



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JOSEPH LEE PUGH,
Defendant-Appellant.

Supreme Court Case No.: CRA15-018

Superior Court Case No.: CF0572-12

OPINION

Cite as: 2016 Guam 22

Appeal from the Superior Court of Guam
Argued and submitted on February 11, 2016
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 Joseph Lee Pugh appeals his convictions for illegal possession of a concealed firearm, possession of a firearm without a firearm-identification card, and possession of an unregistered firearm. Pugh argues that the People’s evidence relating to an uncharged and unrelated burglary wherein the weapon he possessed was stolen from its owner was unfairly prejudicial and resulted in the denial of a fair trial. Additionally, Pugh asserts a Fifth Amendment violation due to a comment on his silence during questioning, made by a Guam Police officer testifying at trial. For the reasons stated herein, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] A grand jury returned an indictment charging Pugh with one count each of illegal possession of a concealed firearm under 10 GCA § 60121(c), possession of a firearm without a firearm-identification card under 10 GCA § 60121(e), possession of an unregistered firearm under 10 GCA § 60121(a), and reckless conduct under 9 GCA § 19.40(a)(2), as well as three counts of child abuse under 9 GCA § 31.30(a)(2)(C).

[3] Before trial, Pugh filed a memorandum indicating that he planned to assert necessity as an affirmative defense to the weapons charges, claiming he feared for his safety and the safety of his family, following an altercation near his residence. Additionally, Pugh’s Motion in Limine sought to exclude evidence that the gun had been stolen, questioning the relevance to his charges, asserting it was overly prejudicial, could confuse the issues, and mislead the jury. Admitting this evidence, Pugh argued, would be a violation of Guam Rules of Evidence (“GRE”) Rule 403, and would also constitute impermissible evidence of bad character or prior bad acts in

violation of GRE 404(a) and (b). The People asserted that establishing that the gun belonged to another person and that the gun was stolen was necessary to show ownership by someone other than Pugh, and thus Pugh could not argue he acquired the gun legally and simply forgot to register it.¹ The People also argued that evidence of the almost two-month gap between Pugh's altercation and when the gun was stolen was relevant to undermine the affirmative defense of necessity. The trial court denied the motion to exclude evidence of the burglary, finding the evidence relevant and not unduly prejudicial in light of the People's intended arguments.

[4] At trial, the People first put on evidence of the gun's origin. John Travers testified that in July 2012, he bought a SIG Sauer P266 handgun in Las Vegas, Nevada, for his wife, Marthella, bringing it to Guam on August 12, 2012. Travers reported the gun missing after a burglary of their home on September 18, 2012. Travers also testified about getting in contact with the Guam Police, who had recovered the gun in the possession of Pugh, after identifying the serial number. He identified photographs of the weapon in court, matching the serial number with his records. On cross-examination, both of the Traverses admitted they had no way of knowing how the weapon ended up in Pugh's hands, or if he was involved in the burglary of their home. The Traverses also testified that they were able to obtain firearm-identification cards in ten and thirty days' time.

[5] Following the Traverses' testimony, Pugh moved for a mistrial, reasserting that evidence of the gun being stolen was not relevant to prove it was unregistered, and regardless, any relevance was outweighed by the risk of unfair prejudice. The trial court denied the motion for the same reasons that it allowed the evidence in the first place, and expressed concern that Pugh

¹ While the transcripts attribute these and the following arguments to Pugh's attorney, it is clear from the content of the statements and context of the proceeding that these arguments belonged to the People.

had asked questions on cross-examination regarding the very subject he claimed was grounds for a mistrial.

[6] In large part, the trial court allowed the testimony to disprove an affirmative defense explaining why Pugh was in possession of an unregistered gun. Pugh had asserted the defense of necessity, based on an altercation at his home that transpired almost three months before the burglary. Pugh's live-in partner, Vanessa Aguilo, testified that a group of neighbors attacked Pugh with rocks and a kitchen knife, resulting in his injury. L.P., Pugh's minor daughter, similarly described this incident. Officer Benjamin Palomo of the Guam Police Department testified that he responded to the fight at Pugh's home, taking a report of the incident that Aguilo had described in court. Aguilo further testified that it was her understanding that Pugh obtained the gun for their family's protection following this incident, claiming that she still felt threatened by their neighbors. On cross-examination, Aguilo admitted she did not know where Pugh had obtained the weapon, or whether he had the proper license.

[7] Pugh was arrested for the current charges about a month after the burglary. Guam Police Officers Donny Pangelinan and William Naval responded to reports of a man with three children pointing a gun at several individuals who had been following or approaching them. The officers located Pugh, who matched the caller's description, in the parking lot of Harmon Drugs. Finding him nervous, the officers patted Pugh down, recovering the gun. Officer Pangelinan testified that when asked, Pugh stated he possessed the correct documents for possession of the gun, but did not have them on his person at the time of the arrest. Officer Pangelinan continued:

I inquired if he had pointed the firearm at anybody. He stated that he has no idea what I'm talking about. Then when I inquired as to where he had acquired the firearm, *he stated he does not want to speak to me any further.*

Transcript (“Tr.”) at 83 (Jury Trial, Jan. 30, 2015) (emphasis added). Upon this comment, Pugh objected and moved for a mistrial on the grounds that this comment violated his Fifth Amendment right to remain silent. The People asserted that the officer’s comment was simply an ill-phrased indication that the conversation ended at that point. The trial court denied the motion for a mistrial and overruled the objection. Pugh did not move to strike the testimony. Notably, the People did not comment on this testimony during the remaining portions of the trial.

[8] Lorraine Alcantara of the Guam Police Department testified that while a firearm-identification card is required to register a gun and obtain a concealed permit, Pugh possessed no registration or firearm-identification card. John Tyquiengco, of the Firearm Identification Unit, testified that the gun indeed was a functioning firearm.

[9] Finally, the People called private investigator Agnes Blas without objection as a rebuttal witness. Blas was hired by the Traverses to investigate the burglary of their home which resulted in Blas interviewing Aguilo, who had testified as to not remembering the substance of this conversation. The People wished to show that, contrary to her testimony at trial, Aguilo had told Blas that she was not aware of Pugh owning a gun for protection, which presumably tended to undermine the defense of necessity. A controversy then arose over how Blas had obtained Aguilo’s name in the investigation of the burglary. Blas testified that after receiving a list of possible witnesses from Marthella Travers, she “was able to locate [Aguilo].” Tr. at 7 (Jury Trial, Feb. 5, 2015). Pugh objected that this testimony could be wrongly interpreted as evidence that Pugh committed the Travers burglary, casting him in a prejudicial light to the jury. The People responded that Blas simply stated that she received the name during her investigation, and the trial court found no violation, advising that Pugh could inquire into the subject. On cross-examination, Pugh asked Blas if she had obtained Pugh or Aguilo’s name based only on

Pugh's arrest. Blas responded, "No, that's incorrect." *Id.* at 10. Pugh immediately ceased questioning and objected that this testimony was irrelevant and overly prejudicial in implying Pugh was a suspect, and tending to convict him of the burglary. The trial court overruled the objection. Pugh then moved for another mistrial for the same reasons given for his objection. The People responded that Blas had not stated that Pugh committed the burglary, and that the purpose of her testimony was to show the timeline of when the gun was stolen, relating to Pugh's affirmative defense. The trial court denied the motion for mistrial, noting that it could give curative instructions if Pugh so desired – an offer that was not accepted. Pugh next moved for judgment of acquittal on the child abuse charges under 8 GCA § 100.10, which the court also denied.

[10] Pugh then renewed his earlier motion for a mistrial, reasserting that Officer Pangelinan's testimony violated his Fifth Amendment right to remain silent, and that the court erred in allowing testimony that the gun was stolen. The court noted that while it is generally impermissible to comment on a defendant's silence, a court need not declare a mistrial if it undertook certain remedial actions. However, the trial court's cited authorities do not precisely correlate to the record.² The court again denied the motion, and additionally found the testimony was not unduly prejudicial.

[11] In reviewing jury instructions, the People proposed supplemental instructions to explain that Pugh's refusal to answer questions when arrested should not be considered in reaching a decision. However, Pugh rejected the proposal, asserting that no instruction could satisfactorily

² The trial court cited *Greer v. Miller*, 483 U.S. 756 (1987), for the tenet that a comment on a defendant's silence does not warrant a mistrial where the court sustains an objection and ceases questioning on the topic, advising the jury to disregard any questions to which an objection was sustained, and when the reference was not overly unfair. However, the record shows that the court in fact overruled the objection to the comment on Pugh's silence, and did not give an immediate instruction to disregard the statement.

cure the prejudice, and in fact would only further draw the jurors' attention to the error. Nevertheless, standard jury instruction 3K did remind the jury that Pugh was on trial only for the crimes charged.³ Furthermore, during closing arguments, *both* parties emphasized that Pugh was not accused of committing the burglary, and that the jury should not assign him any blame on the assumption that he had some part in it.

[12] Following deliberation, the jury returned a verdict of guilty for illegal possession of a concealed firearm, possession of a firearm without a firearm-identification card, and possession of an unregistered firearm. However, the jury found Pugh not guilty of the reckless conduct and child abuse counts. The court sentenced Pugh to two years imprisonment for each of his three convictions, to be served concurrently. Pugh timely filed a Notice of Appeal.

II. JURISDICTION

[13] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-197 (2016)); 7 GCA §§ 3107 and 3108(a) (2005); and 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[14] “Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent prejudice affecting the verdict.” *People v. Hall*, 2004 Guam 12 ¶ 34 (citation omitted); *see also People v. Torres*, 2014 Guam 8 ¶ 18; *People v. Chinel*, 2013 Guam 24 ¶ 18 (“When a defendant objects to an evidentiary ruling, we review a trial court’s decision to admit evidence for an abuse of discretion.” (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

³ Instruction 3K on activities not charged was as follows: “The defendant is on trial for the crimes charged in the Indictment, not for any other activities.” Tr. at 47 (Jury Trial, Feb. 6, 2015).

harmless error standard. *See People v. Jesus*, 2009 Guam 2 ¶¶ 53-55; *see also* Guam R. Evid. 103(a).

[15] We review the denial of a motion for mistrial for an abuse of discretion. *See People v. Flores*, 2009 Guam 22 ¶ 9 (citing *Caston v. State*, 823 So. 2d 473, 492 (Miss. 2002)).

[16] “An alleged violation of the Fifth Amendment is reviewed *de novo*.” *People v. Muritok*, 2003 Guam 21 ¶ 10 (citing *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991)). An established violation is then subject to harmless error review. *See id.* ¶ 23 (citing *United States v. Hasting*, 461 U.S. 499, 507-09 (1983); *Chapman v. California*, 386 U.S. 18 (1967)).

IV. ANALYSIS

[17] On appeal, Pugh’s main argument is that the trial court’s alleged errors, collectively, denied him a fair trial. However, this requires individual scrutiny of each alleged error before reaching a cumulative analysis. We must therefore decide whether the trial court erred in denying Pugh’s Motion in Limine or motions for mistrial, or in allowing Officer Pangelinan’s comment on Pugh’s silence, and finally, whether the trial court’s rulings denied Pugh his right to a fair trial. We address each issue in turn.

A. Denial of the Motion in Limine

[18] Pugh appeals the denial of his pre-trial motion to exclude evidence that the firearm found in his possession was stolen, and that the firearm’s owner’s home was burglarized. Appellant’s Br. at 3 (Sept. 18, 2015). We therefore examine the evidentiary rulings of the trial court under GRE 404 and 403.

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1. GRE 404

[19] Evidence of a person’s character, trait of character, or other crimes, wrongs, or acts to prove the character of a person, is generally inadmissible as evidence to show that they acted in conformity therewith. *See* Guam R. Evid. 404.

[20] While Pugh cites to GRE 404(a) and (b) in his brief, he argues only on the prejudicial versus probative balancing test of GRE 403. *See* Appellant’s Br. at 18-19. Further, in his Motion in Limine, Pugh merely and summarily stated that evidence of the Travers burglary “may also be deemed by the jury as evidence of bad character or a prior bad act.” Record on Appeal (“RA”), tab 82 at 2 (Mot. in Limine, Jan. 29, 2015). However, based on the record, it does not appear that the People used evidence of the burglary to prove that Pugh was a thief or had stolen the gun to show that he acted in conformity with that trait in committing the crimes with which he was charged.⁴ The People argued that the purpose of the testimony referencing the burglary was to show that Pugh did not own the gun and to point out the time difference between the altercation with Pugh’s neighbors and when the gun was stolen. *See* Appellee’s Br. at 17-18 (Nov. 4, 2015). The latter testimony showing a passage of almost three months went to rebut Pugh’s defense of necessity. *See id.* Essentially, the argument was that Pugh could have obtained a firearm-identification card and registered a firearm within the three-month time frame. *See id.* Indeed, upon examination, evidence of the burglary did not tend to show that Pugh acted in conformity with the trait of being a thief on the occasion when he was stopped with an unregistered firearm. Thus, the evidence was not within the contemplation of GRE 404.

⁴ The People stated that they did not intend to use the evidence in this manner during arguments on the Motion in Limine. Tr. at 8 (Jury Trial, Jan. 30, 2015).

[21] Therefore, GRE 404 is not applicable, as the evidence and Pugh’s argument against admission fall outside the scope of the rule. Nevertheless, Pugh’s substantial prejudice effect argument is relevant to a GRE 403 objection.

2. GRE 403

[22] Pugh’s Motion in Limine also sought to exclude any and all evidence relating to the burglary of the Traverses’ home under GRE 403. 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.” GRE 403. “The trial court’s balancing under Rule 403 is reviewed for an abuse of discretion.” *People v. Palisoc*, 2002 Guam 9 ¶ 28 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 6; *United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993)).

a. GRE 403 balancing test

[23] Pugh moved to exclude evidence that the firearm was stolen on the grounds it carried a substantial risk of unfair prejudice, confusion of the issues, or misleading the jury. RA, tab 82 at 1-2 (Mot. in Limine). When arguing the motion, Pugh asserted the People were attempting to imply that Pugh committed the burglary, which was unfairly prejudicial. Tr. at 6-7 (Jury Trial, Jan. 30, 2015). The People responded that evidence of the burglary was probative to show a timeline of the gun’s possession, which went to undermine Pugh’s defense that he obtained a weapon out of immediate fear for his safety following being attacked by his neighbors. *Id.* at 8-11. After receiving each party’s arguments, the trial court denied the motion, finding that the prejudice was “not so severe” against Pugh. *Id.* at 12.

[24] Pugh now asserts that the People's claim that the evidence was relevant to counter the affirmative defense of duress or necessity was faulty. Appellant's Br. at 19. Pugh maintains that evidence that he did not obtain *this* firearm until three months after his beating does not contradict the fact that he *still* feared for his safety and needed a firearm, choosing to obtain it without the necessary licenses. *Id.* at 19. Therefore, any probative value it may have had to impeach Pugh's defense of duress was far outweighed by the greater likelihood that it implied he committed the Travers burglary. *Id.* The People respond that the evidence was probative to show that the gun went missing at a time sufficiently remote from Pugh's altercation so as to cast strong doubt on his affirmative defense of necessity. Appellee's Br. at 17. The People also assert that they did not in any way portray Pugh as the perpetrator of the burglary. *Id.* at 16. Therefore, they argue the probative value of the evidence outweighed any prejudicial effect. *Id.* at 18.

[25] First, we examine the probative value. *See* GRE 403. Pugh asserted the affirmative defense of necessity, to show that he had to obtain a weapon, regardless of legality, for protection after being assaulted by neighbors. RA, tab 80 at 1-2 (Trial Mem., Jan. 29, 2015). The People then tried to negate this assertion by showing that the gun went missing long after the alleged assault, and therefore this was not an immediate occurrence, and Pugh could possibly have obtained a legal gun in that time frame. The Traverses testified as to when the gun was stolen. Blas testified to rebut Aguilo's assertion of not remembering their conversation, wherein Aguilo allegedly stated she did not know of Pugh owning a gun; this undermined Aguilo's earlier testimony that she knew Pugh had a gun for protection, due to continued incidents with the neighbors. Tr. at 2-3, 6 (Jury Trial, Feb. 5, 2015); *see also* Tr. at 42-43, 56 (Jury Trial, Feb. 4, 2015). We find that these facts, along with the evidence that it takes less time to obtain a

firearm license than the time between the assault and Pugh's arrest, were probative of negating Pugh's defense of necessity. *See* Tr. at 23, 41 (Jury Trial, Jan. 30, 2015).

[26] In weighing the prejudicial effect and the risk of confusing the issues or misleading the jury, the court notes that both of the Traverses testified that they did not know how Pugh obtained the weapon. *Id.* at 37, 44. However, Blas's testimony stating that she received Aguilo's or Pugh's name in connection with the burglary investigation did tend to suggest that they were somehow involved in the burglary. *See* Tr. at 7-8 (Jury Trial, Feb. 5, 2015). Additionally, Officer Pangelinan's comment on Pugh's silence about where he obtained the gun suggested that he had committed the burglary. *See* Tr. at 83 (Jury Trial, Jan. 30, 2015). These references to the Travers burglary strongly implied that Pugh committed the crime, casting him in a negative light to the jury. Moreover, this prejudicial effect was especially amplified because the burglary was an uncharged and unrelated crime. The People could have simply established the weapon left Travers's possession at a certain time without introducing such extensive evidence referencing the burglary.

[27] Accordingly, in weighing the evidence related to the Travers burglary, we find that the prejudicial effect substantially outweighed its probative value. Therefore, the trial court abused its discretion in performing its GRE 403 balancing test.

b. Harmless error

[28] Although admission of the evidence related to the burglary under GRE 403 was an abuse of discretion, we reverse only where an error is not harmless. *See Jesus*, 2009 Guam 2 ¶¶ 53-55. Under the harmless error analysis, we examine 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.” *People v. Roten*, 2012 Guam 3 ¶ 41 (citing *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005)). “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.” *Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)).

[29] For the first factor, the case against Pugh was strong. The People presented evidence that he was arrested with a firearm that turned out to belong to another person. *See* Tr. at 92-93 (Jury Trial, Jan. 30, 2015). Pugh did not possess the requisite legal documentation to carry the weapon. *See id.* at 88-93. As for the second factor, the People did not allege that Pugh committed the burglary, and during closing, joined Pugh in emphasizing that the jury should not consider that he had any part in the burglary. *See* Tr. at 3-5 (Jury Trial, Feb. 6, 2015). For the third factor, this evidence was not important to the main case against Pugh, though it was relevant to combat Pugh’s affirmative defense. For the fourth factor, considering the case against Pugh as a whole, the burglary evidence was cumulative of other properly admitted evidence showing that Pugh did not own the gun. However, this was not cumulative of other evidence regarding the affirmative defense, where the only theory was that the gun was stolen months after Pugh’s assault. If we look solely at the affirmative defense, this error would likely not be harmless, given that it was one of the only theories the People used to negate the affirmative defense. However, the error severely diminishes in importance when considering the overall strength of the case, the People’s use of the evidence, the People’s own attempts to mitigate any possible prejudicial effect, the curative instructions offered, and the jury instructions given.

[30] Thus, while the trial court abused its discretion in admitting evidence of the burglary, the error was harmless beyond a reasonable doubt.

B. Denial of the Motions for Mistrial

[31] Pugh also appeals the trial court's denials of his motions for a mistrial on January 30, 2015, and February 5, 2015.⁵ Appellant's Br. at 6, 12. Trial courts generally have broad discretion in adjudging the propriety of a mistrial, granting such a motion only where so dictated by "manifest necessity" or in order to serve the "ends of public justice." *Illinois v. Somerville*, 410 U.S. 458, 461-63 (1973) (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)). This is a purposefully fluid test that adapts to the trial court's impressions and the "varying and often unique situations arising during the course of a criminal trial." *Id.* at 462. "The defendant has the burden of proving that there was an abuse of discretion, and, where the court is to review a motion for mistrial, 'the power ought to be used with the greatest of caution under urgent circumstances, and for very plain and obvious causes.'" *United States v. Gann*, 732 F.2d 714, 725 (9th Cir. 1984) (quoting *United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir. 1980)). "An abuse of discretion occurs when the court makes a judgment that clearly goes against the logic and effect of the facts." *Palisoc*, 2002 Guam 9 ¶ 7 (citing *People v. Quintanilla*, 2001 Guam 12 ¶ 9).

1. The January 30 Motion for Mistrial regarding Pugh's silence

[32] When testifying about Pugh's arrest, Officer Pangelinan responded to the general question of "what happened next?" by saying "when I inquired as to where he had acquired the firearm, he stated that he does not want to talk to me any further." Tr. at 83 (Jury Trial, Jan. 30,

⁵ Pugh also moved for another mistrial on January 30, immediately following the Traverses' testimony, which the trial court denied. Tr. at 49-50 (Jury Trial, Jan. 30, 2015). Whereas Pugh's brief states he appeals the other denials, he does not claim to appeal the denial of this motion that directly followed the Traverses' testimony. See Appellant's Br. at 4.

2015). Pugh immediately orally moved for a mistrial, and additionally filed a written motion on February 3, 2015, arguing that this testimony violated his right to remain silent and exacerbated evidence of the burglary, which deprived him a fair trial. *Id.* at 84; RA, tab 87 at 1-4 (Mot. Mistrial, Feb. 3, 2015). The People filed a response arguing that any reference to Pugh's silence was harmless because the comment was neither extensive nor stressed to the jury, and was inconsequential when compared with the abundance of other evidence. RA, tab 89 at 1-4 (Opp'n Mot. Mistrial, Feb. 5, 2015).

[33] The trial court cited multiple authorities setting standards of mistrial, prejudicial evidence, and harmless error, before denying the motion. *See* Tr. at 21-22 (Jury Trial, Feb. 5, 2015); *Greer*, 483 U.S. 756; *Muritok*, 2003 Guam 21 ¶ 24; Guam R. Evid. 403. Given that the objection to Blas's testimony was overruled and no curative instruction given, the lead authority cited by the trial court is distinguishable.⁶ However, we review denial of a mistrial for an abuse of discretion. *See Flores*, 2009 Guam 22 ¶ 9. "Most importantly, under this standard, [a reviewing court] cannot reverse a decision unless it has a definite and firm conviction that the court below committed a clear error of judgment in the *conclusion* it reached upon a weighing of the relevant facts." *Guam Radio Servs. Inc. v. Guam Econ. Dev. Auth.*, 2000 Guam 23 ¶ 6 (emphasis added) (citing *People v. Quinata*, 1999 Guam 6 ¶ 17); *see also People v. Tuncap*, 1998 Guam 13 ¶ 12 (citing *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992)). As detailed in the Fifth Amendment analysis in section C. below, the reference to Pugh's silence was fleeting, and not reversible error. Further, as discussed in section A.2. above on GRE 403, evidence relating to the burglary did not constitute reversible error. Therefore, when considering

⁶ The underlying trial circumstances in *Greer* involved a sustained objection and an instruction to disregard questions drawing a successful objection. 483 U.S. at 764-65.

the high standard necessary for a trial court to declare a mistrial, the trial court's reasoning was questionable, but not an abuse of discretion.⁷ See *Gann*, 732 F.2d at 725.

[34] In light of the circumstances and the standard for declaring a mistrial, denial of the January 30 motion did not constitute reversible error.

2. The February 5 Motion for Mistrial regarding Blas's testimony

[35] Pugh also moved for another mistrial, claiming Blas's testimony that someone had given her Pugh's name in her burglary investigation was not relevant and was so unfairly prejudicial that nothing could erase this thought from the jurors' minds. Tr. at 15-16 (Jury Trial, Feb. 5, 2015). The People contended Blas did not identify Pugh as a suspect in the burglary, and that her investigation was relevant to show the timeline of the gun arriving on island. *Id.* at 16. The court denied the motion, noting it could give curative or jury instructions and that Pugh could discuss this issue in closing. *Id.* at 17.

[36] Blas's testimony was prejudicial, implying that Pugh committed the burglary. However, the standard for granting a mistrial is high and extremely discretionary. See *Somerville*, 410 U.S. at 461-63; *Gann*, 732 F.2d at 725. Furthermore, jury instructions and both parties' closing arguments reinforced that Pugh was not on trial for burglary, and instructed the jury to not assign any blame to him based on that assumption. See Tr. at 3, 16 (Jury Trial, Feb. 6, 2015). Therefore, despite Pugh's questionable decisions to refuse mitigation of prejudice by special

⁷ Further, even where a trial court applied the wrong or questionable standards, reversal might not be warranted, as this court may still affirm a decision, if it is supported by the record. See, e.g., *People v. Castro*, 2016 Guam 16 ¶ 29 ("Although the trial court did not make a specific cite to the [standard], we may still affirm the trial court's decision if it is supported by the record." (citing *People v. Chinel*, 2013 Guam 24 ¶¶ 40-41)); *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ("We believe that the wrong standards were used to confirm the award. We find, however, that under the appropriate standards, the arbitration award would still be confirmed. Accordingly, we affirm the Superior Court's decision.").

instruction, the default jury instructions and closing statements served that function. Accordingly, denial of the February 5 motion was not an abuse of discretion.

C. The Fifth Amendment Right to Remain Silent

[37] Pugh asserts that allowing a portion of Officer Pangelinan’s testimony, which indicated that Pugh did not wish to speak to him further, constituted a violation of his right to remain silent under the Fifth Amendment. Appellant’s Br. at 20. “The Fifth Amendment to the United States Constitution provides that ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself.’” *Muritok*, 2003 Guam 21 ¶ 11 (alterations in original) (quoting U.S. Const. amend. V). This court, in recognition of the Fifth Amendment privilege against self-incrimination, forbids the use of a defendant’s silence as substantive evidence of guilt in both pre-custodial and custodial circumstances. *See id.* ¶¶ 11, 23. “An alleged violation of the Fifth Amendment is reviewed *de novo*.” *Id.* ¶ 10 (emphasis added) (citation omitted). An established violation requires the convictions to be reversed unless the reviewing court concludes the error was harmless beyond a reasonable doubt. *See id.* ¶ 23 (citations omitted).

1. Substantive evidence of guilt

[38] Evidence of a defendant’s silence in pre-custodial or custodial circumstances violates the Fifth Amendment privilege against self-incrimination, when used as substantive evidence of guilt. *See id.* ¶¶ 11, 23. Therefore, the first inquiry is whether Officer Pangelinan’s testimony stating, “Then when I inquired as to where he had acquired the firearm, *he stated he does not want to speak to me any further,*” was used as substantive evidence of Pugh’s guilt. Tr. at 83 (Jury Trial, Jan. 30, 2015) (emphasis added). The People characterize this as “a single, non-substantive reference to Pugh’s desire to terminate questioning on the street.” Appellee’s Br. at 13. However, the People’s cited cases purportedly supporting their argument involve

impeachment instead of substantive evidence.⁸ Pugh argues this evidence was used to imply he committed the Travers burglary. Appellant's Br. at 20. As Pugh notes, he did not testify at trial. *See id.*

[39] In *Muritok*, a police officer testified that the defendant remained silent when questioned about alcohol regarding a DUI incident. 2003 Guam 21 ¶ 25. This evidence was not introduced as evidence of impeachment, and was substantive in that it tended to imply that the defendant was hiding something regarding his guilt. *See id.* ¶ 23. Here too, the comment at issue was not being used to combat an untrue assertion such as Pugh being unable to explain himself to officers or some similar situation. Moreover, Pugh did not testify at trial, so the comment was clearly not used as impeachment evidence. In context, it was the witness's answer to a general question about what happened next, whereby the witness described the end of the conversation. Further, the People did not emphasize Pugh's silence any further, or reference it in any way for the remainder of the trial. The comment was certainly not used *extensively* as evidence of guilt, especially since Pugh was not charged with burglary. However, Pugh's silence did indicate some guilt regarding how he obtained the firearm, and that he did not have the correct paperwork.

[40] Although non-extensive, the statement was a substantive comment on Pugh's silence in response to questioning, and therefore admission constituted an error by the trial court. Nevertheless, the comment is subject to harmless error review. *See Muritok*, 2003 Guam 21 ¶ 23 (citations omitted).

⁸ The People cited to the following cases: *Jenkins v. Anderson*, 447 U.S. 231 (1980) (testimony used for impeachment); *Hall v. Vasbinder*, 563 F.3d 222 (6th Cir. 2009) (reference to silence allowed to refute theory that defendant did not get to tell his side of the story); *United States v. Salinas*, 480 F.3d 750 (5th Cir. 2007) (finding no protection for pre-Miranda silence); and *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000) (allowing a plainly infringing reference to defendant's silence only because defendant failed the last prong of the harmless error test). Appellee's Br. at 14.

2. Harmless error

[41] Due to the comment on his silence, Pugh’s convictions must be reversed unless we find the error was harmless beyond a reasonable doubt. *See id.* (citations omitted). In determining whether improper testimony regarding defendant’s silence was harmless, this court considers: “(1) the extent of the comments made; (2) whether an inference of guilt from silence was stressed to the jury; and (3) the extent of other evidence suggesting the defendant’s guilt.” *Id.* ¶ 24 (quoting *United States v. Pino-Noriega*, 189 F.3d 1089, 1099 (9th Cir. 1999)).

[42] We first consider the extent of the comments made. *See id.* Pugh argues that this comment, along with several other alleged errors referencing the burglary, suggested that he was guilty of that crime. Appellant’s Br. at 21. However, these other references to the burglary were not additional references to Pugh’s silence, and are irrelevant to this prong. The People argue that this was a single reference to Pugh’s silence by a witness, which was not mentioned again.⁹ Appellee’s Br. at 14-15. The reference was indeed relatively fleeting: Officer Pangelinan merely stated, “Then when I inquired as to where he had acquired the firearm, *he stated he does not want to speak to me any further.*” Tr. at 83 (Jury Trial, Jan. 30, 2015) (emphasis added). This is reminiscent of the facts in *Muritok*, where the court found a reference non-extensive when the officer testified: “I asked him if he had been drinking. He refused to answer that question. I asked him if he was willing to provide blood for the purpose of determining alcohol percentage. He again refused to answer.” 2003 Guam 21 ¶ 25. Considering there was only one mention of Pugh’s silence throughout trial, and cognizant of the similarity to *Muritok*, the current reference was also not extensive.

⁹ As stated above, the People’s cases purporting to be examples of courts allowing numerous mentions of a defendant’s conduct can all be distinguished.

[43] The next inquiry is whether an inference of guilt from silence was stressed to the jury. *See id.* ¶ 24. Pugh argues that the testimony highlighted other evidence regarding uncharged crimes. Appellant's Br. at 22. Again, this argument is misplaced here, as it does not go to show that the silence was stressed as evidence of guilt. The People argue that they made no other reference to Pugh's silence at any other point during the trial. Appellee's Br. at 15. After review of the transcripts, this assertion is correct: the People did not use the testimony in a manner stressing guilt to the jury.

[44] The final prong of harmless error requires us to examine the extent of other evidence suggesting Pugh's guilt. *See Muritok*, 2003 Guam 21 ¶ 24. The People point to an eyewitness description of a man fitting Pugh's description with a gun, and that Pugh turned out to have a gun with no documents showing lawful possession. Appellee's Br. at 15. Because of the other evidence presented regarding Pugh being in possession of an unlawful weapon, there was no shortage of evidence suggesting his guilt of the crimes charged. Indeed, we find that there was little if any reliance on Pugh's silence during questioning to prove that he illegally possessed the weapon.

[45] The reference to Pugh's silence tended to indicate his guilt of wrongfully possessing the firearm. However, in light of the minimal extent of the reference to Pugh's silence, the fact that such silence was not stressed to the jury, and given the other evidence of Pugh's guilt, the erroneously admitted comment was harmless beyond a reasonable doubt. *See Muritok*, 2003 Guam 21 ¶ 28.

D. The Fifth Amendment Right to a Fair Trial

[46] Pugh's main argument is that collective errors were so unfairly prejudicial that they cumulatively denied his due process right to a fair trial, protected by the Fifth and Fourteenth

Amendments (made applicable to Guam by the Organic Act). Appellant’s Br. at 23; *see also Adamson v. California*, 332 U.S. 46, 53 (1947), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964) (noting that the Fifth Amendment right to a fair trial is protected by the Due Process Clause of the Fourteenth Amendment).

[47] Pugh offers minimal analysis or supporting authority regarding the right to a fair trial, generally arguing that any evidence of the burglary was overly prejudicial, and that the deprivation of his right to remain silent was used to highlight the prejudicial evidence. Appellant’s Br. at 22. Therefore, collectively, his right to a fair trial was allegedly violated. *Id.* at 23. The People generally respond that there were no evidentiary errors at trial, nor were there constitutional violations warranting reversal. Appellee’s Br. at 1. This fair trial inquiry takes two forms given Pugh’s claims for relief: an unfairly prejudicial analysis and a cumulative effect analysis.

1. Unfairly prejudicial evidence

[48] The admission of unfairly prejudicial evidence violates the Due Process Clause of the Fourteenth Amendment if it results in a denial of fundamental fairness at trial. *See Lisenba v. California*, 314 U.S. 219, 236 (1941). While no Guam cases have squarely addressed this issue, the Ninth Circuit has indicated that Federal Rules of Evidence (“FRE”) Rule 403 itself, which GRE 403 was modeled after, is the standard to be used in determining whether due process was given. *See United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (“As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.”). Accordingly, we follow the Ninth Circuit’s reasoning, and find analysis of GRE 403 applicable to the issue of whether there was a violation of the right to a fair trial. *See Roten*, 2012 Guam 3 ¶

16 (“Generally, Guam courts view federal case law concerning the [FRE] as persuasive, given the similarities between the GRE and the FRE.”). Because the above analysis of GRE 403 indicates no reversible error in admitting evidence related to the Travers burglary, Pugh’s right to a fair trial was also not violated in this manner.

2. Cumulative effect

[49] Pugh further asserts that the comment on his right to remain silent augmented the alleged prejudicial effect of evidence related to the Travers burglary, and *cumulatively* resulted in an unfair trial. Appellant’s Br. at 22. “The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair.” *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (holding that the defendant was deprived of a fair trial when the trial court excluded critical evidence, and when the State refused to permit the defendant to cross-examine a witness (citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973))). “The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal.” *Id.* (citing *Chambers*, 410 U.S. at 290 n.3).

[50] As detailed above, the two errors committed were individually harmless. Furthermore, there was overwhelming evidence suggesting Pugh’s guilt. Pugh was found with a firearm that did not belong to him, and he did not have the correct paperwork for owning one. Tr. at 82-84 (Jury Trial, Jan. 30, 2015). These facts alone are sufficient to convict Pugh of the charges. Pugh’s only argument was via an affirmative defense, and we do not find sufficient errors with regard to combating that defense to declare a violation.

[51] Therefore, we find no infringement of Pugh’s due process right to a fair trial, and Pugh’s arguments on appeal fail.

V. CONCLUSION

[52] Upon consideration, we find no reversible errors. Moreover, Pugh’s right to a fair trial was not violated.

[53] Accordingly, we **AFFIRM** the trial court’s Judgment.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

KATHERINE A. MARAMAN
Associate Justice

/s/

ROBERT J. TORRES
Chief Justice