IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ALBERT TORRES TEDTAOTAO,
Defendant-Appellant.

Supreme Court Case No.: CRA14-026
Superior Court Case No.: CF0135-13

OPINION

Cite as: 2016 Guam 9

Appeal from the Superior Court of Guam
Argued and submitted on August 10, 2015
Hagåtña, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Albert Torres Tedtaotao appeals a final judgment following his criminal convictions for Burglary and Theft of Property in a jury trial, claiming that the trial court's numerous evidentiary errors warrant reversal of his convictions and vacating the judgment. For the reasons set forth herein, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This case arises from Tedtaotao's criminal convictions for Burglary (Second Degree Felony) and Theft of Property (Third Degree Felony, as a lesser included offense of Theft of Property as a Second Degree Felony). The conduct underlying these charges involved an early morning convenience store break-in, in which the store owner and alleged victim, Mr. Kwang Mun Yu ("Yu"), responded to an alarm notification and encountered two burglars in the act of stealing his money and property, one of whom was purportedly Tedtaotao. Tedtaotao was indicted on one count each of Burglary and Theft of Property.

[3] At trial, during the prosecution's case-in-chief, Guam Police Officer Peter Paulino testified that he interviewed the alleged victim, Yu. He then testified, over Tedtaotao's objection, as to the answers Yu provided during the interview. Officer Paulino testified that Yu arrived at the store, noticed the damaged entrance, and observed a male exiting the store. He noted Yu's description of the man, and relayed the events of Yu's pursuit of him, explaining that Yu had recounted being attacked by the male, striking his assailant as the man attempted to enter a vehicle, and damaging the taillight of said vehicle. Officer Paulino conveyed Yu's statements that the cash register drawer had been removed, that around $150.00 was missing, and that a

trash bag had been filled with cartons of cigarettes. Officer Paulino further testified that Yu allowed him to view the CCTV surveillance video showing the burglary and events Yu had described. In addition, Officer Paulino asserted that Yu's statements to him were corroborated by the video footage of the encounter.

[4] Yu testified that he was awoken early on the morning of December 16, 2012, by an automated phone call from his alarm system alerting him to a break-in. He stated that he arrived at his store prior to its normal operating hours to find one of the entrances damaged. He encountered a large man nearly a foot taller than himself and engaged him in an altercation as the man made his escape. Yu described pursuing the burglars to their getaway car, damaging the taillight and noting the license plate number. Additionally, Yu recounted returning to his store and discovering that the cash register had been broken and many cartons of cigarettes had been removed from their display and collected into a trash bag.

[5] Yu also testified regarding a surveillance video that he had shown to police from his CCTV system, as well as his preparation in copying an excerpt of the footage, which was then admitted into evidence and presented to the jury over Tedtaotao's objection.

[6] The People also presented testimony from Officer Donald Nakamura regarding his attempts to identify the individuals pictured in the surveillance video. Officer Nakamura testified that he had recognized one of the individuals as one Raymond Tedtaotao.[1] He began to explain an interaction with an informant regarding Tedtaotao, but the court sustained an objection for hearsay (though the testimony was not stricken from the record). Officer Nakamura thereafter testified that he presented the video footage of the crime to Probation Officer Leo Diaz and Parole Officers Dean Taitague, Ronald Santos, and Mark Fleming, who all

[1] Raymond Tedtaotao is the brother of the Defendant. All other statements regarding the identification of "Tedtaotao" refer to the Defendant, Albert Tedtaotao.

identified Tedtaotao in the videos. Officers Fleming and Santos testified at trial as well, identifying Tedtaotao in court as the man depicted in the video footage.

[7] The jury returned a verdict finding Tedtaotao guilty of the crimes of Burglary (Second Degree Felony) and Theft of Property (Third Degree Felony, as a lesser included offense of Theft of Property as a Second Degree Felony). The trial court sentenced Tedtaotao to ten years of incarceration and ordered him to attend the first available Residential Substance Abuse Treatment Program ("RSAT").

[8] Tedtaotao timely filed a Notice of Appeal challenging his convictions.

II. JURISDICTION

[9] This court has jurisdiction over appeals from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-114 (2015)); 7 GCA §§ 3107 and 3108 (2005); and 8 GCA § 130.15 (2005). This is an appeal of a final judgment issued by the Superior Court. *See* Record on Appeal ("RA"), tab 83 (Judgment, Nov. 10, 2014).

III. STANDARD OF REVIEW

[10] This court "review[s] the trial court's ruling on the admissibility of evidence for an abuse of discretion." *People v. Tuncap*, 2014 Guam 1 ¶ 12; *see also People v. Muritok*, 2003 Guam 21 ¶ 32. "Specifically, a trial court's decision concerning the admission of evidence over a hearsay objection is reviewed under an abuse of discretion standard." *People v. Roten*, 2012 Guam 3 ¶ 13; *see also People v. Hayes*, No. CR–92–00140A, 1993 WL 469357, at *2 (D. Guam App. Div. Oct. 12, 1993).

[11] We review admission of evidence of prior similar bad acts under Rule 404(b) of the Guam Rules of Evidence ("GRE") for an abuse of discretion. *People v. Evaristo*, 1999 Guam 22 ¶ 6 (citing *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1996)); *see also People v.*

Quintanilla, 2001 Guam 12 ¶ 9. "However, the trial court's determination of whether the evidence falls within the scope of Rule 404(b) is reviewed *de novo*." *People v. Palisoc*, 2002 Guam 9 ¶ 7 (citing *United States v. Arambula–Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993)). The trial court's analysis under GRE 403 is subject to review for an abuse of discretion. *Evaristo*, 1999 Guam 22 ¶ 6 (citation omitted).

[12] Where the trial court has abused its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *See People v. Jesus*, 2009 Guam 2 ¶¶ 53-55. "The 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. Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted).

IV. ANALYSIS

A. Whether the Trial Court Erred in Admitting Video Footage of the Burglary

[13] Tedtaotao begins by challenging the admission of video footage that was copied from a CCTV system via recording on a smartphone and transferred to a USB drive. Appellant's Br. at 14-16 (Apr. 1, 2015). Tedtaotao argues that such evidence was not properly authenticated under GRE 901 and that the court erred in admitting the video without considering the relevant factors articulated by this court for determining whether video evidence has been properly authenticated. *Id.*

[14] Both parties correctly call attention to this court's prior decision in *Tuncap*, 2014 Guam 1, in which we directly addressed the standard for determining admissibility of a surveillance video. Tedtaotao is correct that this court did provide specific factors relevant to deciding whether video evidence has been properly authenticated, including:

> [T]estimony about (1) how the recording system operates, (2) the system's working condition and pattern of maintenance, (3) who operates the system, has access to it, and maintains its archive of recordings, (4) the quality of the recording, and (5) the means by which the recording was copied to the format viewed at trial.

Tuncap, 2014 Guam 1 ¶ 35. However, this court also explicitly cautioned that this list of factors was not required in every case and that the trial court maintains flexibility to consider relevant factors specific to the case before it. *Id.* In doing so, we emphasized that these factors were merely guidelines to aid the trial court's consideration of specific circumstances, rather than a rigid set of tests to be satisfied. *Id.* ¶ 34. This court further explained in detail how video evidence might be properly authenticated even absent the satisfaction of these factors, stating:

> Where testimony about the system is lacking, testimony about the particular recording and the events it recorded may still be "sufficient to support a finding that the matter in question is what its proponent claims." To authenticate in this manner, the trial court should look to when and where the video was first viewed by the testifying witness. If the video is viewed at the scene soon after the event in question and is viewed not from a copy but directly from the system established on-site, there is little to no risk of tampering or editing the tape. To confirm this reasoning, there should also be an affirmance that the contents of the recording viewed contemporaneously with the recorded event are the same as the contents of the recording sought to be introduced into evidence. Authentication can be bolstered where the testifying witness was present at the scene of the recorded event soon after it happened and acknowledges that the recording depicts events that match with the scene observed. Such testimony would further corroborate that the surveillance video accurately depicts what occurred.

Id. ¶ 36 (citations omitted).

[15] The People assert that the trial court conducted an extensive analysis of the authenticity of the video and authentication has been established through appropriate witness testimony. Appellee's Br. at 10-11 (Apr. 30, 2015). Yu, the victim with direct eyewitness knowledge of the events portrayed in the video, testified that he watched the surveillance video together with police officers in his store on the morning of the robbery. Transcripts ("Tr.") at 17-18 (Jury Trial, Mar. 13, 2014). Officer Paulino confirmed that he was allowed to view the CCTV

surveillance video. Tr. at 62 (Jury Trial, Mar. 12, 2014). Yu further testified that the video clip presented in court matched the one he viewed with police that morning. Tr. at 20-22 (Jury Trial, Mar. 13, 2014). Both Officer Paulino and Officer Steven Topasna corroborated this fact, stating that the video shown to the jury was the same as the one they saw and copied during the initial investigation of the burglary. Tr. at 68, 97, 111-13 (Jury Trial, Mar. 12, 2014). Given these statements, it is clear that evidence in the record properly authenticated the video under the requirements articulated in *Tuncap*.

[16] In addition to his objections to the authentication, Tedtaotao also implies that editing the surveillance footage to present as evidence only minutes of footage that was hours long, renders it inadmissible. Appellant's Br. at 16. This argument is unpersuasive. Indeed, courts addressing this issue have found that editing hours-long surveillance footage in order to present only relevant portions is acceptable and will not render such video evidence inadmissible. *See, e.g.*, *Bunch v. State*, 123 So. 3d 484, 493-94 (Miss. Ct. App. 2013) (holding that edited version of surveillance footage was properly admitted in burglary prosecution where omitted portions of videos were superfluous and irrelevant, as videos showed hours of footage and defendant possessed ability to play omitted portions of surveillance footage during defense's case-in-chief); *Broadbent v. Allison*, 626 S.E.2d 758, 763-64 (N.C. Ct. App. 2006) (allowing admission of six-minute edited video condensed from several months of footage because excerpts were time stamped and jury was made aware that footage was edited).

[17] We therefore find that the trial court did not abuse its discretion in admitting video evidence copied from the store's CCTV surveillance system and edited to include only relevant portions.

B. Whether the Trial Court Erred in Admitting Statements of the Victim through the Testimony of Officer Paulino

[18] Tedtaotao next claims that the trial court erred in allowing certain testimony from Officer Paulino regarding Yu's statements to him. Appellant's Br. at 17. Tedtaotao claims that, while Officer Paulino was testifying and describing interviewing Yu in the course of his investigation, the officer testified to the substance of Yu's statements. *Id.* at 17-20. Tedtaotao objected multiple times on hearsay grounds. Tr. at 43, 45, 48 (Jury Trial, Mar. 12, 2014). These objections were overruled by the court on the basis that the witness was "there for official business" and because "he's a police officer." *Id.* at 44, 48. The People do not directly dispute this point, arguing instead that "[e]ven if the trial court was not correct in allowing Officer Paulino to testify as to matters told to him by Mr. Yu, it is not reversible error." Appellee's Br. at 12.

[19] "Guam defines hearsay as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 32 (quoting 6 GCA § 801(c) (2005)). A hearsay statement is not admissible as evidence "unless it falls into a known exception." *Id.* (citing 6 GCA § 802 (2005)). We must first determine whether Officer Paulino's statements were, in fact, hearsay. Officer Paulino testified that Yu arrived at the store, noticed the damaged entrance, and observed a male exiting the store. Tr. at 43, 46, 48, 50-53 (Jury Trial, Mar. 12, 2014). Officer Paulino noted Yu's description of the man, how he was dressed and what he was holding. *Id.* at 52-53. In addition, Officer Paulino relayed the events of Yu's pursuit, explaining that Yu recounted being assailed by the intruder, striking his attacker as he attempted to enter a vehicle and damaging the taillight of said vehicle. *Id.* at 53-54. Finally,

Officer Paulino conveyed Yu's observations upon returning to the store: noticing that the cash register drawer had been removed, that approximately $150.00 was missing, and that a trash bag had been filled with cartons of cigarettes. *Id.* at 54-55. None of these statements were based upon the personal knowledge of Officer Paulino, who was not present at the time of these events. Rather, this evidence merely repeated out-of-court statements Yu made to Officer Paulino during an interview. Thus, there is no doubt that such testimony includes statements "other than one made by the declarant while testifying at the trial or hearing." *See J.J. Moving Servs.*, 1998 Guam 19 ¶ 32.

[20] The second prong of the analysis requires determining if the statements were "offered in evidence to prove the truth of the matter asserted." *Id.* In evaluating this question, many other jurisdictions have found that law enforcement testimony regarding a declarant's out-of-court statement is not hearsay if used for the purpose of explaining why a government investigation was undertaken or as background to explain an officer's state of mind and actions. *See, e.g.*, *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994); *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987); *United States v. Hunt*, 749 F.2d 1078, 1084 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). However, both this court and federal case law analyzing this issue have nonetheless limited the scope of such background, stating that:

> A police officer . . . may reconstruct the steps taken in a criminal investigation, may testify about his contact with [a witness], and may describe the events leading up to a defendant's arrest, but the officer's testimony must be limited to the fact that he spoke to [a witness] without disclosing the substance of that conversation. *There is a clear distinction between an [officer] testifying about the fact that he spoke to [a witness] without disclosing the contents of the conversation and the agent testifying about the specific contents of the conversation which is inadmissible hearsay.*

Roten, 2012 Guam 3 ¶ 19 (alterations in original) (quoting *United States v. Williams*, 133 F.3d 1048, 1052 (7th Cir. 1998)). Further, evidence which is intended to provide background may

nonetheless be ruled inadmissible based on the pervasiveness and overall number of out-of-court statements introduced by the prosecution. *See United States v. Cass*, 127 F.3d 1218, 1222-23 (10th Cir. 1997); *Garrett v. United States*, 78 F.3d 1296, 1302-03 (8th Cir. 1996), *cert. denied*, 519 U.S. 956 (1996) (holding that if a "statement is both permissible background and highly prejudicial, otherwise inadmissible hearsay, fairness demands that the government find a way to get the background into evidence without the hearsay" (internal quotation marks omitted)).

[21] Here, the nature of the testimony appears intended to demonstrate the truth of matters asserted. Further, the trial court in overruling Tedtaotao's objection seemed to believe that such testimony is admissible due to an exception involving the witness's status as a police officer and the official nature of his investigation. There is no indication that such evidence is being presented for the limited purpose of providing background or explaining the course of Officer Paulino's investigation. Further, the People specifically referenced factual assertions conveyed by Officer Paulino as evidence that such testimony conveyed valid facts. *See* Tr. at 4-11 (Jury Trial, Mar. 24, 2014). This, combined with the pervasiveness of out-of-court statements referenced by the officer, demonstrates that the evidence was presented to prove the truth of the matter asserted and constitutes hearsay, inadmissible unless otherwise subject to an enumerated exception. We now turn to whether any exception is applicable here.

[22] The trial court overruled Tedtaotao's hearsay objections on the justification that the witness was "there for official business" and because "he's a police officer." Tr. at 44, 48 (Jury Trial, Mar. 12, 2014). From these statements, we may infer that the trial court believed that, despite their nature as hearsay, the statements were admissible under the Public Records and Reports exception found in GRE 803(8). This exception does authorize the admission of a public official's records, reports, or statements in any form setting forth "matters observed

pursuant to duty imposed by law as to which matters there was a duty to report." GRE 803(8)(B). However, this exception unambiguously excludes "in criminal cases matters observed by police officers and other law enforcement personnel." *Id.* Thus, the fact that Officer Paulino took statements from Yu in his official capacity and pursuant to his duty to conduct an investigation and report his findings does not render the relevant hearsay statements admissible.

[23] In addition to falling beyond the scope of the Public Records exception, the improper nature of the evidence is not cured by the fact that the testifying witness is a police officer. Case law from several jurisdictions has held that a law enforcement officer's testimony repeating out-of-court statements to prove the truth of the matter presented is improper on hearsay and confrontation grounds. *See Cass*, 127 F.3d at 1222-24 (out-of-court statements repeated by FBI agent constituted hearsay because they were admitted to prove the truth of the matter asserted); *Jones v. Basinger*, 635 F.3d 1030, 1040-42 (7th Cir. 2011) (extensive testimony by police officers regarding non-testifying informant's out-of-court statement to them was hearsay and violated prisoner's Sixth Amendment right to confront informant). Contrary to the conclusions of the trial court, the fact that Officer Paulino was a police officer testifying in a criminal case is precisely why the hearsay statements conveyed were not rendered admissible by statutory exception. *See* GRE 803(8)(B).

[24] Accordingly, we conclude that the trial court abused its discretion in admitting Officer Paulino's testimony consisting of Yu's statements because it was hearsay.

C. Whether the Trial Court Erred in Admitting Officer Paulino's Testimony Asserting that the Victim's Statements to Him were Corroborated by what the Officer Observed in the Video Footage

[25] Tedtaotao also alleges that the trial court erred in admitting as evidence Officer Paulino's assertion that Yu's statements to him were corroborated by the video footage. Appellant's Br. at 20; *see also* Tr. at 62 (Jury Trial, Mar. 12, 2014). Tedtaotao states that such testimony constituted impermissible credibility bolstering by a law enforcement officer, warranting reversal. *Id.* at 20-21. The People do not directly address this claim, stating merely that such evidentiary errors were harmless in light of the overwhelming evidence presented. *See* Appellee's Br. at 12.

[26] Credibility vouching "occurs when the government places the 'prestige of the government behind the witnesses through personal assurances of their veracity' and is improper." *Moses*, 2007 Guam 5 ¶ 16 (quoting *People v. Ueki*, 1999 Guam 4 ¶ 19). Credibility vouching is also referred to as bolstering and may arise either through comment by the prosecuting attorney, or through a government witness's testimony. *See Parmelee v. Piazza*, 622 F. Supp. 2d 212, 228 (M.D. Pa. 2008) (using bolstering and vouching interchangeably); *Gaston v. State*, 731 S.E.2d 79, 81 (Ga. Ct. App. 2012) (finding improper bolstering through statements of a witness with regard to the believability of another's testimony). This court has previously held that testimony by a law enforcement officer that bolsters the credibility of a witness is inappropriate and may constitute harmful error where such bolstering relates to a victim's identification of a criminal perpetrator. *Roten*, 2012 Guam 3 ¶¶ 31, 47. This conclusion is based on the uniquely powerful effect of bolstering by law enforcement officers due to the high regard for their institution. *Id.* ¶ 31; *see also United States v. Garcia-Ortiz*, 528 F.3d 74, 79-80 (1st Cir. 2008) (finding error where a law enforcement officer's testimony improperly bolstered testimony of another witness). Additionally, this finding is consistent with the holdings of other

jurisdictions that police testimony merely asserting that a witness's statements had been corroborated is improper. *See United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999).

[27] The jury was presented with both Yu's direct testimony and the video footage of the events described. As such, they were perfectly capable of deciding for themselves whether the latter corroborates the former, and Officer Paulino's testimony improperly "invaded the jury's exclusive province to decide witness credibility." *Roten*, 2012 Guam 3 ¶ 31 (quoting *United States v. Whitted*, 11 F.3d 782, 785-86 (8th Cir. 1993)). In light of these facts, this court finds Officer Paulino's statement that the video footage of the scene corroborated the account of Yu to be inadmissible witness bolstering by a law enforcement witness.

D. Whether the Trial Court Erred in Admitting Statements through the Testimony of Officer Nakamura Identifying Tedtaotao as one of the Burglars in the Video Footage

[28] Tedtaotao's fourth argument contends that the testimony regarding out-of-court identification of him as the man pictured in the surveillance video is inadmissible. Appellant's Br. at 21-22. Officer Nakamura testified that he presented the video footage of the crime to Probation Officer Diaz and Parole Officers Taitague, Santos, and Fleming, each of whom identified Tedtaotao in the videos. Tr. at 29-33 (Jury Trial, Mar. 20, 2014). Tedtaotao asserts such testimony is hearsay that should have been excluded from evidence by the trial court. Appellant's Br. at 22. The People address this argument merely by stating that Officer Nakamura's testimony that Tedtaotao was one of the persons shown in the video was cumulative of other evidence and not reversible error. Appellee's Br. at 12.

[29] Hearsay is "'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *J.J. Moving Servs.*, 1998 Guam 19 ¶ 32 (quoting GRE 801(c)). The evidence offered clearly falls within this

definition, as the out-of-court statements of Probation Officer Diaz and Parole Officers Taitague, Santos, and Fleming were conveyed to the jury by Officer Nakamura and were presented to prove the truth of the matter asserted, that Tedtaotao was one of the persons depicted in the video of the crime. *See* Tr. at 29-33 (Jury Trial, Mar. 20, 2014). Further, there does not appear to be any applicable exception within the rules of evidence, nor have the People put forth such justification. *See* GRE 803-804. Accordingly, such evidence constitutes impermissible hearsay and should have been excluded by the trial court.

E. Whether the Trial Court, After Sustaining a Hearsay Objection, Erred in Failing to Strike the Hearsay Testimony or to Provide a Curative Instruction

[30] Tedtaotao next asserts that the trial court committed error when, following a sustained objection on hearsay grounds, the court failed to strike Officer Nakamura's testimony about an informant's statement from the record and did not give a curative instruction to the jury to disregard the relevant testimony. Appellant's Br. at 22. The People respond that no error was committed due to the fact that Tedtaotao did not request any instruction at the time the objection was sustained. Appellee's Br at 12-13. The People further reiterated their claim that any purported error was harmless due to the overwhelming evidence supporting conviction. *Id.* at 13-15. This court has previously considered statements upon which an objection was sustained but which were neither stricken from the record nor the subject of a curative instruction to remain evidence in the case, subject to evaluation by the triers of fact and the appellate panel. *See People v. George*, 2012 Guam 22 ¶ 22 n.3 ("The People objected to this question after K.A.'s mother answered it. The trial court sustained the objection, but there was no motion to strike, and the jury was not instructed to disregard the testimony." (citation omitted)). Further, we have noted that, where the court finds evidence or statements to be improper, a corrective

instruction must be given at the time of the statement and must be appropriately specific to neutralize the improper statement. *See People v. Mendiola*, 2010 Guam 5 ¶ 27. Thus, a failure to strike evidence and instruct the jury to disregard it where an objection has been sustained constitutes a potential error.

[31] With regard to Tedtaotao's failure to request a curative instruction, the People correctly note our previous holding that defense counsel bears primary responsibility for "ensuring that the error was cured in the manner most advantageous to his client, including making a timely objection, moving to strike the testimony or requesting a special jury instruction at the close of the evidence." *People v. Muritok*, 2003 Guam 21 ¶ 26 (citation and internal quotation marks omitted). However, *Muritok* also stressed the trial court's duty to instruct the jury on applicable law and placed responsibility for the failure on both counsel and the court. *Id.* Ultimately, the question of whether failure to strike improper evidence from the record and issue a corrective instruction warranted reversal of the judgment turned on the extensiveness of such improper testimony and whether it was stressed to the jury. *Id.* In this case, the scope of the improper testimony appears quite limited. Indeed, the defense objection cut off the improper answer before Officer Nakamura was able to state what the informant told him with regard to Tedtaotao. *See* Tr. at 29 (Jury Trial, Mar. 20, 2014). Further, the examining prosecutor offered to limit the scope of Officer Nakamura's answer, reminding him that the question related only to whom in the video he was personally able to identify and eliciting the answer that the officer could identify no one other than Raymond Tedtaotao. *Id.* at 29-30. The statements of the unnamed informant were not disclosed to the jury, and the informant does not appear to be mentioned at any point other than briefly. *Id.* Consequently, we hold that the hearsay statements regarding the informant's identification of Tedtaotao were not extensive enough to warrant reversal, due to

defense counsel's actions in cutting off improper testimony, the trial court's sustaining of the objection, and the People's subsequent limiting of the scope of Officer Nakamura's testimony.

F. Whether the Trial Court Erred in Admitting Lay Witness Testimony Identifying Tedtaotao as One of the Burglars in the Video Footage

[32] Tedtaotao's ensuing claim attacks the use of lay witness testimony by the People in presenting statements from a probation officer and several parole officers, identifying Tedtaotao as the man pictured in the video of the crime. Appellant's Br. at 23-25. At trial, Officer Nakamura testified that he presented the video footage of the crime to Probation Officer Diaz and Parole Officers Taitague, Santos, and Fleming, each of whom identified Tedtaotao in the videos. Tr. at 29-33 (Jury Trial, Mar. 20, 2014). In addition, Officers Fleming and Santos both testified, personally identifying Tedtaotao in court as the man depicted in the video footage. *See id.* at 63-66, 81-85. As noted above, the testimony from Officer Nakamura regarding identifications by other law enforcement officers was impermissible hearsay. However, Tedtaotao also argues that the direct testimony from Parole Officers Fleming and Santos violated GRE 701 regarding admissibility of lay witness testimony. Appellant's Br. at 23-25.

[33] GRE 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

GRE 701. Tedtaotao claims that this rule is violated when a witness invades the province of the jury by providing opinion testimony as to an ultimate issue of the case, such as the identity of the criminal shown in the video of the crime. Appellant's Br. at 23-24. In support of this proposition, Tedtaotao cited *United States v. Calhoun*, in which the court expressed skepticism

that a parole officer's identification satisfied the second prong of Rule 701 of the Federal Rules of Evidence ("FRE").[2] 544 F.2d 291, 295 (6th Cir. 1976). However, the court in *Calhoun* did not definitively resolve this issue, instead basing its disposition on an interpretation of FRE 403. *Id.* at 296-97. The issue of admissibility under Guam's counterpart rule, GRE 403, will be addressed by this court below.

[34] As the People correctly point out, the majority of federal courts which have applied the principles of FRE 701 to facts mirroring those presented here have found that parole officer identification of a defendant depicted in video or photo evidence is permissible. In *United States v. Contreras*, a criminal defendant contended that his parole officer's testimony "violated the second requirement of Rule 701 because the jury could review the surveillance footage and determine for themselves, based on [the defendant's] presence in the courtroom, whether he was the bank robber." 536 F.3d 1167, 1170 (10th Cir. 2008). The court disagreed, explaining, "[a] witness's identification testimony satisfies Rule 701's second requirement if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Id.* (citation and internal quotation marks omitted). Based on this factor, the court concluded:

> [The officer's] familiarity with Contreras offered the jury a more sophisticated identification than they could make on their own. She had repeated interactions with Contreras, and thus could identify him based on many factors that would not be apparent to a jury viewing the defendant only in a courtroom setting. Accordingly, the district court did not abuse its discretion by concluding that [the officer]'s testimony complied with Rule 701.

Id. This rationale and conclusion have been mirrored in several federal courts addressing this very issue. *See, e.g., United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (finding a

[2] "The Guam Rules of Evidence are essentially identical to its like-numbered counterparts in the Federal Rules of Evidence. Therefore, interpretations of the Federal Rules of Evidence from other jurisdictions are persuasive authority." *Jesus*, 2009 Guam 2 ¶ 32 n.8 (citations omitted).

probation officer's testimony identifying defendant as the robber depicted in bank surveillance photo was rationally based and sufficiently helpful to be admissible as lay opinion testimony, where officer had met with defendant on four occasions over a two-month period); *United States v. Farnsworth*, 729 F.2d 1158, 1160-61 (8th Cir. 1984) (finding parole officers' opinions concerning identity of a person depicted in a surveillance photograph admissible under FRE 701, since there is some basis for concluding that the witness was more likely to correctly identify the defendant from the photograph than was the jury).

[35] Both parole officers who identified Tedtaotao had specialized familiarity with him through their extensive past interactions. Officer Fleming stated that he had met with Tedtaotao on approximately ten occasions and Officer Santos had interacted with Tedtaotao regularly, meeting once a month for sixteen years. Tr. at 64-65, 85 (Jury Trial, Mar. 20, 2014). Accordingly, admitting direct testimony from Tedtaotao's parole officers identifying him as the man portrayed in the surveillance footage of the crime did not violate GRE 701 regarding admissibility of lay witness testimony.

G. Whether the Trial Court erred in Admitting Evidence that Tedtaotao had a History of Incarceration and Parole

[36] Tedtaotao next asserts that the trial court erred in admitting testimony revealing his history of incarceration and as a parolee in violation of GRE 403 and 404(b). Appellant's Br. at 25-26. This court has previously identified the relevant factors for evaluating the admission of evidence under GRE 404(b). *People v. Camaddu*, 2015 Guam 2 ¶ 12 (citing *People v. Torres*, 2014 Guam 8 ¶ 41). As we explained:

> To be admissible under GRE 404(b), the evidence of prior acts and crimes must (1) prove a material element of the crime currently charged; (2) show similarity between past and charged conduct; (3) be based on sufficient evidence; and (4) not be too remote in time. . . . The four-part test stated above has been referred to

> as the *Hinton* test, reiterated in *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994).

Id. (citations and internal quotation marks omitted). Consistent with other jurisdictions, after analyzing the evidence under GRE 404(b) factors, "[t]he trial court must then undertake a balancing test, weighing the admissibility of the evidence using the GRE 403 factors." *Camaddu*, 2015 Guam 2 ¶ 12; *see also State v. Kassebeer*, 193 P.3d 409, 423 (Haw. 2008).

[37] Tedtaotao claims that the court failed to undertake the required four-factor analysis governing admission of GRE 404(b) evidence and did not properly balance the probative value and prejudicial effect of the testimony, as required by GRE 403. Appellant's Br. at 26-30. The People respond by mentioning that several jurisdictions have ruled that testimony by a parole officer for the purposes of identification is admissible and not unduly prejudicial. Appellee's Br. at 15-17.

[38] Despite their presentation together, this analysis actually requires inquiry into two separate types of testimony. First, we must determine if the witnesses' mere status as parole officers makes their identification of Tedtaotao and statements regarding familiarity with him inherently inadmissible or unduly prejudicial. Specifically, the evaluation will focus on (1) Officer Fleming's statement that he had met with Tedtaotao roughly ten times and was "very confident" that the individual in the video was him and (2) Officer Santos's statements that he had interacted with Tedtaotao about once a month for sixteen years, was "one hundred percent" certain of his identification and that "I just know Albert. He's no stranger to me." *See* Tr. at 64-65, 67, 81-82, 85, 90 (Jury Trial, Mar. 20, 2014). Second, we must determine whether the officers' identification of themselves as parole officers and explanation of their relationship with

Tedtaotao, which revealed his history of incarceration and parole, was inadmissible or unduly prejudicial. *See id.* at 60-61, 66-67, 78-79, 81-85, 89-93.

1. Admissibility under GRE 404(b)

[39] GRE 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." GRE 404(b). Evidence of such acts is admissible, however, as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

[40] With regard to the first set of statements identifying Tedtaotao in the video and describing the officers' frequency of contact and level of familiarity with him, we hold that GRE 404(b) is inapplicable. These statements do not themselves reference prior wrongs or crimes in any way nor do they allow the jury to draw the inference of any such acts. *See* Tr. at 64-65, 67, 81-82, 85, 90 (Jury Trial, Mar. 20, 2014). Further, the express purpose of these statements is to establish the identity of the perpetrator, which clearly falls within the rule's exception and would be admissible. *See* GRE 404(b).

[41] Turning to the second category of statements, we must determine if testimony stating merely that the defendant has previously been incarcerated and on parole falls within the scope of GRE 404(b). At first glance, such statements refer only to a particular status of the defendant and do not themselves specifically allege any previous crimes or wrongs. However, the obvious inference drawn by a jury when presented with information regarding prior incarceration and parole is that a defendant has a history of prior criminal convictions. This finding would be consistent with other jurisdictions, which have held that a defendant's parole status is considered evidence of prior criminal acts for purposes of Rule 404(b). *See, e.g.*, *United States v. Cruz*, 326 F.3d 392, 394-95 (3d Cir. 2003); *United States v. Manarite*, 44 F.3d 1407, 1418 (9th Cir. 1995).

Further, some courts conclude that evidence revealing a defendant's previous incarceration is potentially excludable under Rule 404. *See, e.g.*, *State v. Berry*, 546 S.E.2d 145, 151 (N.C. Ct. App. 2001).

[42] However, unlike a typical GRE 404(b) analysis, which compares the current charged crime to a particular past wrong, the evidence presented here merely indicates Tedtaotao's previous incarceration and parole, without reference to the nature of the underlying criminal conviction. There has been no showing that the accusations faced by Tedtaotao during his trial bore any similarity to the prior wrongs he committed. The evidence of parole status and prior incarceration is sufficiently established via testimony from multiple parole officers. Tr. at 65-67, 82 (Jury Trial, Mar. 20, 2014). However, the information conveyed is not clearly probative of the material element for which it was introduced, namely the identity of the perpetrator portrayed in the video. Other courts have found that, while establishing the level of familiarity a witness has with the person they are identifying is relevant to the credibility of such identification, the fact that the familiarity arose from a defendant's previous incarceration is unnecessary and of no probative value. *See United States v. Sostarich*, 684 F.2d 606, 608-09 (8th Cir. 1982). Similarly, the testimony of Officers Fleming and Santos identifying Tedtaotao, as well as their statements regarding their frequency of contact with him and degree of certainty in their recognition of him, are relevant to establish the witnesses' extensive familiarity with Tedtaotao's appearance. However, there is no additional value gained by the officers' identification of their profession and revelation that Tedtaotao was previously on parole and incarcerated. Such surplusage serves only the impermissible purpose of highlighting Tedtaotao's propensity for criminality. Further, because this information is not itself necessary for demonstrating the extent of the officers' acquaintance with Tedtaotao or their recognition of him as one of the men depicted in the

surveillance video, it does not fall within the identity exception of GRE 404(b). Thus, testimony provided by parole officers explaining the basis of their familiarity with the defendant for purposes of identification is admissible for identity under GRE 404(b). However, evidence revealing Tedtaotao's history of incarceration and parole does not satisfy the factors adopted in *Camaddu* and is inadmissible under GRE 404(b).

2. Admissibility under GRE 403

[43] Even if admissible under GRE 404(b), relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice" or "confusion of the issues." GRE 403.

[44] Tedtaotao claims that the court abused its discretion in failing to explicitly weigh the factors of Rule 403. Appellant's Br. at 27-28. This court, relying on a footnote from the Ninth Circuit decision in *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987), has held that the trial court has a duty to weigh the GRE 403 factors explicitly. *See People v. Evaristo*, 1999 Guam 22 ¶ 17. However, despite emphasizing the importance of a trial court's duty to weigh the competing prejudice and probative value of evidence, the Ninth Circuit nonetheless affirmed a decision in which the district court had merely conducted an implicit balancing of these factors. *Johnson*, 820 F.2d at 1069-70. Similarly, in *United States v. Green*, the Ninth Circuit

> refused "to require a mechanical recitation of Rule 403's formula on the record as a prerequisite to admitting evidence under Rule 404(b)," and concluded that the demands of Rule 403 are met if it "appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence."

648 F.2d 587, 592-93 (9th Cir. 1981) (quoting *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978)). However, the trial court commits error where "the record does not disclose that the trial judge performed the necessary weighing under Rule 403." *Id.* at 593.

[45] Viewing the record as a whole, it is clear that the trial judge considered and balanced the competing factors presented by Rule 403. The admissibility of Officer Fleming and Officer Santos's testimony was briefed comprehensively by both parties, and the court held a separate hearing specifically on the motion in limine in which both parties presented arguments with regard to the probative value and prejudicial effect of the evidence in question. *See* RA, tab 48 (Mot. Limine, Mar. 11, 2014); RA, tab 51 (Def. Supp. Mem. Mot. Limine, Mar. 12, 2014); RA, tab 52 (Opp'n Mot. Limine, Mar. 12, 2014); Tr. at 5-17 (Jury Trial, Mar. 12, 2014). Additionally, in its decision denying Tedtaotao's motion, the trial court specifically mentioned the Rule 403 concerns regarding prejudice, but ultimately emphasized the importance of the testimony in assisting the jury with identification of the individual depicted in the surveillance footage. Tr. at 18-20 (Jury Trial, Mar. 12, 2014). Further, this decision specifically referenced competing case law presented by the parties with regard to the admissibility of parole officer identification under Rule 403. *Id.* (citing *Calhoun*, 544 F.2d 291; *Contreras*, 536 F.3d 1167). Therefore, we find that the trial court performed the necessary weighing required under GRE 403. *See Green*, 648 F.2d at 592-93. We must thus proceed to evaluate the merits of the GRE 403 decision to determine if the admission of the evidence constituted an abuse of discretion.

[46] As Tedtaotao correctly notes, the Sixth Circuit, in *Calhoun*, did hold that allowing testimony by a parole officer to identify a defendant in a video was unduly prejudicial and inadmissible under FRE 403 due to the risk of revealing past criminality and that such prejudice could not be cured through cross-examination, as this would expose further details of detrimental character evidence. 544 F.2d at 296. However, subsequent case law from a majority of jurisdictions encountering this particular issue has found no violation of Rule 403, in many cases

explicitly rejecting the holding in *Calhoun*. In discussing this issue, the Fifth Circuit traced the relevant case law thusly:

> Subsequent cases from the Fourth, Eighth and Ninth Circuit Courts of Appeals have criticized *Calhoun,* where they have not rejected it outright. . . . In *United States v. Garrison*, 849 F.2d 103, 107 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988), the trial court admitted the testimony of the defendant's probation officer concerning defendant's weight loss after the time of the robbery for which the defendant was being tried. The Fourth Circuit found that, for purposes of identification, the testimony was not so prejudicial under Rule 403 as to be inadmissible. Similarly, in *United States v. Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984), the Eighth Circuit, confronted with a situation nearly identical to that in *Calhoun*, also expressly rejected the holding of *Calhoun*. The *Farnsworth* Court held that it was not an abuse of discretion for the trial court to have permitted parole officers to identify the defendant. . . . In *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986), the defendant's parole officer testified that the person depicted in bank surveillance photographs taken during a robbery was the defendant. The Ninth Circuit held that given the familiarity of the parole officer with the defendant the opinion testimony of the parole officer was sufficiently probative to outweigh the danger of unfair prejudice. Then, in *United States v. Butcher*, 557 F.2d 666, 670 (9th Cir. 1977), the Ninth Circuit upheld the district court's admission of opinion testimony by police and parole officers, on the basis of their prior contacts with the defendant, that the defendant was the person depicted in bank surveillance photographs. The *Butcher* Court held that it was not prejudicial for the district court to admit police and parole officers' testimony despite the existence of alternative evidence in the record. 557 F.2d at 669-70.
>
> We add our voice to the chorus of these cases insofar as they reject an inflexible holding that a trial court's decision to allow a defendant's parole officer to testify against the defendant is a per se violation of Rule 403.

United States v. Pace, 10 F.3d 1106, 1115 (5th Cir. 1993).

[47] It is clear that the majority of jurisdictions allow parole officers to use their familiarity with criminal defendants to identify them. However, as indicated above, this conclusion does not mean that such testimony may include facts revealing that a defendant has been on parole or previously incarcerated. On the contrary, in several of the cases referenced above, the trial court did not allow the parole officer to testify as to their profession or explain the basis of their relationship with the defendant. *See, e.g.*, *Garrison*, 849 F.2d at 107 ("The witness's identity as

parole officer was not revealed by the government . . . ."); *Farnsworth*, 729 F.2d at 1161 ("The court directed the government not to delve into the circumstances of the parole officers' relationships with the defendant. On direct examination, the government brought out only the number of times each witness had seen the defendant and the duration of those visits."). Further, the Fifth Circuit in *Pace* expressly held that the trial court abused its discretion in allowing the officer to give testimony which revealed the defendant's history of parole, stating:

> We find here on balance that the trial court committed error in allowing the probation officer to state his occupation to the jury. In the context of this trial, this information was unduly prejudicial. Other courts, too, have found error when a government witness reveals to the jury, or gives testimony from which the jury could infer, that the defendant is on probation or has been recently involved in illegal conduct. *See United States v. Fortenberry*, 860 F.2d 628, 632 (5th Cir. 1988); *United States v. Poston*, 430 F.2d 706, 709 (6th Cir. 1970).

10 F.3d at 1116.

[48] We hold that, in light of the unique importance of the parole officers' testimony in this case as the only positive identifications of Tedtaotao as well as the applicable federal case law, the trial court did not err in admitting the parole officers' testimony identifying Tedtaotao as one of the individuals in the surveillance video and describing the extent of their familiarity with him under a balancing of the Rule 403 factors. However, the court did err in admitting evidence identifying the parole officers' professions and the details of their relationship with Tedtaotao that revealed his history of incarceration and parole, as these facts were not necessary to the identification and were unduly prejudicial.

H. Whether the Evidentiary Errors were Harmless

[49] The trial court committed several evidentiary errors in conducting the jury trial of Tedtaotao. Specifically, the court abused its discretion in (1) allowing testimony from Officer Paulino regarding out-of-court statements made by Yu, (2) allowing Officer Paulino to assert that

the victim's statements to him were corroborated by the video footage, (3) admitting Officer Nakamura's testimony regarding out-of-court identification by parole officers identifying Tedtaotao as the man pictured in the surveillance video, and (4) admitting testimony regarding Tedtaotao's prior incarceration and parole status. Where the trial court has abused its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *See Jesus*, 2009 Guam 2 ¶¶ 53-55; *see also Williams*, 133 F.3d at 1053 (applying similar standards under the FRE). Thus the next inquiry is whether the errors committed by the court warrant reversal of the conviction or were merely harmless. This court has previously addressed the appropriate standard for evaluating harmless error, explaining that:

> "[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. Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted). A harmless error inquiry typically involves analysis of numerous factors, including: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence. *See United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

People v. Roten, 2012 Guam 3 ¶ 41 (alteration in original). We apply these factors to the evidence presented in this case to determine whether the conviction should remain undisturbed in spite of the numerous errors committed by the trial court.

[50] Beginning with the overall strength of the People's case, the court evaluates the sufficiency of properly admitted evidence in the record. Neither party has challenged the admissibility of the direct testimony of the victim, Yu. Yu testified that he was awoken early on the morning of December 16, 2012, by an automated phone call from his alarm system alerting him of a break-in. Tr. at 10 (Jury Trial, Mar. 13, 2014). He stated that he arrived at his store prior to its normal operating hours to find one of the entrances damaged. *Id.* at 10-11. He

encountered a large man nearly a foot taller than himself and engaged in an altercation as the man made his escape. *Id.* at 11-12, 14. Yu described pursuing the burglars to their getaway car, damaging the taillight and noting the license plate number. *Id.* at 14-15. Additionally, Yu recounted returning to his store and discovering that the cash register had been broken and many cartons of cigarettes had been removed from their display and collected into a trash bag. *Id.* at 16. His testimony establishes definitively that a crime was committed as well as the details of events and the timeframe in which they occurred. We also held that surveillance video evidence of the crime was properly authenticated and admitted into the record. *See* Section A above. The video shows the two individuals who committed the acts described by Yu, enabling identification by the jury or others. *See* Tr. at 16-22, 26-27 (Jury Trial, Mar. 13, 2014); People's Ex. 110 (CCTV video excerpt, Dec. 16, 2012). Moreover, we found that the identification of Tedtaotao via direct testimony of two parole officers who viewed the video was admissible lay witness testimony and not unduly prejudicial. *See* Sections F, G above. Their testimony directly identifies Tedtaotao as one of the individuals depicted on video while committing the crime charged. *See* Tr. at 61-64, 79-81 (Jury Trial, Mar. 20, 2014). In addition to the jury's ability to evaluate the video evidence itself, witnesses possessing specialized familiarity with Tedtaotao's appearance due to their extensive past interactions with him confirmed that he was one of the criminals present at the scene. *See id.* at 63-66, 81-87. This evidence, taken together, presents an overwhelmingly strong case supporting the guilty verdict returned by the jury. Other jurisdictions evaluating similar evidence have found that clear video evidence combined with testimony identifying defendants depicted in the footage is sufficient to render other testimonial errors harmless. *See, e.g.*, *B.K.C. v. State*, 781 N.E.2d 1157, 1162-63 (Ind. Ct. App. 2003); *Commonwealth v. Doyle*, 984 N.E.2d 297, 303 (Mass. App. Ct. 2013).

[51] The second factor, the prosecutor's conduct with respect to the improperly admitted evidence, involves whether such evidence was repeatedly referenced or emphasized and whether the prosecutor used the evidence in urging a guilty verdict in summation. *See Garcia*, 413 F.3d at 217-18. The prosecutor, through his questioning, did facilitate fairly significant extrapolation on the hearsay statements of both Officers Paulino and Nakamura. *See* Tr. at 43, 46, 48, 50-55 (Jury Trial, Mar. 12, 2014); Tr. at 29-33 (Jury Trial, Mar. 20, 2014). In addition, the facts revealed in both statements were emphasized in detail during the People's summation. Tr. at 4-12, 14 (Jury Trial, Mar. 24, 2014). However, as we will discuss in further detail below, these facts were also revealed through alternate avenues of properly presented evidence. It is not clear whether the People's closing argument emphasized the improper evidence or merely relied on the admissible testimony regarding the same facts covered by the improper statements. *See* Tr. at 4-15 (Jury Trial, Mar. 24, 2014). This ambiguity prevents determination of whether such conduct weighs against a harmless error finding. The prosecutor also elicited in-depth testimony on the improper subjects of Tedtaotao's prior incarceration and parole status. *See* Tr. at 60-61, 66-67, 78-79, 81-85, 89-93 (Jury Trial, Mar. 20, 2014). He also referenced this testimony in detail during his summation. *See* Tr. at 12-15 (Jury Trial, Mar. 24, 2014). In fairness, it appears from the references to the parole officers' frequency of interaction and confidence in their surveillance video identifications that the prosecutor was attempting to emphasize their familiarity with Tedtaotao in order to lend credibility to their identification of him, rather than simply to highlight Tedtaotao's past incarceration. In sum, these repeated references to prejudicial information of prior wrongs while urging a guilty verdict weigh against a finding of harmless error.

[52] Given the particular interaction of facts present in this case, we find it prudent to evaluate the final two factors of our inquiry together, since evidence which is merely cumulative of other properly admitted evidence is, by definition, of negligible importance to the prosecution's case. Here, other evidence in the record establishing the same material facts subsumes all of the improperly admitted evidence. As discussed, Officer Paulino's conveyance of Yu's statements regarding the events of the crime was inadmissible. However, Yu himself presented these same facts via direct testimony. Tr. at 10-16 (Jury Trial, Mar. 13, 2014). Consequently, any negative effect Tedtaotao suffered from such hearsay testimony was harmless. Further, Officer Paulino's comment that the surveillance video corroborated Yu's account was also harmless, since the jury was presented with both Yu's direct testimony and the video evidence itself, enabling it to determine that the video and Yu's account were consistent. *See Riley v. State*, 166 So. 3d 705, 749-50 (Ala. Crim. App. 2013) (finding improper police testimony cumulative and harmless where jury was presented surveillance video which enabled them to identify the defendant). Additionally, the testimony from Officer Nakamura that provided a hearsay identification of Tedtaotao by parole officers was merely cumulative of direct testimony from Officers Santos and Fleming, which identified with certainty that Tedtaotao was one of the individuals shown in the video of the crime. Finally, while the testimony of Officers Santos and Fleming revealing Tedtaotao's history of incarceration and parole was inadmissible, several admissible statements established their specialized familiarity with Tedtaotao's appearance and supported their identification of him as pictured in the video. *See* Tr. at 64-65, 67, 81-82, 85, 90 (Jury Trial, Mar. 20, 2014). Thus, each piece of improperly admitted evidence was of limited importance to the prosecution's case, and material information revealed by these sources was established by alternate and admissible forms of evidence.

[53] Based on the above facts and analysis, we find the errors committed by the trial court to be harmless, rather than reversible.

V. CONCLUSION

[54] We hold that the trial court did not abuse its discretion in admitting video evidence copied from the store's CCTV surveillance system and edited to include only relevant portions. Further, we hold the trial court did not err in admitting the lay witness testimony of Parole Officers Santos and Fleming identifying Tedtaotao as one of the persons depicted in the video footage or their testimony explaining the basis of their familiarity with Tedtaotao. However, we find that the trial court did abuse its discretion in admitting impermissible hearsay and bolstering testimony from Officers Paulino and Nakamura. Further, we hold that the trial court abused its discretion in admitting testimony from Parole Officers Santos and Fleming, which revealed Tedtaotao's past incarceration and parole status. Nonetheless, we find the errors committed by the trial court to be harmless.

[55] Accordingly, we **AFFIRM** the Judgment containing Tedtaotao's criminal convictions.

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