencing errors.

1. Improper Vouching – Statement 2

[50] Because we find that Statement 2 was improper vouching, we must also address whether Meseral was denied effective assistance of counsel as to this error. In doing so, we apply the *Strickland* two-pronged test, which requires that a defendant demonstrate that: (1) his trial counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. 466 U.S. at 687.

[51] Meseral asserts:

> When the Government gave its closing arguments, and repeatedly vouched for the veracity of its witnesses, Counsel objected but the objection was insufficient. After the court ruled on the objection, the Government proceeded to vouch extensively for its witnesses, even beyond the scope of the court's ruling. Counsel did not continue to object.

Appellant's Br. at 22.

[52] In reviewing the record and the circumstances surrounding Statement 2, we find that trial counsel's performance was not deficient. When it appeared that the prosecutor was about to vouch for the government's witnesses, Meseral's counsel immediately objected, and the court cautioned the prosecutor not to engage in such conduct. Trial counsel's initial objection was reasonable considering the circumstances and the timing of the objection. In determining whether counsel's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," especially where counsel's acts may be considered "sound trial strategy." *Strickland*, 466 U.S. at 689. Trial counsel timely objected prior to any improper vouching, and we cannot say that counsel's performance was deficient merely because he did not repeat his objection. *See Moses*, 2007 Guam 5 ¶ 43 ("Defense counsel here was not ineffective for failing to object to every questionable statement made by the prosecutor."). Even "[a] decision by trial counsel not to object to a portion of closing argument may indeed fall within the ambit of trial strategy." *Id.* (quoting *Holmes v. State*, 543 S.E.2d 688, 692 (Ga. 2001)).

[53] Moreover, a defendant is not denied effective assistance of counsel simply because his counsel fails to object to a prosecutor's improper comments; rather, "the 'defendant must show prejudice by his counsel's failure to object' or more specifically, that the outcome would have been affected." *Id.* ¶ 43 (quoting *People v. Nitz*, 572 N.E.2d 895, 907 (Ill. 1991)). Assuming

arguendo that counsel's performance was deficient, Meseral fails to show how he was prejudiced by trial counsel's failure to object when the prosecutor made Statement 2. As we explained above, the jurors were reminded about their role as fact finders when considering the testimony of the witnesses and were also instructed to consider only the evidence presented at trial and not the arguments of the attorneys. We therefore find no error as to this claim.

2. Alleged Sentencing Errors

[54] Lastly, Meseral argues trial counsel was ineffective during the sentencing proceedings and alleges that: (1) trial counsel waived Meseral's right to have the presentence report prepared within 21 days; (2) Meseral was not provided with a copy of the presentence report, and it is unclear from the record whether trial counsel discussed the report with him; (3) trial counsel failed to ensure that Meseral had an opportunity to allocute; (4) trial counsel failed to ensure that the court advise Meseral of his right to appeal, his right to the appointment of appellate counsel, and his right to file post-trial motions; and (5) trial counsel did not object to the additional sentencing provisions imposed in the judgment. Appellant's Br. at 22. We address each alleged error in turn.

a. Trial Counsel's Waiver of Preparation of Presentence Report within 21 Days

[55] Meseral argues that trial counsel was ineffective because counsel waived Meseral's right to have a presentence investigation report prepared within 21 days of his guilty verdict without indicating on the record that this right had been discussed and that Meseral had consented to the waiver. Appellant's Br. at 22. Meseral does not articulate where this right to a presentence report ("PSR") within 21 days is derived. Presumably, the right is derived from 8 GCA § 120.14, which provides that after a verdict of guilty, the court shall appoint a time for pronouncing judgment, which must be within 21 days after the verdict. 8 GCA § 120.14(a)

(2005). Subsection (b), however, allows the court to extend the 21-day period "[f]or such period as is necessary to permit preparation of the presentence report . . . ." 8 GCA § 120.14(b)(2). Thus, the statute contemplates that the preparation of a PSR may take longer than 21 days. In any event, the PSR in this case was filed a mere 14 days after the jury's verdict. Thus, notwithstanding any alleged error in counsel's waiver of Meseral's perceived right to a PSR within 21 days, Meseral has failed to demonstrate any prejudice, particularly because the report was filed within 14 days. Accordingly, Meseral fails the second prong of the *Strickland* test.[7]

b. Discussion of the Presentence Report with Trial Counsel

[56] Meseral also contends that he was deprived effective assistance of counsel because his trial counsel did not inform the court at sentencing "that he had received the PSR, that he had provided a copy to [Meseral], that he and [Meseral] had discussed it, nor whether or not there were any objections." Appellant's Br. at 22.

[57] Title 9 GCA § 80.14, which regulates the use of presentence reports, provides, in relevant part:

> (a) The presentence report shall not be a public record. It may be made available only to the sentencing court, . . . and to the parties as provided in this Section.
>
> (b) At least two (2) days before imposing sentence the court shall furnish the offender, or his counsel if he is so represented, a copy of the report of the presentence investigation . . . and the court shall afford the offender or his counsel an opportunity to comment thereon.

9 GCA § 80.14(a)-(b) (2005). Section 80.14 lacks any express requirement that trial counsel state on the record that he had received the PSR and had provided a copy to and discussed it with

[7] Meseral does not specifically contend that the timing of his sentencing hearing violated 8 GCA § 120.14. Although the sentencing hearing was not held within 21 days of the verdict, the parties stipulated to continue the hearing to a date that was well beyond 21 days after the verdict. Moreover, the parties filed their sentencing memoranda weeks after the 21-day period had expired. Given these circumstances, we find no deficiency of counsel's performance or prejudice to Meseral resulting from the continued hearing date.

the defendant. Furthermore, section 80.14 imposes a duty on the court to afford the defendant or his counsel an opportunity to comment on the PSR, but it does not require that trial counsel actually comment on the report. Without further authority to support Meseral's contention that trial counsel had an affirmative duty to communicate to the court the aforementioned information, Meseral fails to demonstrate that his counsel's performance was deficient. Furthermore, he does not articulate how he was prejudiced by the alleged deficiency. Accordingly, we reject Meseral's claim of ineffectiveness as to these alleged errors.

c. Right to Appeal

[58] Meseral also alleges trial counsel did not ensure that the court advise him of his right to appeal, his right to court-appointed appellate counsel, or his right to file post-trial motions. Appellant's Br. at 22. The People submit that Meseral was not prejudiced as a result of trial counsel's failure to object when the court did not inform Meseral of these rights, and that such error, if any, was harmless. Appellee's Br. at 32.

[59] Title 8 GCA § 120.30 provides that "[a]fter imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal . . . ." 8 GCA § 120.30 (2005). Title 8 GCA § 1.11 provides that a defendant who is financially unable to employ appellate counsel shall be entitled to court-appointed counsel at public expense. 8 GCA § 1.11(b) (2005).

[60] Section 120.30 is substantially similar to current Rule 32(j) and former Rule 32(a)(2) of the Federal Rules of Criminal Procedure. *Compare* 8 GCA § 120.30, *with* Fed. R. Crim. P. 32(j), *and* Fed. R. Crim. P. 32(a)(2) (1975). The Advisory Committee Notes to Rule 32 state:

> The court is required to advise the defendant of his right to appeal . . . because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence.

> The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him.

Fed. R. Crim. P. 32 advisory committee's note.

[61] In *Hoskins v. United States*, the Third Circuit stated:

> Clearly, the purpose of [former Rule] 32(a)(2) is to insure that each and every person convicted of a crime . . . be given timely and adequate notice of his appellate rights, regardless of whether he is represented by counsel or is indigent. Where this purpose has been fully complied with and it can be inferred beyond a reasonable doubt that the defendant has full knowledge of his appeal rights, mere technical noncompliance with the provisions of 32(a)(2) should not require a resentencing absent a clear showing of prejudice.

462 F.2d 271, 274 (3d Cir. 1972) (footnote omitted).

[62] A review of the trial transcripts after the court imposed sentence show that there was some discussion between the trial court and trial counsel regarding Meseral's right to appeal and the appointment of appellate counsel:

> THE COURT: Technically speaking at this hearing, Mr. Moots, your client, he clearly – or maybe he's aware of his right, considering he has you, but he has the right to appeal, and I guess to that extent, as it goes -- it may go to sentencing as well. Is that correct?
>
> MR. MOOTS: Say again, Your Honor?
>
> THE COURT: To sentencing? I mean, you're appealing the trial.
>
> MR. MOOTS: It'll be -- Yeah, the trial (indiscernible) --
>
> THE COURT: An outcome.
>
> MR. MOOTS: -- And whatever interest the appellate counsel wants to raise because I'm not on the other – I didn't sign up for the appeals counsel.
>
> . . . .
>
> MR. MOOTS: I won't be doing the appeal, so --
>
> THE COURT: All right.

> MR. MOOTS: But he has a right to an appeal. I will file a notice of appeal and a motion with the Supreme Court to appoint appellate counsel.
>
> THE COURT: All right. Very good. Just to be sure that he's apprised of that right . . . that right to appeal.
>
> MR. MOOTS: Yes, Your Honor.

Tr. at 19-20 (Sentencing, Mar. 31, 2010).

[63] After sentencing, trial counsel timely filed the notice of appeal and moved for the appointment of appellate counsel for Meseral. Clearly, from the discussion above, although the trial court did not specifically address Meseral and inform him of his right to appeal, the trial court, in addressing counsel, ensured that Meseral was aware of his right to appeal. A mere technical violation should not warrant reversal of his conviction. Under *Strickland*, trial counsel's performance was not deficient and Meseral did not suffer prejudice because counsel promptly filed the notice of appeal and made a request for the appointment of appellate counsel.

d. Additional Sentencing Provisions in Judgment

[64] Meseral complains trial counsel did not object to the additional provisions included in the judgment which were not imposed at the sentencing hearing. Appellant's Br. at 23. Meseral fails to articulate which specific provisions were not imposed at sentencing. The People assert that the additional provisions included provisions that would apply once Meseral was deported. Notwithstanding the inclusion of the additional provisions, the People contend Meseral was not prejudiced and the error, if any, was harmless. Appellee's Br. at 33.

[65] At sentencing, in arguing for a one-year suspended sentence for the convicted offenses and a five-year sentence for the special allegation, trial counsel noted that because Meseral would be deported after serving his sentence, the request of a five-year sentence was reasonable:

> MR. MOOTS: I'm asking the Court to -- for the minimum of five years. And five years of incarceration provides plenty of protection [for] Mrs. John, because upon his release, Mr. Meseral is not [going to] be on Guam.

Tr. at 6 (Sentencing, Mar. 31, 2010).

[66] In imposing the sentence, the trial court stated:

> THE COURT: In a way, the job of determining the sentence was made a little bit less difficult because of the likely transmission, if you will, or deportation of Mr. Meseral to the Republic of Palau, because he is not, I guess, technically a citizen of the United States and therefore doesn't have a complete right to remain here on Guam throughout. And I would agree that would certainly lend some added protection to Mrs. John, whose [sic] not from there; am I correct?

Id. at 11.

[67] The trial court and counsels then discussed imposing additional conditions given that Meseral would be deported after serving his conviction. *Id.* at 14-15. The court was cognizant that if Meseral was not deported, and Meseral was placed on parole, additional conditions should be imposed. Although the trial court did not outline the list of additional conditions at the sentencing, primarily because of Meseral's deportation, the court informed counsels that additional conditions should be imposed if Meseral was not deported. *Id.* Thus, the additional provisions included in the judgment are applicable only if Meseral is not deported. Moreover, should Meseral not be deported and instead be placed on parole, the conditions of his parole would be set by the parole board as provided under 9 GCA § 80.80. The judgment here did not impose additional conditions; rather, the conditions are a recommendation to the board should Meseral be placed on parole. Meseral has failed to show that trial counsel was deficient in failing to object to the inclusion of the provisions because the parties knew such provisions applied only in the event Meseral was not deported and that the conditions were merely recommendations to the parole board. Meseral also has not shown how he was prejudiced by the inclusion of these provisions. Thus, we find no error as to this claim.

e. Failure to Allocute

[68] Finally, Meseral claims he was denied effective assistance of counsel because trial counsel failed to ensure he had an opportunity to allocute before the trial court imposed the sentence. Appellant's Br. at 22. Meseral seeks reversal of the conviction for the claimed allocution error. The People concede the error, but contend that reversal of the conviction is not warranted and that the more appropriate remedy is to vacate the sentence and remand for resentencing. Appellee's Br. at 32.

[69] Guam law requires that "[b]efore imposing sentence[,] the court shall afford counsel an opportunity to speak on behalf of the defendant and *shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.*" 8 GCA § 120.26 (2005) (emphasis added).

[70] Before imposing Meseral's sentence, the trial court addressed both counsels and allowed them to present argument. Meseral's trial counsel argued for a suspended one-year sentence for the offenses of conviction and for a five-year sentence for the special allegation, for a total sentence of five years, noting that Meseral would be deported after serving his sentence. Tr. at 4-9 (Sentencing, Mar. 31, 2010). The trial court did not personally address Meseral or ask him if he wished to make a statement in his own behalf before imposing the sentence. After counsels presented argument on the sentencing, the trial court sentenced Meseral.

[71] "The right of allocution allows a defendant to personally address the court before sentencing in an attempt to mitigate punishment." *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991). Title 8 GCA § 120.26 requires that the trial court personally address the defendant and ask the defendant if he wishes to make a statement on his behalf. 8 GCA § 120.26. Section 120.26 is substantially similar to Federal Rules of Criminal Procedure Rule

32(i)(4), which states that before imposing sentence, the court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence[.]" Fed. R. Crim. P. 32(i)(4)(A)(ii).

[72] In *United States v. Luepke*, 495 F.3d 443 (2007), the Seventh Circuit succinctly discussed the allocution error under Rule 32. In *Luepke*, the parties disputed the appropriate standard of review for the alleged error. *Id.* at 446. The government asserted that the defendant failed to make a timely objection and therefore the plain error standard applied. *Id.* Defendant contended that because he was not provided a real opportunity to object, the harmless error standard applied. *Id.* In considering the appropriate standard of review, the court agreed with the majority of circuit courts, like we have *supra*, that the right of allocution under Rule 32 is subject to forfeiture and therefore to plain error review. *Id.*; *see also United States v. Muhammad*, 478 F.3d 247, 249 (4th Cir. 2007) (reviewing unobjected-to allocution claim for plain error); *United States v. Magwood*, 445 F.3d 826, 828 (5th Cir. 2006) (same); *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002) (same).

[73] In examining the history and purpose of Rule 32, the Fifth Circuit in *United States v. Reyna* concluded that while "the right of allocution is deeply rooted in our legal tradition and [is] an important, highly respected right," it is "neither constitutional nor jurisdictional." 358 F.3d 344, 349 (5th Cir. 2004). The court read the United States Supreme Court's statement in *United States v. Olano*, 507 U.S. 725 (1993), that a "'constitutional right or a right of any other sort'" may be forfeited by the failure to make a timely objection, to mean that all errors in a criminal proceeding are subject to plain error analysis. *Id.* at 350 (quoting *Olano*, 507 U.S. at 731). The *Reyna* court then noted that after *Olano*, the Supreme Court has confirmed that the seriousness of

claimed errors does not operate to remove them from plain error review. *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 466 (1997)).

[74] Both Meseral and the People contend that the harmless error standard applies to the alleged allocution error here. However, we agree with the majority of jurisdictions that the appropriate standard of review of an unobjected-to allocution claim is plain error. On plain error review, "[w]e will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Quitugua*, 2009 Guam 10 ¶ 11. We now decide whether plain error exists in this case.

i. Whether clear error occurred

[75] It is clear based on the record before us that the trial court did not personally address Meseral before imposing the sentence. The right of allocution, although not constitutional, is a personal right and requires that the sentencing court ask the defendant himself if he wants to make a statement for the court to consider before sentencing. *See Green v. United States*, 365 U.S. 301, 304 (1961). Such right is premised on the idea that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."[8] *Id.*

[8] The record in *Green* was unclear as to whether the trial court's question "Did you want to say something?" was directed to the defendant or to his counsel. 365 U.S. at 304-05. The *Green* court thus suggested:

> To avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, ... [t]rial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.

Id. at 305.

[76] Because the trial court did not personally address Meseral or ask him if he wished to make a statement before imposing his sentence, a violation of the clear duty imposed on the court under 8 GCA § 120.26, Meseral satisfies the first two prongs of the plain error test.

ii. Whether the error affected Meseral's substantial rights

[77] We now address whether the clear error affected Meseral's substantial rights. This requires that the defendant show he was prejudiced, that is, that the error affected the outcome of the proceedings. *People v. Felder*, 2012 Guam 8 ¶ 22 (quoting *Mendiola*, 2010 Guam 5 ¶ 24). As we have previously noted, "[t]here may be a 'special category of forfeited errors that can be corrected regardless of their effect on the outcome.'" *Quitugua*, 2009 Guam 10 ¶ 31 n.8 (quoting *Olano*, 507 U.S. at 735). "In the case of such errors, regardless of a showing of prejudice 'the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected.'" *Id.* (quoting *Olano*, 507 U.S. at 735).

[78] This court has yet to identify a class of presumptively prejudicial errors. *See id.* In *Quitugua*, we reviewed the trial court's failure to inform the defendant when she entered her guilty plea that her sentence would include a three-year special parole term. *Id.* ¶ 1. On plain error review, we declined to apply a presumption of prejudice, noting that the defendant had not advocated for such a presumption on appeal. *Id.* ¶ 31 n.8.

[79] We have also declined to apply a presumption of prejudice when reviewing an unobjected-to constructive amendment of an indictment. *Felder*, 2012 Guam 8 ¶ 31. In *Felder*, we noted:

> Because the right to a grand jury indictment is not a fundamental constitutional right in Guam, and because even where it is constitutionally provided, many federal circuit courts do not find an unpreserved objection to constructive amendment to be *per se* reversible error, we are hard-pressed to adopt such a *per se* rule here.

Id. We found persuasive the reasoning of the Fifth Circuit in *United States v. Fletcher*, where the court said:

> [T]o hold that a constructive amendment of the indictment requires *per se* reversal even under *Olano* would encourage the kind of sandbagging that the plain error standard is designed in part to prevent. Were we to so hold, no rational defense counsel would ever object to the erroneous instructions in a prosecution similar to this one [because] defense counsel would . . . know that a conviction would necessarily be reversed on appeal.

Id. ¶ 31 n.14 (alteration and omission in original) (quoting *United States v. Fletcher*, 121 F.3d 187, 193 (5th Cir. 1997), *abrogated on other grounds as recognized by United States v. Robinson*, 367 F.3d 278, 286 n.11 (5th Cir. 2004)).

[80] The same reasoning is also persuasive when reviewing an allocution error. The right of allocution is neither constitutional nor jurisdictional. *Reyna*, 358 F.3d at 349. The allocution error in this case is not a structural error and does not fit within the special category of forfeited errors that should be corrected regardless of prejudice. *Quitugua*, 2009 Guam 10 ¶ 31 n.8 (quoting *Olano*, 507 U.S. at 735). Meseral does not advance specific arguments or cite to any authority to support adoption of a presumption of prejudice for allocution violations. Under these circumstances, we decline to adopt a presumption of prejudice.

[81] Rather, we are persuaded by the Fourth Circuit's application of the substantial rights prong of the plain error test when addressing allocution violations. In applying this prong, the Fourth Circuit examines each case to determine whether the error was prejudicial. *Muhammad*, 478 F.3d at 249 (quoting *Cole*, 27 F.3d at 998). We adopt this approach and will examine each case to determine if the error was prejudicial. Although not expressed in his opening brief, at oral argument Meseral's counsel contended that Meseral was prejudiced because he was not invited to address the court to explain why trial counsel's recommended sentence should be considered. Oral Argument at 10:20:05-10:20:20 (Aug. 30, 2012). Meseral's counsel further

argued that the trial court's failure to address Meseral prevented him from showing remorse, and that although trial counsel advocated for a lesser sentence, it was not sufficient to cure the error. *Id.*

[82] We will not speculate as to what Meseral may have said, nor will we try to ascertain whether it would have been persuasive. Meseral was sentenced to one year direct time for each of the five charges, with each to run concurrently. The trial court also sentenced Meseral to serve the minimum of five years for the four counts of the accompanying special allegations, with each to run concurrently. All together, the trial court sentenced Meseral to serve direct time of six years of imprisonment. Meseral's counsel argued for a suspended sentence of one year for the offenses of conviction and five years for the special allegation. We cannot conclude that Meseral would have received the same sentence had he been afforded the opportunity to allocute. In addition, the absence of a statement by Meseral in the presentence report also weighs in favor of finding prejudice.

[83] Merely affording trial counsel the opportunity to address the court prior to sentencing also does not satisfy the requirement of section 120.26. The burden is on the court to inquire whether the defendant desires the opportunity to speak. *United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990). "The defendant is not required to indicate that [he] wishes to address the court nor is the right of allocution lost for failing to make such an indication."[9] *Id.* As the Supreme Court expressed when interpreting Rule 32:

> [T]he Rule explicitly affords the defendant two rights: 'to make a statement in his own behalf,' and 'to present any information in mitigation of punishment.' We

[9] In *Quinata v. Superior Court*, we held that a defendant's consent to a postponement of a trial may be implied by the failure of defense counsel or defendant to object at the time the trial is postponed outside the statutory period. 2010 Guam 8 ¶ 30. Our holding in *Quinata*, however, is distinguishable because unlike the statutory speedy trial statute, section 120.26 requires that the court personally address the defendant prior to sentencing. Even if trial counsel advocated for a lesser sentence, the trial court was still required to personally address Meseral.

> therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32.

Green, 365 U.S. at 305. Meseral therefore has demonstrated that the trial court's failure to address him personally was error that affected his substantial rights.

iii. Whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial system.

[84] The final prong of the plain error test tracks the fourth prong of the plain error review by federal courts. *Quitugua*, 2009 Guam 10 ¶ 47. The plain error doctrine, as it has developed in our jurisdiction, allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) when necessary to prevent a miscarriage of justice or (2) to maintain the integrity of the judicial process. *Id.* ¶ 46. Reversal for plain error is permissive, not mandatory. *Id.* "If the forfeited error is plain and affects substantial rights, the [appellate court] has authority to order correction, but is not required to do so." *Id.* ¶ 47 (quoting *Olano*, 507 U.S. at 744).

[85] Although some federal courts have ordinarily remanded where a defendant has been denied the right to allocute, the Supreme Court of the United States has stated that an allocution error "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). "Thus, the general rule does not foreclose the possibility that the facts of a particular case may compel a conclusion that any violation of the defendant's right to allocut[e] did not affect seriously the fairness of the judicial proceedings." *United States v. Pitre*, 504 F.3d 657, 663 (7th Cir. 2007).

[86] However, the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process. *Luepke*, 495 F.3d at 451. "Aside from its practical role in sentencing, the right has value in terms of maximizing the *perceived equity* of the process." *Id.*

(quoting *Barnes*, 948 F.2d at 328). A defendant's allocution plays a crucial part in the sentencing process, and therefore a denial of this right is not the sort of "isolate[ed]" or "abstract" error that we might determine does not impact the fairness and integrity of the judicial proceedings. *Adams*, 252 F.3d at 288.

[87] On the record before us, we conclude that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. There is nothing in the record before us which indicates that the denial of Meseral's right to allocution did not implicate the core values in the sentencing procedures, and, therefore, we find plain error. Although Meseral seeks reversal of the conviction, we hold that resentencing is the appropriate remedy for the allocution error. Because we find that the allocution violation warrants reversal of Meseral's sentence, we will not address the ineffective assistance of counsel claim as to this error.

VI. CONCLUSION

[88] In sum, we find no error in Meseral's prosecutorial misconduct claims, with the exception of the improper vouching in Statement 2. Although the prosecutor improperly vouched for the government's witnesses when he made Statement 2, such error was harmless under the circumstances of this case.

[89] We decline to decide the ineffective assistance of counsel claims which require an examination of facts beyond the trial court record, as such claims are more appropriately addressed in a petition for a writ of habeas corpus before the trial court. As for the ineffectiveness claims we do address—the failure to object to the improper vouching in Statement 2 and the alleged sentencing errors in sections (a), (b), (c) and (d) above—Meseral has failed to satisfy the test for ineffectiveness laid out in *Strickland*.

[90] As to the allocution error, we find that the trial court committed plain error when it failed to personally address Meseral to ask him whether he wished to make a statement before pronouncing the sentence, in violation of 8 GCA § 120.26. On the record before us, we conclude that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings and resentencing is an appropriate remedy for the allocution error.

[91] Accordingly, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for resentencing not inconsistent with this opinion.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

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

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

JUN 06 2014

By: *IMELDA B. DUENAS*
Assistant Clerk of Court
Supreme Court of Guam