IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

CHAD RYAN DE SOTO,
Defendant-Appellant.

Supreme Court Case No.: CRA14-025
Superior Court Case No.: CF0083-13

OPINION

Cite as: 2016 Guam 12

Appeal from the Superior Court of Guam
Argued and submitted on August 11, 2015
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Chad Ryan De Soto appeals from a final judgment convicting him of three counts of Aggravated Murder and eleven counts of Attempted Aggravated Murder following his attack against pedestrians in Tumon. De Soto first argues the convictions should be reversed because the trial court committed plain error in failing to adequately instruct the jury on the doctrine of "diminished capacity." Second, De Soto contends the trial court committed numerous evidentiary errors, namely: (1) permitting impact testimony by victim and non-victim witnesses, (2) allowing impeachment evidence rebutting a defense witness's testimony about her conversations with De Soto, (3) permitting testimony of De Soto's psychotherapist despite the psychotherapist-patient privilege, and (4) allowing the prosecutor to make improper statements that commented on the credibility of defense witnesses and implied De Soto would be released if found not guilty by reason of insanity. De Soto believes his trial counsel's failure to object to the psychotherapist's testimony resulted in ineffective assistance of counsel, and that these errors cumulatively denied him a fair trial. For the reasons stated below, we affirm De Soto's convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On the night of February 12, 2013, De Soto drove his vehicle through a group of pedestrians in Tumon, injuring six people and killing one. After running through the pedestrians, De Soto got out of his vehicle, stabbed several people, and killed two more (hereinafter the "Incident").

[3] A Grand Jury indicted De Soto for three counts of Aggravated Murder (As a 1st Degree Felony), and twelve counts of Attempted Aggravated Murder (As a 1st Degree Felony), each accompanied by a special allegation of the Possession of a Deadly Weapon in the Commission of a Felony. De Soto pleaded not guilty by reason of mental illness, disease or defect pursuant to 9 GCA § 7.22(d).

A. Witness "Impact" Testimony During Trial

[4] At trial, several victims and non-victims offered "impact" testimony regarding how the Incident affected them. One such witness was Roderick San Juan, a non-victim who worked as a security officer at the nearby Globe Nightclub the evening of the Incident. When San Juan was asked how the Incident affected him, De Soto objected on relevancy grounds, but the court overruled the objection when the People argued the statement went to bias, perception, and ability to remember. San Juan was permitted to testify regarding his difficulty sleeping and that he sought therapy as a result of the Incident. The People asked other non-victim and victim witnesses about the effect the Incident had on their lives, including Frank A. Jackson, Emma Dela Cruz, Kaylani Quichocho, Nicolas Dizmang, Tony Bruce Richardson, and Yusuki Sugiyama. De Soto objected on either relevancy or unfair prejudice grounds to each witness's testimony.

B. Trial Testimony by Defense Witnesses Offered to Support De Soto's Mental Condition

[5] De Soto called several witnesses to testify regarding his mental condition. One physician, Dr. Leopold Arcilla, Jr., provided testimony ruling out the use of drugs as a possible cause of his violent behavior. Joseph Hernandez, a former classmate of De Soto, testified that De Soto appeared sad, extremely depressed, and malnourished in the weeks leading up to the Incident. De Soto's family members testified De Soto was depressed after the death of their

grandfather and exhibited erratic behavior. De Soto's girlfriend, Reanne Acasio, testified De Soto began acting strangely around January and February of 2013, when he recalled events that did not occur, expressed fear of government and elitist conspiracies, and claimed to be Leviathan.

[6] De Soto and Acasio ceased interaction for some time, and Acasio blocked his social media accounts. However, the two had a lengthy Skype conversation the day before the Incident. In reference to her last communication with De Soto before the Incident, Acasio testified that De Soto described bizarre instances of hallucinations. The morning after the conversation, Acasio stated De Soto messaged her stating "till it's gone," presumably referencing her previous Facebook post to him stating that "you don't know what you got till it's gone." Tr. at 46 (Jury Trial, July 1, 2014).

[7] On cross-examination, Acasio was questioned concerning statements she made to investigators from the Federal Bureau of Investigation ("FBI") following the Incident. When confronted by the prosecutor, she claimed to have forgotten certain statements made to the FBI. When asked whether she recalled the last thing De Soto told her when questioned by police officer Ronelle Rivera, Acasio testified she told Rivera that she had a conversation with De Soto, but was not questioned further, and that she could not recall "telling the officer the last thing [De Soto] said to [her]." *Id.* at 60. The prosecutor pressed further and asked:

> Q Do you remember the last thing [De Soto] said to you being, you will forgive me for what I will do tonight; you will find out tomorrow?
>
> A No, I never - - I don't remember ever saying that.

Id. at 60. De Soto's counsel then objected, but the content of the sidebar is inaudible. The prosecutor continued:

> Q If Detective Ronelle Rivera were to testify that you told him the last thing [De Soto] said to you on February 12th, 2013, was, you will forgive me

> for what I will do tonight; you will find out tomorrow, would the detective be incorrect?
>
> A Yes.
>
> Q In your phone - - I'm sorry - - your conversation with the FBI do you recall telling an FBI agent the last thing that [De Soto] said to you was, whatever I do tonight, I want you to forgive me?
>
> A I don't recall.

Id. at 62. Acasio testified she and De Soto had rekindled their relationship after the Incident and spoke by phone while he was in prison "a few times a week," but did not talk about what she was going to testify to at trial. *Id.* at 51.

C. Mental Health Testimony Offered by De Soto

[8] De Soto underwent four psychological and forensic psychiatric evaluations by different practitioners. The first mental health professional called by the defense was Dr. Michael Kim, a court-appointed psychiatrist, who examined De Soto in February of 2013. Dr. Kim evaluated De Soto on one occasion, but was not aware of any statements made by Acasio at the time of his evaluation. The court qualified him as an expert in the field of psychiatry, and admitted his curriculum vitae and expert report. Dr. Kim concluded that De Soto "was competent to stand trial . . . understood the wrongfulness of his actions . . . and able to control his actions." Tr. at 22 (Jury Trial, July 7, 2014). However, Dr. Kim indicated that if he had access to Acasio's FBI narration and he had more sessions with De Soto, he might have diagnosed De Soto with a psychotic disorder.

[9] The defense also called Dr. Karen Fukutaki, a qualified expert in forensic psychiatry. Dr. Fukutaki examined De Soto at the detention facility on November 2, 2013, and reviewed police reports, a search warrant, Department of Corrections records, and FBI interview transcripts before the examination. Dr. Fukutaki's curriculum vitae and report were admitted into evidence. In generating her report, Dr. Fukutaki reviewed reports generated by De Soto's treating

psychotherapist, Dr. Andrea Leitheiser, in making her evaluation. She testified that De Soto satisfied two of the prongs of Guam's insanity defense, namely that he "didn't understand the wrongfulness of his actions and he didn't have a rational understanding of the situation in which he was involved and the consequences of his actions, but that he had some control over his actions." Tr. at 22 (Jury Trial, July 8, 2014). Furthermore, she testified De Soto was "grossly psychotic" at the time of the commission of the crime. *Id.* at 21-22.

[10] The next day, the defense called Dr. Martin Blinder, another psychiatrist who evaluated De Soto. The trial court qualified Dr. Blinder as an expert in forensic psychiatry. Dr. Blinder evaluated De Soto in July of 2013, and his report was entered into evidence. In preparing his report and evaluation, Dr. Blinder reviewed Acasio's narrative provided to the FBI, Dr. Kim's reports, and records prepared by Dr. Leitheiser. In Dr. Blinder's opinion, De Soto suffered from psychosis at the time of the Incident, and did "not know at least the quality and the wrongfulness of his homicidal acts." Tr. at 27-28 (Jury Trial, July 9, 2014). Following Dr. Blinder's testimony, De Soto rested his case-in-chief.

D. The People's Rebuttal Witnesses

[11] During rebuttal, the People called Dr. Leitheiser, who was employed as a psychologist at the Department of Corrections. The defense objected to her qualification as an expert because she was a psychologist rather than a psychiatrist, but the objection was overruled. Furthermore, the court noted that the defense "opened the door and talked about Dr. Leitheiser's testimony [sic] vigorously." Tr. at 25 (Jury Trial, July 10, 2014). There does not appear to have been an objection on privilege grounds. Dr. Leitheiser was qualified as an expert in psychology by the court, and her mental health assessment of De Soto was admitted. Dr. Leitheiser first evaluated De Soto on or about February 14, 2013. She testified that her role at the Department of

Corrections was to provide "oversight of the mental health provision of services, and also . . . direct mental health care to the detainees and inmates." *Id.* at 65. She generated a clinical record of De Soto for the period between February 14, 2013, and March 13, 2013, and diagnosed him with major depression, generalized anxiety disorder, and a personality disorder due to challenged coping. In her observations, however, his thought processes were "logical and organized," and he did not display evidence of hallucinations or delusions.

[12] The People also called Officer Rivera to testify about an interview he conducted with Acasio. Rivera testified that Acasio told him the last thing De Soto said to her was "You will forgive me for what I will do tonight. You will find out tomorrow." Tr. at 8 (Jury Trial, July 10, 2014). The People next called Blake Anderson of the FBI in rebuttal. Anderson interviewed Acasio about three days after the Incident in Salt Lake City, Utah. Anderson testified that Acasio stated the last thing De Soto told her before the Incident was "'[w]hatever I do tonight, I want you to forgive me.'" *Id.* at 16. Additionally, Pay-Tel recordings between De Soto and Acasio obtained through the Guam Department of Corrections phone system were played for the jury to rebut Acasio's testimony.

E. Jury Instructions

[13] During opening statements, the defense indicated they were relying on the insanity defense. Soon after, defense counsel attempted to explain diminished capacity and the respective burdens of proof to the jury, but the People objected:

> If at the end of this evidence, you have a strong gut feeling that he's guilty, but you still have reasonable doubt as to whether he had the mental capacity to commit these crimes - -
>
> MR. TYDINGCO: Objection.
>
> . . . .
>
> MR. MILLER: His capacity is always an issue, Your Honor. That's the *Jung* case.

> . . . .
>
> MR. MILLER: The standard -- the *Jung* case tells us that in addition to not guilty by reason of mental defect, and the statute that covers that, the Government still has to prove mental capacity. To have capacity to have the intention mens rea necessary to commit the crime. And the jury may consider his mental illness as to what the Government is proved to the capacity issue. The capacity never goes away, it's still an issue.
>
> . . . .
>
> MR. TYDINGCO: Objections to burdens shifting, Your Honor. (Indiscernible 2:11:45).

Tr. at 19 (Jury Trial, Opening Statements, June 16, 2014). The court's ruling is not clear from the record, but defense counsel proceeded to a new topic following a sidebar conference.

[14] At the end of the trial, the court read the instructions for the affirmative defense of insanity by mental illness, disease, or defect. Following the jury instruction regarding insanity, the court provided a diminished capacity instruction:

> Jury instruction 1G, diminished capacity -- you may consider evidence of the Defendant's mental illness, disease, or defect on the issue of whether the prosecution has met its burden of proof beyond a reasonable doubt as to whether the Defendant has the requisite state of mind as to each and every element of the charge against him.

Tr. at 69 (Jury Trial, July 17, 2014); Record on Appeal ("RA"), tab 181 at 1G (Jury Instructions, Aug. 4, 2014).[1] This instruction was suggested by De Soto's counsel, and was derived from *People v. Jung*, 2001 Guam 15. The court inquired regarding defense counsel's lack of including language about lesser included offenses in the instruction, but defense counsel indicated the wording reflected his understanding of the diminished capacity doctrine. The jury was also instructed as to the People's burden of proof. The court did not provide additional instructions explaining the difference between a "Not Guilty by Reason of Mental Illness" defense and the

[1] Jury instruction 1H charged that instructions needed to be considered as a whole. Instruction 1J set forth the elements for the not guilty by reason of mental disease, illness, or defect defense, and Instruction 1K set forth the requirement of mental capacity.

"Diminished Capacity" doctrine. Defense counsel did not object to the instructions presented at trial.

F. Closing Arguments

[15] During closing arguments, the People made the following statements, commenting on Acasio's credibility:

> In the end, those key statements, Reanne Acasio most likely perjured herself. You can conclude that because she initially said she didn't remember and, certainly, Detective Rivera from the FBI agency would be wrong.

Tr. at 168 (Jury Trial, July 16, 2014).[2] The defense did not object. The prosecutor continued:

> And much of the opinions of the doctors, the psychiatrists, psychologists was based on the stories of self-reported symptoms that he tells them, that Reanne Acasio tells them. That's what the doctors relied on.
>
> And Reanne Acasio gets much of the information she shares based on her conversations with which the Defendant tells her what's going on with him, acts what's going on with him. And what has this evidence proved to us or shown to us when it comes to the Defendant, Chad De Soto, and his girlfriend, Reanne Acasio? They are bold actors. Yes. They are.

Tr. at 170 (Jury Trial, July 16, 2014). The defense did not object. Finally, the prosecutor implied that De Soto would be immediately released if he prevailed on his insanity defense:

> Based on all the evidence that's been presented to you in reviewing the arguments I have presented to you, tell this actor, the Defendant, that this is not a theater play. This is not a movie script. It's not a TV show, for him to get control over his girlfriend. Don't let him walk out of here on temporary insanity defense, that he doesn't have mental responsibility, when the evidence shows he does, because he hasn't proven it.

Tr. at 195-96 (Jury Trial, July 16, 2014). The defense did not object to this statement.

[16] Guilty verdicts were returned on August 4, 2014, to three counts of Aggravated Murder (As a 1st Degree Felony), each with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, and eleven counts of Attempted Aggravated Murder

[2] The prosecutor erroneously refers to Detective Rivera of the Guam Police Department as an FBI agent in this statement. Tr. at 170 (Jury Trial, July 16, 2014); *see* Tr. at 46 (Jury Trial, July 1, 2014).

(As a 1st Degree Felony), with three counts of Special Allegation of Possession and Use of a Deadly Weapon in Commission of a Felony. De Soto was sentenced to multiple life sentences. Judgment was entered, and De Soto timely appealed.

II. JURISDICTION

[17] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-115 (2015)); 7 GCA §§ 3105, 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[18] "The issue of whether a trial court's jury instruction misstates elements of a statutory crime is reviewed *de novo*." *People v. Root*, 2005 Guam 16 ¶ 8 **(**citing *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004)). "However, where . . . the defendant fails to object to the jury instructions at trial, we will not reverse absent plain error." *People v. Diego*, 2013 Guam 15 ¶ 23 (footnote omitted) (quoting *People v. Felder*, 2012 Guam 8 ¶ 8).

[19] "A trial court's evidentiary decisions are reviewed under an abuse of discretion standard." *People v. Perez*, 2015 Guam 10 ¶ 19 (citations omitted). "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." *Id.* ¶ 20 (alterations, citations, and internal quotation marks omitted). When a party does not raise a Guam Rules of Evidence ("GRE") 403 objection at trial, but merely "[objects] to the relevance of the evidence, and the trial court overruled that objection . . . we review [the] issue for plain error." *People v. Castro*, 2013 Guam 20 ¶ 35 (citing *People v. Mendiola*, 2010 Guam 5 ¶ 13).

[20] "A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*." *Angoco v. Bitanga*, 2001 Guam 17 ¶ 7 (alteration omitted) (quoting *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986)).

[21] Objectionable comments by the People are reviewed under a harmless error standard and will be reversed only if "it is more likely than not that the comment affected the jury's verdict" in a way that "taint[s] the underlying fairness of the proceedings." *People v. Moses*, 2007 Guam 5 ¶ 7 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 18). However, failure to object at trial requires a plain error review. *See People v. Quitugua*, 2009 Guam 10 ¶ 10 (citations omitted).

IV. ANALYSIS

A. Whether the Trial Court Adequately Instructed the Jury on the Respective Burdens of the People and De Soto Regarding "Diminished Capacity

[22] De Soto claims the jury instructions insufficiently advised the jury of the effect of the diminished capacity doctrine on the evidence and the parties' respective burdens of proof. Appellant's Br. at 9 (May 8, 2015). Specifically, he stresses that the People are required to prove each element of the crimes charged beyond a reasonable doubt, and that the jury should have been instructed the People were required to negate or disprove diminished capacity as it relates to the requisite mental state beyond a reasonable doubt. *Id.* at 8-9 (citing 8 GCA § 90.21). The People counter that diminished capacity is not a complete defense, but instead permits evidence of "diminished capacity" in appropriate cases. Appellee's Br. at 32 (June 2, 2015) (citing *Jung*, 2001 Guam 15 ¶ 31). Although the People agree that evidence of diminished capacity may be considered to negate a mental state, and the People are required to prove *mens rea* beyond a reasonable doubt, they do not believe they are "additionally required to *disprove* or negate the doctrine of 'diminished capacity.'" *Id.* at 34.

[23] Guam's diminished capacity doctrine is set forth in 9 GCA § 7.19, and provides that "[e]vidence that the defendant suffered from mental illness, disease or defect is admissible whenever it is relevant to prove the defendant's state of mind." 9 GCA § 7.19 (2005); *see also Jung*, 2001 Guam 15 ¶¶ 30, 37. This court's decision in *Jung* evaluated the extent of the diminished capacity doctrine in Guam. In *Jung*, we reversed the defendant's convictions for attempted murder and aggravated assault because the trial court erroneously failed to provide a *sua sponte* jury instruction on the issue of diminished capacity. 2001 Guam 15 ¶¶ 1, 60. We adopted the majority approach, which extends the diminished capacity doctrine to both specific and general intent crimes. *Id.* ¶¶ 39, 43-44. As the People suggest, this majority view interprets diminished capacity as an evidentiary doctrine that "essentially is nothing more than a recognition that relevant evidence is admissible," and acknowledges the "defendant must possess a certain state of mind . . . to be convicted" of a particular crime. *Id.* ¶ 33 (citations omitted). "[A]ny evidence showing the absence of that state of mind is relevant and thus admissible to negate that element." *Id.* (citations omitted); Appellee's Br. at 30-31.

[24] The People are also correct that unlike the affirmative defense of insanity, "diminished capacity does not provide any grounds for acquittal not provided in the offense." *Jung*, 2001 Guam 15 ¶ 31 (citing *United States v. Pohlot*, 827 F.2d 889, 897 (3rd Cir. 1987)); Appellee's Br. at 30. Instead, "diminished capacity is often used to reduce the defendant's guilt to a lesser offense" upon a showing that a legally sane defendant was incapable of forming a crime's requisite mental state. *Jung*, 2001 Guam 15 ¶ 31 (citing *State v. Sessions*, 645 P.2d 643, 644 (Utah 1982)).

[25] Diminished capacity is not one of Guam's codified complete defenses, such as consent or justification defenses. Appellee's Br. at 33 (citing 8 GCA § 90.21 (discussing reasonable doubt

burden of proof); 9 GCA § 7.64 (defining defense of consent); 9 GCA §§ 7.78-7.98 (defining justification defenses)). In *State v. Marchi*, the defendant analogized the diminished capacity doctrine to self-defense and challenged the trial court's charge that "did not instruct the jury that the State had to disprove [defendant's] diminished capacity claim." 243 P.3d 556, 561 (Wash. Ct. App. 2010). The court rejected the "argument because self-defense is a lawful act that absolves the actor of culpability and, consequently, the absence of self-defense is an element the State must prove." *Id.* at 562 (citing *State v. James*, 736 P.2d 700, 702 (Wash. Ct. App. 1987)). Self-defense requires a specific burden of proof instruction "to avoid juror confusion about who has the burden of proof on the self-defense issue." *Id.* (citing *James*, 736 P.2d at 702). However, "unlike self-defense, diminished capacity . . . is not a 'true' defense" because it does not add an additional element to the offense charged. *Id.* (citing *James*, 736 P.2d at 702).

[26] Notwithstanding the limited nature of the diminished capacity defense, *Jung* acknowledges "that the concepts inherent in criminal trials, such as *mens rea*, diminished capacity, and insanity, can be confusing to those trained in the law" and "may confound a jury composed of average members of the community." *Jung*, 2001 Guam 15 ¶ 58. Thus, jury instructions should "clarify for the jury that evidence of mental illness, disease or defect was relevant to show that [a defendant] was insane *as well as* that he lacked the mental state required for conviction of the crimes of which he was charged." *See id.*

[27] De Soto believes that *Jung* leaves open the issue of what instructions should be provided when both diminished capacity and the defense of insanity are raised, turning to other jurisdictions for guidance. Appellant's Br. at 9-12. The People counter that under a plain error analysis, we should consider only whether the instructions erroneously described Guam's law regarding diminished capacity, particularly in light of the variability of different jurisdictions.

Appellee's Br. at 35. Because Instruction 1G tracked the language of Guam's *Jung* case, the People analogize this case to prior decisions upholding jury instructions that track the language of Guam statutes at issue. Appellee's Br. at 35-36 (citing *Diego*, 2013 Guam 15 ¶ 28).

[28] The language from *Jung* was reproduced without substantive alteration in the jury charge De Soto specifically requested, but now claims was defective:

> "You may consider evidence of the Defendant's mental illness, disease, or defect on the issue of whether the prosecution has met its burden of proof beyond a reasonable doubt as to whether the Defendant has the requisite state of mind as to each and every element of the charge against him. "

See Tr. at 13-14 (Jury Trial, July 14, 2014); *see also Jung*, 2001 Guam 15 ¶ 48.[3] The trial court cautioned that the supplemental instruction provided by defense counsel did not highlight lesser included offenses in conjunction with diminished capacity, but defense counsel indicated the instruction reflected his understanding of the doctrine. Tr. at 13-14 (Jury Trial, July 14, 2014). The jury was, however, instructed with respect to lesser included offenses of manslaughter, negligent homicide, and assault as a misdemeanor. Tr. at 92-133 (Jury Trial, July 17, 2014). Since the defendant did not object at trial to the diminished capacity instruction given (which defendant requested), the standard of review is plain error.

[29] Plain error is satisfied when: "(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." *Diego*, 2013 Guam 15 ¶ 23 (citations and internal quotation marks omitted).

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[3] We concluded in *Jung* that a specific instruction is the better practice when evidence is presented on the issue of mental abnormality, disease, or defect as it applies to diminished capacity:

> We think that the better practice in appropriate cases warranted by the facts would be a specific instruction to the jury that it may consider evidence of the defendant's mental illness, disease or defect on the issue of whether the prosecution's burden of proof beyond a reasonable doubt of each and every element of the charge against him.

2001 Guam 15 ¶¶ 45-48 (footnote omitted).

[30] Under a plain error assessment, we must first determine whether there was an error. At the end of the trial, the court first read the instructions for the affirmative defense of insanity. Tr. at 69 (Jury Trial, July 17, 2014) (the "burden of proof as to mental responsibility" Instruction 1F stated that it was the defense's burden to "prove mental illness, disease, or defect at the time by the preponderance of the evidence"); RA, tab 181 at 1F (Jury Instructions). Following the jury instruction regarding insanity, the court provided the verbatim diminished capacity instruction requested by De Soto's counsel. Tr. at 69 (Jury Trial, July 17, 2014); RA, tab 181 at 1G (Jury Instructions). De Soto now stresses that instruction did not give the jury "any indication that the evidence of mental illness, disease or defect was relevant to determining the specific *mens rea* element of each respective crime." *Jung*, 2001 Guam 15 ¶ 57 (citing *Barrett v. State*, 772 P.2d 559, 564-65 (Alaska Ct. App. 1989)); Appellant's Br. at 9-12. The People believe, however, that Instruction 1L adequately informed the jury of the People's obligation to prove each element of each crime charged beyond a reasonable doubt. *See* Tr. at 71 (Jury Trial, July 17, 2014); Appellee's Br. at 34.

[31] Although De Soto may believe in hindsight that the instructions were not ideal, they were not erroneous under Guam law. The charge specifically referenced that the People bore the burden of proof. Tr. at 71 (Jury Trial, July 17, 2014). Also, Instruction 1G tracked the language of leading Guam authority on diminished capacity. *See Jung*, 2001 Guam 15 ¶ 48.

[32] Like *Marchi*, *Jung* does not mandate an instruction that the People must "disprove" diminished capacity. *See Marchi*, 243 P.3d at 561-62. Furthermore, our prior decisions "look[] to the evidence presented in the particular case and what tactical decisions may have been made by each party in their handling of the case based on the asserted error." Appellee's Br. at 43 (citing *Felder*, 2012 Guam 8 ¶¶ 38-48). Because De Soto's counsel "put all of his eggs in the

insanity basket" rather than emphasize diminished capacity, he has failed to demonstrate on appeal that his defense would have been different. *See* Appellee's Br. at 44-45.

[33] We conclude the trial court's charge was not erroneous under Guam law, and need not address the remaining plain error factors. Although the trial court's charge was not erroneous, we believe it would be good practice in future cases for the trial court to provide additional instructions, such as the detailed Connecticut instructions, that explain the difference between insanity and diminished capacity when both issues are raised by the defendant.[4]

B. Whether the trial court committed evidentiary errors, which cumulatively denied De Soto a fair trial

[34] De Soto next contends the trial court committed numerous evidentiary errors, namely (1) permitting impact testimony by victim and non-victim witnesses, (2) allowing impeachment evidence rebutting Acasio's testimony, (3) permitting testimony of De Soto's psychotherapist despite the psychotherapist–patient privilege, and (4) allowing the prosecutor to make improper statements. Appellant's Br. at 18-23. De Soto believes his trial counsel's failure to object to the

[4] Like Guam, Connecticut courts recognize the "diminished capacity" doctrine's applicability for general intent crimes. *State v. Gracewski*, 767 A.2d 173, 180 (Conn. App. Ct. 2001). Connecticut's detailed jury instructions provide different prompts for different mental states and provide in part:

> Evidence has been presented in this case indicating that the defendant was of limited or impaired mental capacity at the time of the Incident. If the defendant, because of this diminished capacity, was unable to form the intent necessary to the crime(s) of <*insert the crimes to which the defense applies*>, then the element of intent would not have been proven for (this / these) crimes.
>
> An essential element of the crime of <*insert offense*>, with which the defendant is charged, is that (he/she) acted with <*insert the appropriate type of intent*:> [specific intent, recklessness, negligence, and general intent]
>
> . . . .
>
> The state has the burden to establish the element of the defendant's intent to commit <*insert specific offense*> beyond a reasonable doubt. The defendant does not have to prove that he did not have the intent. In deciding whether the defendant had the necessary intent, you must consider all the evidence bearing on that issue, including the evidence of the defendant's limited or impaired mental capacity and his conduct before, during and after the alleged Incident. If you have a reasonable doubt on that issue, you must find (him/her) not guilty.

Connecticut Criminal Jury Instruction 2.7-5 (2012), *available at* http://www.jud.ct.gov/JI/criminal/part2/2.7-5.htm (last visited Feb. 5, 2016). Connecticut further tailors its instructions for specific mental states, which could be beneficial in future Guam cases. *See id.*

psychotherapist's testimony resulted in ineffective assistance of counsel, and that these errors cumulatively denied him a fair trial. *Id.* at 21-23.

1. Whether the court erred in permitting impact testimony by victim and non-victim witnesses.

[35] Several witnesses were questioned on direct about the effect of the Incident on their lives, and De Soto unsuccessfully and inconsistently objected to each question on either relevancy or undue prejudice grounds. Appellant's Br. at 16-18. In the People's view, the evidence was properly admitted to establish that the witnesses had the ability to perceive and remember the Incident. Appellee's Br. at 47.

[36] The threshold for relevancy includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Guam R. Evid. 401. "This threshold was intended to be minimally stringent." *Perez*, 2015 Guam 10 ¶ 40 (citations omitted). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Guam R. Evid. 403.

[37] Here, the People asked non-victim and victim witnesses about the effect the Incident had on their lives, including San Juan, Jackson, Dela Cruz, Quichocho, Dizmang, Richardson, and Sugiyama. Tr. at 90 (Jury Trial, June 16, 2014); Tr. at 16-18 (Jury Trial, June 17, 2014); Tr. at 19-20 (Jury Trial, June 19, 2014); Tr. at 93 (Jury Trial, June 19, 2014); Tr. at 35-36 (Jury Trial, June 24, 2014); Tr. at 50-51 (Jury Trial, June 24, 2014); Tr. at 17-18 (Jury Trial, June 30, 2014).

[38] De Soto objected on either relevancy or unfair prejudice grounds to the testimony. Tr. at 90 (Jury Trial, June 16, 2014) (San Juan; relevancy only); Tr. at 16-17 (Jury Trial, June 17, 2014) (Jackson; relevancy only); Tr. at 19 (Jury Trial, June 19, 2014) (Dela Cruz; relevancy

only); Tr. at 93 (Jury Trial, June 19, 2014) (Quichocho; objection at sidebar inaudible); Tr. at 35 (Jury Trial, June 24, 2014) (Dizmang; relevancy and unfair prejudice); Tr. at 50 (June 24, 2014) (Richardson; relevancy only); Tr. at 17 (Jury Trial, June 30, 2014) (Sugiyama; relevancy and unfair prejudice). The only non-victim witness testimony De Soto made a prejudice objection to which was overruled was Dizmang. Tr. at 35 (Jury Trial, June 24, 2014).[5] The People contend that all other GRE 403 objections were not properly preserved for appeal. Appellee's Br. at 50.

[39] The People successfully overcame the objections, arguing the testimony was relevant to bias and perception.[6] To support their argument that the impact testimony was relevant, the People cite *Wilson v. Beard*, which holds that impeachment evidence must demonstrate "some connection between the proffered information and the witness's ability to observe the event at the time of its occurrence, to communicate his observations accurately and truthfully at trial, or to maintain a clear recollection in the meantime." *Wilson v. Beard*, 589 F.3d 651, 666 (3d Cir. 2009) (citations and internal quotation marks omitted). Because the witnesses in this case observed the Incident at a distance, the People argue the traumatic impact of the event supports witness credibility. Appellee's Br. at 48. The People's reliance on impeachment authority is misplaced, however, because the testimony was offered on direct.

[40] The impact testimony was relevant to witness perception of the event, so the issue is whether its minimal probative value was outweighed by its prejudicial effect. Other jurisdictions have concluded that similar admission of long-term impact testimony during the guilt phase of

[5] The prosecutor also questioned Haruka Nohara regarding how the injuries she sustained during the Incident affected her. Tr. at 71 (Jury Trial, June 23, 2014). The court sustained the objection, and the argument against relevance and unfair prejudice is indiscernible from the record. *Id.* at 72. De Soto is puzzled that the trial court sustained an objection to the same question in the case of Haruka Nohara, and believes this ruling should have been extended to other witnesses. Tr. at 71-72 (Jury Trial, June 23, 2014); Appellant's Br. at 18.

[6] Tr. at 90 (Jury Trial, June 16, 2014) (San Juan); Tr. at 16 (Jury Trial, June 17, 2014) (Jackson); Tr. at 19 (Jury Trial, June 19, 2014) (Dela Cruz); Tr. at 93 (Jury Trial, June 19, 2014) (Quichocho); Tr. at 35 (Jury Trial, June 24, 2014) (Dizmang); Tr. at 50-51 (Jury Trial, June 24, 2014) (Richardson); Tr. at 17 (Jury Trial, June 30, 2014) (Sugiyama).

trial is erroneous. For example, in *United States v. Copple*, the Third Circuit Court of Appeals determined that testimony regarding the long-term impact of victims in a fraud case met the minimally stringent requirements for relevance under FRE 401, but had "little probative value and was unfairly prejudicial." 24 F.3d 535, 546 (3rd Cir. 1994). In that case, many victims testified that they used their children's college funds to pay back losses resulting from the fraud. *Id.* at 545. "Others testified that paying back the money had affected their health." *Id.* Ultimately, the court determined the error was harmless because the "evidence overwhelmingly indicate[d] that [the defendant] knowingly devised or participated in a scheme to defraud." *Id.* at 547.

[41] Similarly, in *United States v. McVeigh*, the defendant challenged testimony of eight victim witnesses regarding the long-term impacts of the bombings at issue. 153 F.3d 1166, 1203 (10th Cir. 1998), *disapproved of on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). One witness testified about losing his status as a pilot, another discussed medical discharge from the military due to head injuries, others provided accounts of attending funerals, and one witness told of feeling "fortunate" that she was able to identify her husband's body. *Id.* The Tenth Circuit Court of Appeals found this "long-term-effects" testimony was "not particularly relevant to the issues presented during the guilt phase." *Id.* Although the court found the trial court abused its discretion, it held the errors were harmless because "the long-term effects of the bombing did not add much in terms of emotional impact to the emotional elements that necessarily flowed from the proper description of the crime itself and it occupied only a tiny fraction of the trial time." *Id.* at 1204.

[42] The admission of Dizmang and Sugiyama's impact testimony must be reviewed for harmless error because De Soto made a prejudice objection under Rule 403 during their

testimony. Dizmang answered, "I suffer from anxiety attacks and depression from the incident." Tr. at 36 (Jury Trial, June 24, 2014). Sugiyama was a victim witness whose testimony was more extensive, but was neither lengthy nor detailed. Tr. at 17-18 (Jury Trial, June 30, 2014); RA, tab 10 at 6 (Indictment, Feb. 21, 2013). He described the loss of his wife and his children's mother and how his older daughter was injured even though his wife was protecting her and fighting back. Tr. at 17-18 (Jury Trial, June 30, 2014). He concluded by stating that he was "sad and angry." Tr. at 17 (Jury Trial, June 30, 2014).

[43] When the trial court abuses its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard. *Perez*, 2015 Guam 10 ¶ 34 (citing *People v. Jesus*, 2009 Guam 2 ¶¶ 53-55). "'Error is harmless unless it results in actual prejudice or 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *United States v. Williams*, 133 F.3d 1048, 1053 (7th Cir. 1998)). A "harmless error inquiry analyzes the following factors: (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." *Id.* ¶ 35 (quoting *People v. Roten*, 2012 Guam 3 ¶ 41).

[44] Turning first to the harmless error test, the prosecution's case was quite strong, and overwhelming evidence identified De Soto as the assailant. San Juan testified as to witnessing a Toyota strike pedestrians outside the Globe and Sandcastle on the evening of February 12, 2013. Tr. at 75-79 (Jury Trial, June 16, 2014). Dela Cruz testified that she witnessed a man assault several individuals in front of the Outrigger in doing what appeared to be a stabbing motion before she ran to escape the scene. Tr. at 10-19 (Jury Trial, June 19, 2014). Quichocho testified

that she saw the driver emerge from the vehicle, stabbed Japanese tourists, and identified the assailant as her former classmate, De Soto. Tr. at 80-85 (Jury Trial, June 19, 2014). She further testified that De Soto ran towards her and attacked her with the knife. *Id.* at 87-88. Dizmang testified to witnessing a vehicle crash into the ABC store on February 12, 2013, and that he ran from the scene upon seeing the driver reveal two knives that he used to attack people. Tr. at 22-32 (Jury Trial, June 24, 2014). He also identified the knives pictured in People's Exhibits 106 and 107 as the ones wielded by the driver, and identified De Soto as the assailant in court. *Id.* at 33-34, 36. Richardson testified as to witnessing a car crash into the ABC Store on February 12, 2013. Tr. at 38-43 (Jury Trial, June 24, 2014). He witnessed the driver emerge from the vehicle, brandishing knives and proceeding to stab a group of people. *Id.* at 43-48. Richardson identified De Soto as the assailant in court. *Id.* at 51-52. Finally, Sugiyama identified De Soto as the individual who struck his wife and young children with the vehicle, and who also attacked him, his wife and his children with a knife. Tr. at 7-17 (Jury Trial, June 30, 2014). Sugiyama testified his wife died as a result of the injuries. *Id.* at 16. As to the insanity defense, expert testimony established that De Soto's thoughts were organized following his arrest, and that he was competent to stand trial. Tr. at 21-22 (Jury Trial, July 7, 2014); Tr. at 74-75 (Jury Trial, July 10, 2014).

[45] Moreover, the prosecution relied very little on the impact testimony during closing arguments. Although the prosecutor mentioned during summation that the witnesses' lives would "never be the same," and that Sugiyama's children would grow up without their mother or grandmother, the majority of the prosecution's references to the witnesses referenced their personal knowledge of De Soto's actions during the Incident. Tr. at 148-156, 160 (Jury Trial, July 16, 2014). The impact testimony of the witnesses was relatively insignificant in comparison

with these eyewitness accounts of the Incident. Viewed against the extensive backdrop of evidence and strength of the prosecution's case, it was harmless error to admit the impact testimony of Dizmang and Sugiyama because De Soto has not demonstrated the testimony had a substantial or injurious effect on the case for harmless error purposes. *See Perez*, 2015 Guam 10 ¶ 34.

[46] However, since De Soto raises a GRE 403 challenge for all witnesses other than Dizmang and Sugiyama for the first time on appeal, admission of that evidence must be reviewed for plain error. When a party does not raise a GRE 403 objection at trial, but merely "[objects] to the relevance of the evidence, and the trial court overruled that objection . . . we review this issue for plain error." *Castro*, 2013 Guam 20 ¶ 35 (citing *Mendiola*, 2010 Guam 5 ¶ 13). "Plain error is highly prejudicial error." *Quitugua*, 2009 Guam 10 ¶ 11. Under the plain error analysis, when a clear error is identified, the defendant bears the burden of establishing that error is prejudicial through "'affect[ing] the outcome of the case.'" *People v. Fegarido*, 2014 Guam 29 ¶ 41 (quoting *Mendiola*, 2010 Guam 5 ¶ 24) (citing *Felder*, 2012 Guam 8 ¶ 31). If the record does not reflect that the defendant was prejudiced by the error, "the government will prevail." *Id.* (quoting *Quitugua*, 2009 Guam 10 ¶ 31). To be prejudicial, the error must be "'a mistake so serious that but for it the [defendant] probably would have been acquitted.'" *Id.* (alteration in original) (quoting *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996)).

[47] Jackson testified that the long-term impact of the Incident was significant. Tr. at 16-18 (Jury Trial, June 17, 2014). He stated that he suffered from high blood pressure and lost his job due to difficulties stemming from witnessing the Incident. Tr. at 17 (Jury Trial, June 24, 2014). Dela Cruz testified that she could not sleep the night of the Incident. Tr. at 20 (Jury Trial, June 19, 2014). Quichocho, a victim witness who was stabbed, testified that she kept her emotions to

herself because it was difficult to communicate the various emotions she felt resulting the Incident. Tr. at 93 (Jury Trial, June 19, 2014). San Juan testified that he had difficulty sleeping for weeks following the Incident. Tr. at 91 (Jury Trial, June 16, 2014). Richardson stated, "It affected me deeply. . . . I witnessed someone losing their life in a horrible, vicious attack." Tr. at 51 (Jury Trial, June 24, 2014). The testimony given by each of these witnesses was not lengthy or detailed, and was not relied upon by the People in their closing argument. *See* Tr. at 148-156, 160 (Jury Trial, July 16, 2014). As in *McVeigh*, the long-term effects of the attack in this case "did not add much in terms of emotional impact to the emotional elements that necessarily flowed from the proper description of the crime itself." 153 F.3d at 1204 (10th Cir. 1998).

[48] De Soto has failed to establish that the challenged testimony of the other witnesses affected his substantial rights under a plain error analysis because the exclusion of this testimony would not likely have resulted in his acquittal. *See Fegarido*, 2014 Guam 29 ¶ 41 (quoting *Remsza*, 77 F.3d at 1044). Thus, De Soto has failed to establish the impact testimony resulted in reversible error.

2. Whether the Court Erred in Allowing Impeachment Evidence Rebutting Acasio's Testimony

[49] Questions regarding the propriety of a rebuttal witness are reviewed for an abuse of discretion. *See People v. Flores*, 2009 Guam 22 ¶ 117. A prior inconsistent statement may be admitted for impeachment purposes even when they are oral and unsworn. *United States v. Sisto*, 534 F.2d 616, 622 (5th Cir. 1976) (citing McCormick on Evidence § 34 (1972)). Questioning a witness on whether these statements occurred "'may be drawn out in cross-examination of the witness himself, or if on cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness.'" *Id.* (quoting McCormick on Evidence § 34). However, proper foundation "must be

laid to establish that it is in fact [the witness's] statement," through asking the witness "whether he made the alleged statement, giving its substance and naming the time, place and person to whom made." *United States v. Nacrelli*, 468 F. Supp. 241, 253-54 (E.D. Pa. 1979) (citations omitted).

[50] The Second Circuit Court of Appeals was persuaded by Wigmore's Treatise that suggests "an 'unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.'" *United States v. Insana*, 423 F.2d 1165, 1169 (2d Cir. 1970) (quoting III Wigmore, Evidence, § 1043 (3d ed. 1940)). The *Insana* court concluded that a judge has wide discretion to admit or exclude "a prior sworn statement which the witness does not in fact deny he made." *Id.* at 1170 (citation omitted).

[51] On the other hand, the Sixth Circuit Court of Appeals held that admitting the "entire substance of a witness's disavowed, unsworn prior statements . . . abridged defendants' right to a fair trial" if credited by the jury. *United States v. Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977) (citations omitted). Contrasting prior sworn and unsworn statements, the court discouraged the use of "unsworn remarks, attributed to a Government witness" which might "cloak[] potentially self-serving accounts of a witness's statements with the dignity and credibility of the prosecutor's office." *Id.* at 641 (citation omitted). The *Shoupe* court cautioned, however, that its holding was not a "blanket rejection of impeachment by prior inconsistent statements in situations similar to this." *Id.* at 643.

a. Rebuttal by Law Enforcement Witnesses

[52] Acasio testified at trial that the last thing De Soto communicated to her prior to the Incident was something to the effect of "you don't know what you have until it's gone."

Appellee's Br. at 52 (citing Tr. at 46 (Jury Trial, July 1, 2014)). During the People's rebuttal, Officer Rivera testified that Acasio stated to him during an interview that the last thing De Soto said to her was: "You will forgive me for what I will do tonight. You will find out tomorrow." Tr. at 9 (Jury Trial, July, 10, 2014).[7] The People next called Agent Anderson of the FBI. *Id.* at 15-17. Anderson testified that during his interview with Acasio, she stated the last thing De Soto told her was: "Whatever I do tonight, I want you to forgive me." *Id.* at 15-16.

[53] The People argue this impeachment was proper even though Acasio was able to provide a detailed account of her last conversation with De Soto. De Soto contends it was not proper impeachment because Acasio denied making the statement to Rivera and indicated she could not recall making the statement to Agent Anderson. Tr. at 61-62 (Jury Trial, July 1, 2014).[8]

[54] We agree with *Sisto* and *Insana* and hold that prior inconsistent statements may be admitted for impeachment purposes even when they are oral and unsworn. *See Sisto*, 534 F.2d at 622; *Insana*, 423 F.2d at 1169. Acasio may have been falsifying her loss of memory, and this evidence allowed the People to attack her credibility. *See Insana*, 423 F.2d at 1169. Thus, it was proper to allow the People to impeach Acasio with unsworn statements made to third-party witnesses.

[7] De Soto's counsel made hearsay, best evidence, and narrative objections, and the People countered it was impeachment because Acasio testified she never made the statement. Tr. at 6-8 (Jury Trial, July 10, 2014). The objections were overruled, and Rivera's testimony continued. *Id.* at 9.

[8] De Soto asserts that this rebuttal was improper because the People never provided Acasio a copy of her statement to refresh her recollection as required by GRE 613, and also because Acasio could not recall her statement to Anderson. Appellant's Br. at 19. The People maintain, however, that Acasio's statements to Rivera and Anderson were oral rather than written, and that De Soto is conflating the two confrontation requirements for oral vs. written statements. Appellee's Br. at 53, n.17. GRE 612 refers to allowing a writing to refresh a witness's recollection, while GRE 613 refers to examining a witness concerning prior statement(s). Prior statements need not be shown or their contents disclosed to the witness at the time of examination for GRE 613 purposes, but shall be shown to opposing counsel if requested.

b. Rebuttal through Pay-Tel Recordings

[55] Pay-Tel recordings between De Soto and Acasio were played for the jury to rebut Acasio's testimony. Tr. at 50-58 (Jury Trial, July 10, 2014). De Soto objected on hearsay and relevance grounds, but the People successfully argued that Acasio's statements went to her bias and credibility. *Id.* at 51-52. On appeal, De Soto argues the Pay-Tel recordings were improper impeachment and rebuttal, and should have been introduced at the People's case-in-chief or as impeachment.

[55] During cross-examination, Acasio denied having any knowledge of an incident in which De Soto was angry about her kissing another man where he proceeded to smash a window. Tr. at 51 (Jury Trial, July 1, 2014). However, the Pay-Tel recordings between Acasio and De Soto disclosed the incident of Acasio kissing another person at the GATE Theater, and De Soto's reaction to that kissing. Tr. at 53-54 (Jury Trial, July 10, 2014).

[56] Like the rebuttal testimony of the law enforcement officers discussed above, the admission of the Pay-Tel recordings for impeachment purposes was not an abuse of discretion under the analysis of *Sisto* and *Insana* adopted by the court. *See Sisto*, 534 F.2d at 622; *Insana*, 423 F.2d at 1169.

3. Whether the Court Erred in Permitting Testimony of De Soto's Psychotherapist

[57] De Soto also claims the trial court erred in allowing the testimony of Dr. Leitheiser, because it breached the psychotherapist-patient privilege. Appellant's Br. at 20-21. The People stress, however, that De Soto waived the privilege when his attorneys disclosed medical records produced by Dr. Leitheiser to expert witnesses Dr. Fukutaki and Dr. Blinder. Appellee's Br. at 56; *see also* Tr. at 36 (Jury Trial, July 8, 2014); Tr. at 14 (Jury Trial, July 9, 2014).

[58] The psychotherapist-patient privilege is explicitly recognized in Guam. Guam R. Evid. 504(g). The United States Supreme Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (citations omitted). A patient can waive this psychotherapist-patient privilege by knowingly and voluntarily relinquishing it. *United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013) (citing *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000)). This can occur through (1) disclosing the substances of therapy sessions to third parties, or (2) not properly asserting the privilege during testimony. *Id.* In *Bolander*, the defendant provided materials to his expert, but did not assert the psychotherapist-patient privilege prior to disclosure to the expert. *Id.* Bolander's privilege argument was also rejected because the psychotherapist at issue "was not being sought for treatment, but rather to evaluate Bolander's mental condition." *Id.* The privilege "only extends to those psychotherapists who are being consulted for diagnosis and treatment." *Id.* (citing *Jaffee*, 501 U.S. at 15).

[59] Furthermore, GRE 503 provides that absent a claim by its holder, the psychotherapist-patient privilege is waived with respect to a communication protected by such privilege if:

> [A]ny holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, *including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.*

Guam R. Evid. 503(a) (emphasis added).

[60] Here, De Soto waived the privilege because the records generated by Dr. Leitheiser and submitted to his experts were disclosed for evaluation rather than treatment purposes. *See* Tr. at 18 (Jury Trial, July 8, 2014) (Dr. Fukutaki testified her interaction with De Soto was as "an

evaluator, not as a treatment provider"). Additionally, De Soto manifested consent to disclosure through his conduct by calling third-party experts during the trial proceeding and by failing to assert the psychotherapist-patient privilege during Dr. Leitheiser's trial testimony. *See* Tr. at 21-32, 64-96 (Jury Trial, July 10, 2014); *see also United States v. Georgiou*, 742 F. Supp. 2d 613, 635 (E.D. Pa. 2010) (holding that an objection raised for the first time on appeal is reviewed for plain error). This interpretation is similar to the conclusion reached by Massachusetts courts in evaluating their psychotherapist-patient privilege statute. The Massachusetts Supreme Court determined action was required by the patient to stop disclosure of medical records because "[t]he privilege is not self-executing." *See Commonwealth v. Oliveira*, 780 N.E.2d 453, 458 (Mass. 2002) (footnote omitted). Because our statute similarly requires action by the patient to prevent waiver through consent to disclosure, there was no error in admitting De Soto's disclosures to Dr. Leitheiser as evidence.

[61] The psychotherapist-privilege issue was the only ground for which ineffective assistance of counsel was raised. As there was no error in admitting this testimony, and because De Soto has failed to address how his counsel was ineffective under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), we conclude there was no ineffective assistance of counsel with respect to the privilege issue.

4. Whether the Court Erred in Allowing the Prosecutor's Statements Commenting on the Credibility of Defense Witnesses and Implying that De Soto would be Released from Custody if the Jury Returned a Not Guilty by Reason of Insanity Verdict

[62] De Soto contends the People engaged in vouching during summation, and improperly implied De Soto would be immediately released if found not guilty by reason of insanity. Appellant's Br. at 22. The People counter that these statements were allowable comments on the

evidence presented to the jury. Appellee's Br. at 60; *see also Moses*, 2007 Guam 5 ¶ 28 (holding that certain commentary on evidence already presented to the jury was permissible).

[63] "[W]hen addressing claims of prosecutorial misconduct, we first determine whether the challenged statements were indeed improper." *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (citing *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999)). However, an improper argument is not a per se violation of the defendant's constitutional rights. *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (citations omitted). To rise to the level of a constitutional violation, the "'prosecutor's 'comments' [must have] so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *See Evaristo*, 1999 Guam 22 ¶ 20 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Even if the People's comments to the jury are "'undesirable or even universally condemned,'" the remarks are not necessarily "tantamount to a constitutional violation." *Id.* ¶ 20 (quoting *Darden*, 477 U.S. at 181).

[64] "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). A jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005) (citations and internal quotation marks omitted). Thus, prosecutorial misconduct can arise if a prosecutor personally attests "to the credibility of government witnesses or attack[s] the credibility of defense witnesses." *United States v. Ainesworth*, 716 F.2d 769, 771 (10th Cir. 1983) (citations omitted).

[65] It is also improper for a prosecutor to suggest "that when an accused is found insane he is let free." *People v. Babbitt*, 755 P.2d 253, 278 (Cal. 1988) (citations omitted). The relevant inquiry when the prosecutor makes such a comment is then whether the comment was prejudicial. *Id.* at 278-79 (holding that a single remark by the prosecutor was erroneous, but non-prejudicial when the jury had already rejected diminished capacity and insanity defenses during sentencing phase).

[66] De Soto objects to the following statements made by the prosecutor as improper vouching. First, he contends the prosecution improperly commented on Acasio and Agent Rivera's credibility:

> In the end, those key statements, Reanne Acasio most likely perjured herself. You can conclude that because she initially said she didn't remember and, certainly, Detective Rivera from the FBI agency would be wrong.

Tr. at 168 (Jury Trial, July 16, 2014). Next, he objects to the following statements regarding Acasio and De Soto:

> And much of the opinions of the doctors, the psychiatrists, psychologists was based on the stories of self-reported symptoms that he tells them, that Reanne Acasio tells them. That's what the doctors relied on.
>
> And Reanne Acasio gets much of the information she shares based on her conversations with which the Defendant tells her what's going on with him, acts what's going on with him. And what has this evidence proved to us or shown to us when it comes to the Defendant, Chad De Soto, and his girlfriend, Reanne Acasio? They are bold actors. Yes. They are.

Id. at 170. De Soto also submits the following statement was improper because it implied an acquittal would allow him to go free:

> Based on all the evidence that's been presented to you in reviewing the arguments I have presented to you, tell this actor, the Defendant, that this is not a theater play. This is not a movie script. It's not a TV show, for him to get control over his girlfriend. Don't let him walk out of here on temporary insanity defense, that he doesn't have mental responsibility, when the evidence shows he does, because he hasn't proven it.

Id. at 195-96. Although De Soto contends these were inflammatory and prejudicial statements, he acknowledges they must be reviewed under plain error because defense counsel did not object. Appellant's Br. at 22; *see also Mendiola*, 2010 Guam 5 ¶ 13).

[67] We conclude that the statement referring to De Soto and Acasio as "bold actors" was permissible. However, the statement alleging that Acasio perjured herself was improper vouching. Likewise, the implication that De Soto was concocting his defense and would "walk out" on an insanity defense was troubling. Although these remarks are improper, they are not necessarily "tantamount to a constitutional violation." *See Evaristo*, 1999 Guam 22 ¶ 20 (citing *Darden*, 477 U.S. at 181). De Soto has failed to establish that his substantial rights were violated under the plain error assessment that these errors must be viewed. As stated above, to satisfy the prejudicial prong of a plain error analysis, the error must be "a mistake so serious that but for it the [defendant] probably would have been acquitted.'" *Fegarido*, 2014 Guam 29 ¶ 41 (quoting *Remsza*, 77 F.3d at 1044).

[68] The jury was properly instructed that it was their duty to weigh conflicting testimony and determine the credibility of the witnesses from their observations, and that the opening statements and closing arguments of the attorneys were not evidence. Tr. at 65 (Jury Trial, July 17, 2014); RA, tab 181 at 1C (Jury Instructions). Moreover, the jury was also specifically instructed not to consider punishment in its deliberations. Tr. at 72-73 (Jury Trial, July 17, 2014); RA, tab 181 at 2D (Jury Instructions). Furthermore, numerous eyewitnesses identified De Soto as the assailant, and expert testimony showed De Soto's thoughts were organized following his arrest, and that he was competent to stand trial. Tr. at 21-22 (Jury Trial, July 7, 2014); Tr. at 74-75 (Jury Trial, July 10, 2014). Hence, although the prosecutor made improper comments, De Soto has failed to establish that the error affected his substantial rights under a plain error

analysis because it is not likely that he would have been acquitted in the absence of the prosecutor's improper comments.

5. Cumulative Error

[69] "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) (citations and internal quotation marks omitted). Notably, a cumulative-error analysis references all errors without qualification. *Id.* at 1207 (citations omitted). Thus, a "'cumulative error' analysis considers 'all errors and instances of prosecutorial misconduct which were preserved for appeal with a proper objection or which were plain error.'" *Moses*, 2007 Guam 5 ¶ 57 (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 n.2 (9th Cir. 1988)).

[70] Here, the errors include (1) permitting impact testimony; and (2) the prosecutor's improper statements. Viewed together, these errors did not cumulatively impact De Soto's right to a fair trial in light of the overwhelming evidence establishing his guilt.

V. CONCLUSION

[71] The trial court's diminished capacity instruction was not erroneous. Viewed against the entirety of the evidence supporting De Soto's guilt, it was harmless error to admit the impact testimony of Dizmang and Sugiyama. De Soto likewise failed to establish that the challenged testimony of the other witnesses affected his substantial rights under a plain error analysis. The trial court also appropriately allowed impeachment evidence as Acasio may have been falsifying her loss of memory and this evidence allowed the People to attack her credibility. Moreover, the trial court properly admitted Dr. Leitheiser's testimony because De Soto waived any objection by disclosing those medical records to his experts. As there was no error in admitting this

testimony, and De Soto failed to present a *Strickland* analysis, there is no ineffective assistance of counsel with respect to this issue. Furthermore, the prosecutor's improper statements did not affect De Soto's substantial rights under a plain error review. Finally, errors committed by the trial court did not cumulatively impact De Soto's right to a fair trial. For the foregoing reasons, we **AFFIRM** all of De Soto's criminal convictions.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice