IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

CLIFFORD BENAVENTE SAN NICOLAS,
Defendant-Appellant.

Supreme Court Case No.: CRA15-030
Superior Court Case No.: CF0049-13

OPINION

Cite as: 2016 Guam 32

Appeal from the Superior Court of Guam
Argued and submitted on May 2, 2015
Dededo, Guam

Appearing for Defendant-Appellant:
Leevin T. Camacho, *Esq.*
Law Office of Leevin T. Camacho
194 Hernan Cortez Ave., Ste. 216
Hagåtña, GU 96910

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

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

MARAMAN, J.:

[1] Defendant-Appellant Clifford B. San Nicolas appeals from a final judgment convicting him of one count of intentional Murder (As a First Degree Felony), one count of reckless Murder (As a First Degree Felony), one count of Family Violence (As a Third Degree Felony), and one count of Possession of a Firearm Without an Identification Card (As a Third Degree Felony). San Nicolas argues that the trial court abused its discretion by refusing his request to poll the jurors about potential exposure to a Pacific Daily News ("PDN") article that contained extraneous and prejudicial information. He further asserts that the information in the article adversely affected the verdict. We affirm in part, vacate the verdict and sentence imposed in part, and remand this case for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Following the shooting of Valene Joi Borja on January 26, 2013, San Nicolas was indicted for Attempted Murder (As a First Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; Family Violence (As a Third Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; and Possession of a Firearm Without an Identification Card (As a Third Degree Felony).

[3] When San Nicolas was arrested and advised of his constitutional rights, he gave three versions of what transpired during the shooting incident to Guam Police Department Officer Matthew P. Cepeda. First, he stated that Borja, his "common law" wife, was standing outside of her vehicle after preparing rice when he saw her fall to the ground. Transcripts ("Tr.") at 166

(Jury Trial, Apr. 7, 2015). When he checked her, she was bleeding from the right side of her neck, prompting him to rush her to medics in Dededo. He denied owning any guns on that date.

[4] When questioned regarding 22 shell casings found on the ranch grounds, Cepeda testified that San Nicolas appeared frustrated and changed his story. In this second version, San Nicolas stated he asked Borja to cook rice, she prepared the rice, and he began shooting at stray dogs in their driveway. After shooting at the dogs, San Nicolas told Cepeda that the gun accidentally went off when placed on the table, hitting Borja. Cepeda read San Nicolas's written statement into evidence, which stated, "Me and my wife woke up cooking rice 10 a.m., shoot the dog, and then put the gun down on table. Then gun went off and hit her. I then rush her to the medic." *Id.* at 172.

[5] In yet a third account, San Nicolas admitted arguing with Borja about improperly cooked rice, prompting him to pick up a gun with the purpose of frightening her while she sat in the passenger side of their vehicle. He claimed the gun accidentally fired and hit her neck. After trying to help her on his own, he brought her to the Dededo Fire Station. Cepeda read another statement by San Nicolas into evidence, which stated, "I make a statement. I just wanted to scare her. She didn't hear me about the rice. I didn't mean it. I never wanted to hurt her." *Id.* at 172-73.

[6] The bullet in Borja's neck fractured her spinal cord, paralyzing her from the neck down. Borja contracted pneumonia due to being quadriplegic, which resulted in her death.

[7] After Borja succumbed to her injuries, a Grand Jury returned a Superseding Indictment against San Nicolas for Aggravated Murder (As a First Degree Felony), Family Violence (As a Third Degree Felony), and Possession of a Firearm Without an Identification Card (As a Third Degree Felony). The first two charges likewise included special allegations of Possession and

Use of a Deadly Weapon in the Commission of a Felony. A Second Superseding Indictment added two additional charges, intentional Murder and reckless Murder, both as first degree felonies. All charges, with the exception of Possession of a Firearm Without an Identification Card (As a Third Degree Felony), included special allegations of Possession and Use of a Deadly Weapon in the Commission of a Felony.

[8] A jury trial commenced April 7, 2015. Following the close of the People's case on the third day of trial, San Nicolas successfully moved for a judgment of acquittal on the aggravated murder charge, with the court finding insufficient evidence of premeditation.

[9] San Nicolas's counsel also moved to poll the jury regarding exposure to a newspaper article published by the PDN on April 8, 2015 (hereinafter, the "Article"), contending that it "contain[ed] inadmissible evidence that violate[d] Mr. San Nicolas' Sixth Amendment right to a fair trial and other rights." Record on Appeal ("RA"), tab 76 at 1-2 (Mot. to Poll Jury, Apr. 9, 2015); Tr. at 5 (Jury Trial, Apr. 9, 2015). San Nicolas's motion included a PDN website printout of the Article as an exhibit, with the banner headline "*Murder trial begins*." RA, tab 76 at 3-5, Ex. A (PDN Article, Apr. 9, 2015). The first few paragraphs of the Article summarized trial testimony and Borja's suffering until her death. The Article further referenced San Nicolas's methamphetamine addiction and stated that he was "a 'repeat offender' with a violent criminal history that spans at least 10 cases, according to the Superior Court of Guam records. Court documents show that San Nicolas has at least four prior cases involving allegations of family violence – all of which ended in a conviction." *Id.* The Article concluded with a paragraph stating, "He was on parole at the time of the shooting, court documents state." *Id.*

[10] The trial court denied the motion, stated it would not "poll the jury at th[at] time unless some other information is brought to the [court's] attention," indicated it could take judicial

notice of the fact the article existed, and decided to "continue with the trial anyway because [it could] always poll the jury at a later time." Tr. at 18-19 (Jury Trial, Apr. 9, 2015). San Nicolas's motion for judgment of acquittal following presentation of all evidence was also denied. The jury was instructed to avoid media reports regarding the proceedings each day of trial.

[11] In his case-in-chief, San Nicolas took the stand and provided extensive testimony regarding his drug use. He described the physical and mental effect methamphetamine had on him, including an initial high and motivated state followed by hallucinations and paranoia after days of going without sleep. On the date of the incident, he had been awake for five or six days on a drug binge.

[12] San Nicolas further testified that he had been convicted of methamphetamine use "[q]uite a few times[,]" that he pleaded guilty to possession of a Schedule II controlled substance in 2010, and that he had pleaded guilty to four counts of Third Degree Terrorizing and one count of Third Degree Family Violence in 2007. Tr. at 68, 104 (Jury Trial, Apr. 10, 2015). The 2007 terrorizing incident involved his neighbors, and the family violence involved him arguing with his son's mother while drunk and inflicting a knife wound upon himself. Borja was not involved in these incidents, but her stepfather acted as San Nicolas's attorney. Prior to this case, San Nicolas had not been charged with family violence against Borja.

[13] Borja's stepfather testified in rebuttal that he encountered San Nicolas in a holding cell on his way to talk to a client, and San Nicolas told him "I'm sorry I shot her." *Id.* at 166-67. In response, San Nicolas testified that he did not recall the conversation and that the conversation never took place.

[14] The jury returned guilty verdicts for all charges other than the charge of aggravated murder on which the court acquitted San Nicolas. Following the verdict, San Nicolas again moved for acquittal, and he also moved for a new trial based in part on the trial court's refusal to poll the jurors. Specifically, the Motion for a New Trial argued that this court's decision in *People v. Flores*, 2009 Guam 22, requires the trial court to poll the jury when the media publishes inadmissible "extraneous information" during the pendency of trial. RA, tab 98 at 2-3 (Mem. Supp. Mot. New Trial, Apr. 20, 2015).

[15] San Nicolas's motion to acquit and his motion for new trial were denied. The trial court reasoned that the content of the media release was not inherently prejudicial given San Nicolas's own account of his convictions:

> Under the standard outlined in *Flores*, prior to a mandated polling of the jury a court must first be presented with sufficient facts to support a finding of inherent prejudice. *Flores*, 2009 Guam 22 ¶¶ 99-101. Given the testimony introduced at trial by the Defendant relating to his past use of drugs and their effects upon him, the Court is not persuaded that the content of the media release posed sufficient prejudice to merit jury polling, or a new trial. *Id.*
>
> Defendant at trial dedicated a significant portion of his defense to the detailing [sic] his prior extensive drug possession, use and distribution. He also introduced evidence of the dissociative effect that the use of drugs had upon him. Defendant as well testified about as his [sic] prior three convictions for drugs, family violence and terrorizing. Given this testimony the Court is unable to find that that [sic] a media release possibly revealing seven additional charges and a violent history was inherently significantly prejudicial. *Id.*

RA, tab 109 at 6 (Dec. & Order, July 23, 2015).

[16] The trial court merged the intentional murder and reckless murder charges with the family violence charge, imposing an aggregate sentence of life in prison. Additionally, San Nicolas was sentenced to serve seventeen years for the special allegations and three years for the charge of possession of a firearm without an identification card. San Nicolas is eligible for parole upon serving 35 years in prison.

[17] Judgment was entered on September 1, 2015, and San Nicolas timely appealed. A corrected judgment was entered on April 19, 2016.

II. JURISDICTION

[18] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-244 (2016)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[19] "We review for an abuse of discretion the trial court's denial of [a] motion for a new trial based on mid-trial publicity." *Flores*, 2009 Guam 22 ¶ 87 (footnote omitted).

IV. ANALYSIS

A. Whether the Trial Court's Failure to Poll Jurors about Exposure to Mid-trial Publicity Violated San Nicolas's Right to a Fair Trial

[20] San Nicolas claims reversible error on the ground that the trial court improperly denied his requests to poll the jury regarding exposure to the Article. *See* Appellant's Br. at 8-9 (Nov. 20, 2015). In his view, the Article contained inherently prejudicial information regarding past convictions, which required the trial judge to adhere to the procedures set forth in *Flores*, 2009 Guam 22. *See* Appellant's Br. at 8-14. The People argue that polling was unnecessary in this case because the contents of the Article were not inherently prejudicial. *See* Appellee's Br. at 12 (Jan. 6, 2016). Specifically, they assert that the Article did not pose a risk of inadvertent exposure, the trial court's instructions to avoid media reports were sufficient, and that the contents of the Article were not necessarily inadmissible. *Id.* at 12, 15-22.

[21] "The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury." *Flores*, 2009 Guam 22 ¶ 89 (citing U.S. Const. amend. VI; *Turner v. Louisiana*,

379 U.S. 466, 472 n.10 (1965)). Thus, "[t]he jury's verdict must be based solely upon the evidence presented at trial, and not on extraneous information." *Id.* (citing *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961)). Accordingly, juror exposure to extraneous information implicates a defendant's constitutional right to a fair trial, and "a mistrial is required if the misconduct of the jury prejudiced the defendant to the extent that he or she did not receive a fair trial." *Id.* (citing *Dunlap v. People*, 173 P.3d 1054, 1091 (Col. 2007); *United States v. Berry*, 627 F.2d 193, 197 (9th Cir. 1980)).

1. Guam's approach to mid-trial publicity

[22] This court set forth the procedures to follow when addressing mid-trial publicity in *Flores*, 2009 Guam 22. To determine the appropriate approach for Guam regarding mid-trial publicity, we looked to *State v. Holly*, 201 P.3d 844 (N.M. 2009), and *Harper v. People*, 817 P.2d 77 (Colo. 1991). *See Flores*, 2009 Guam 22 ¶¶ 96, 101. We adopted the American Bar Association ("ABA") standard, which sets out a three-step process once the court is notified of potentially prejudicial mid-trial publicity, which includes the following steps:

> First, the trial court determines whether the publicity is inherently prejudicial. Second, if prejudicial, the court then polls the jury collectively to assess whether any of the jurors were actually exposed to the publicity. Third, the court individually examines the exposed jurors to ensure that the fairness of the trial has not been compromised. Ideally, jurors should be questioned as soon as possible after potential exposure to assess any prejudice.

Id. ¶ 95; *see also id.* ¶¶ 94, 101.

[23] As to the first step, we defined inherently prejudicial publicity as information that is "substantially adverse to a defendant, has not been presented to the trial jury in court, and is not properly admissible in the trial." *Id.* ¶ 109 (citations omitted). In assessing whether the mid-trial publicity is inherently prejudicial, the trial court should consider the nature of the publicity,

including "[(1)] the timing of the media coverage, [(2)] its possible effects on legal defenses, and [(3)] the character of the material disseminated . . . ." *Id.* ¶ 101 (footnote omitted). In particular, we looked to the sub-factors set forth in *Holly* and instructed the trial court to consider them "as a valid guide" in future cases. These sub-factors include:

> (1) whether the publicity goes beyond the record or contains information that would be inadmissible at trial, (2) how closely related the material is to matters at issue in the case, (3) the timing of the publication during trial, and (4) whether the material speculates on the guilt or innocence of the accused.

Id. ¶¶ 100-01 n.26 (quoting *Holly*, 201 P.3d at 849). Additionally, the trial court should assess the likelihood of juror exposure to the publicity, balancing the "prominence of the publicity" against the "nature and likely effectiveness of the trial judge's previous instructions on the matter . . . ." *Id.* ¶ 100 (quoting *Holly*, 201 P.3d at 849) (internal quotation marks omitted).

[24] Using the principles set forth in *Flores*, we must now assess whether the contents of the Article were inherently prejudicial.

2. Whether the contents of the Article were inherently prejudicial

[25] San Nicolas argues that "the trial court failed to properly analyze whether the information contained in the PDN article was inherently prejudicial." Appellant's Br. at 10. The People disagree that the contents of the Article were inherently prejudicial when compared to the facts of *Harper*, *Holly*, and *Flores*. Appellee's Br. at 15-22. The trial court ruled that it was "not persuaded that the content of the media release posed sufficient prejudice to merit jury polling, or a new trial." RA, tab 109 at 6 (Dec. & Order) (citation omitted). We now turn to the sub-factors set forth in *Flores*.

//

//

a. The timing of the media coverage

[26] In assessing prejudice, we consider the "timing of the media coverage . . . ." *Flores*, 2009 Guam 22 ¶ 101. This overlaps with the third *Holly* sub-factor, which considers "the timing of the publication during trial." *Id.* ¶ 100 (quoting *Holly*, 201 P.3d at 849).

[27] In *Flores*, "[t]he timing of the news report was critical, as it was shown on the third day of trial where the only witness who testified was [the witness's friend]. The jury, if exposed to the news report, could have presumed Flores' guilt even before hearing testimony from other witnesses." 2009 Guam 22 ¶ 114. This was particularly relevant in *Flores* because two competing theories of the victim's death, liver disease versus blunt force trauma, were presented to the jury and the publicity at issue portrayed the victim "as a fit and athletic person full of life . . . ." *Id.* ¶¶ 114-15. "Flores alerted the trial court of the news report immediately after it was shown and requested a voir dire of the jury during the trial and again when the verdict was returned." *Id.* ¶ 113. Similarly, the media coverage in *Harper* occurred on the second day of trial. 817 P.2d at 85. The defendant brought the issue to the court's attention the next morning. *Id.* at 79. The news report in *Holly* also appeared the second day of trial, but the court found the error harmless despite a finding of prejudice. 201 P.3d at 846-47, 852. The *Holly* court considered a two-day delay between publication of the objectionable publicity and Holly's notification of the publicity to the trial court in its assessment. *Id.* at 850-51.

[28] In this case, the Article was published following the People's presentation of evidence on the second day of trial. Tr. at 4, 17-19 (Jury Trial, Apr. 9, 2015). San Nicolas finished presenting his evidence on the fourth day of trial. Tr. at 188 (Jury Trial, Apr. 10, 2015). In San Nicolas's view, publicity on the night following the second day of trial increased the potential for juror exposure, and he stresses that he had not yet testified, nor had any evidence of prior

convictions been presented at that point in time. Appellant's Br. at 13. Furthermore, he believes the Article posed the risk of leading a juror who read the Article to "assume[] that San Nicolas was a violent person who had a history of family violence before [he] was even given the opportunity to present his case." *Id.* (citing *Flores*, 2009 Guam 22 ¶ 114).

[29] The People counter that the four-day trial "was a short one," and that "the jury's potential window of exposure was concomitantly brief as well." Appellee's Br. at 21. Both parties present compelling arguments. All cases discussed include publicity occurring relatively early in trial. The key difference in *Holly*, in which the appellate court did not reverse defendant's conviction, was the two-day delay in notifying the court. Yet, despite the delay, the *Holly* court still determined the material prejudicial. *See* 201 P.3d at 850-51.

[30] Unlike the defendant in *Holly*, San Nicolas requested polling the day following the Article's publication[1] and moved for a new trial on the issue post-verdict. *See* RA, tab 76 at 1-3 (Mot. to Poll Jury); Tr. at 191 (Jury Trial, Apr. 10, 2015); RA, tab 98 at 1-4 (Mem. Supp. Mot. New Trial). The timing of the Article, before San Nicolas testified, presented a risk that the jurors inferred that San Nicolas had a propensity for violence before they heard his defense. Thus, the timing factor weighs in favor of the court finding inherent prejudice.

b. The possible effects of the media coverage on legal defenses

[31] This court also examines the possible effects of mid-trial publicity on legal defenses. *See Flores*, 2009 Guam 22 ¶¶ 100-01 (citation omitted). San Nicolas takes issue with the fact that the Article contained information that had not been received by the jury—specifically, information regarding ten Superior Court cases including four family violence convictions. *See*

[1] The People joined San Nicolas's motion and requested that the jury be polled prior to jury deliberations. *See* RA, tab 102 at 5-6 (People's Opp'n Def.'s Mot. New Trial & Mot. J. Acquittal, Apr. 22, 2015); RA, tab 98 at 3 (Mem. Supp. Mot. New Trial).

Appellant's Br. at 11-12; Appellant's Reply Br. at 1-4 (Jan. 20, 2016). He analogizes the case to *Flores*, where the information contained in the mid-trial publicity—specifically, information regarding the victim's health—extended beyond merely summarizing witness trial testimony. *See Flores*, 2009 Guam 22 ¶ 105. Although San Nicolas concedes that the jury received evidence regarding a conviction for possession of a Schedule II substance, one for terrorizing, and one for family violence, he believes the provision stating "that San Nicolas had a criminal history spanning ten (10) cases" was particularly prejudicial. Appellant's Br. at 12; *see also* RA, tab 76 at 4, Ex. A (PDN Article) ("San Nicolas is a 'repeat offender' with a violent criminal history that spans at least 10 cases . . . .").

[32] The trial court found, given San Nicolas's testimony regarding his drug use, possession, distribution, family violence, and terrorizing, that it was unlikely "that a media release possibly revealing seven additional charges and a violent history was inherently significantly prejudicial." RA, tab 109 at 6 (Dec. & Order) (citation omitted). The trial court made this finding without any assessment of the *Flores* factors. *See id.*

[33] We disagree with the trial court's conclusion because San Nicolas's defense rested upon whether the shooting was accidental, which could have resulted in either an acquittal or mitigation to the lesser-included offense of manslaughter. Therefore, we determine the media coverage had a possible negative impact on his legal defense and weighs in favor of finding that the contents of the Article were inherently prejudicial.

c. The character of the material disseminated

[34] In *Flores*, we highlighted that "the character of the material disseminated" warrants consideration. 2009 Guam 22 ¶ 101 (footnote omitted). This overlaps with the second *Holly* sub-

factor, which looks to "how closely related the material is to matters at issue in the case . . . ." *Id.* ¶ 100 (quoting *Holly*, 201 P.3d at 849).

[35] San Nicolas believes that "[t]he information in the article was arranged in a manner which suggested that [he] was guilty of the charges he was facing at trial." Reply Br. at 2. The Article, in his view, implies he has a "propensity to commit acts of violence towards family members" and that he was guilty in this case due to his past violence. *Id.*

[36] The contents of the Article weigh in favor of a finding of prejudice. Like the facts presented in *Harper*, references to San Nicolas's prior family violence convictions involve the same type of offense at issue in the present case. *See* 817 P.2d at 85 (holding that an article that referenced the defendant's prior sexual assault conviction "had great potential for unfair prejudice" because it was "the same type of offense for which he was prosecuted in the present case"). It is distinguishable from the facts presented in *Holly*—which held that although the publicity was prejudicial, error was harmless—in that the material does not reference convictions arising from the same factual set of circumstances. *See* 201 P.3d at 847 (finding publicity at issue described how Holly recently pleaded guilty to racketeering and tampering with evidence charges stemming from same sequence of events as murder charges at issue in pending trial). However, the fact that the Article contained inadmissible information about San Nicolas's prior violence-related convictions, and that the information was discovered largely by the PDN's own research, weighs in favor of finding that the Article was inherently prejudicial.

d. Whether the publicity went beyond the record or contained information that would be inadmissible at trial

[37] San Nicolas testified regarding only one family violence conviction and objects to the Article's reference to "'*at least* four cases' involving allegations of family violence 'all of which

ended in conviction.'" Appellant's Br. at 12; *see also* RA, tab 76 at 4-5, Ex. A (PDN Article). In his view, the contents of the Article contained "information not presented at trial and implied that there may have been more family violence convictions or cases." Appellant's Br. at 12. Moreover, he feels that the language characterizing him as having a "violent criminal history," and the Article's reference to his parole status at the time of the shooting was prejudicial. Appellant's Br. at 12-13; *see also* RA, tab 76 at 4-5, Ex. A (PDN Article).

[38] The People counter that San Nicolas testified to "nearly everything that had been mentioned in the article," except his parole status. Appellee's Br. at 21. At the time of the Article's publication, the People also note, the officers who interviewed San Nicolas had already testified "that San Nicolas was a paranoid drug addict who had struck the victim on an earlier occasion and had argued with her that very day before shooting her and confessing to the police." *Id.* (citation omitted); *see also* Tr. at 169, 173 (Jury Trial, Apr. 7, 2015) (Cepeda testified about San Nicolas recounting his argument with Borja and his confession to shooting Borja); Tr. at 18-19, 101-02 (Jury Trial, Apr. 8, 2015) (Officer Orallo testified that he found white powder and drug paraphernalia at the scene of the crime; Francine Santos testified she witnessed San Nicolas hit Borja).

[39] Quoting language from *Frank v. Brookhart*, 877 F.2d 671 (8th Cir. 1989), the People urge that a mid-trial newspaper article is not inherently prejudicial when it "did not disclose any material which the jurors had not heard in the prosecutor's opening statement." Appellee's Br. at 21 (quoting *Frank*, 877 F.2d at 674) (internal quotation marks omitted). That language, however, related to the ruling of the Iowa District Court's "observ[ation]" of the Iowa state trial court's consideration of prejudice, and the *Frank* case itself still employed the "presumption" test

we rejected in *Flores*. *See Frank*, 877 F.2d at 674-75; *see also Flores*, 2009 Guam 22 ¶¶ 96-102 (adopting ABA test and rejecting "presumption" test).

[40] The People also cite *United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981), to support their argument that the mere "fact that certain information would be inadmissible at trial does not automatically make it inherently prejudicial." Appellee's Br. at 20 (citing *Porcaro*, 648 F.2d at 758). The articles at issue in *Porcaro* contained information regarding "the co-defendants' guilty pleas, the murder of one defendant, alleged underworld connections and references to co-defendants' prior convictions and arrests" that "would have been manifestly improper for the jury to consider as evidence." 648 F.2d at 758. As San Nicolas points out, however, *see* Reply Br. at 3-4, the remainder of the *Porcaro* paragraph with the above language concludes that "the publicity in question did not refer to appellant in a way that inherently impeded fair and impartial consideration of the evidence by the jury before whom he was tried. The fact that such articles were published during the trial, without more, is insufficient to warrant a presumption of prejudice." *Porcaro*, 648 F.2d at 758.

[41] Unlike *Porcaro*, the Article in this case specifically names San Nicolas. *See* RA, tab 76 at 4-5, Ex. A (PDN Article). Furthermore, it is particularly troubling that the Article contained inadmissible information acquired through the PDN's own research that was not part of the trial record.[2] Accordingly, because the publicity went beyond the record at the time of the Article's publication and contained inadmissible information, this factor weighs in favor of a finding the Article was inherently prejudicial.

[2] San Nicolas argued the day after the Article's publication that the Article was particularly damaging "because [PDN] actually did a records search. They pulled in prior convictions . . . ." Tr. at 18 (Jury Trial, Apr. 9, 2015). The trial court replied: "I know, but the point being is whether somebody read it or not." *Id.*

e. Whether the material within the Article speculated on the guilt or innocence of San Nicolas

[42] The Article did not speculate as to San Nicolas's guilt or innocence. *See* RA, tab 76 at 4-5, Ex. A (PDN Article); *see also* Appellee's Br. at 20. This is not a case like *Holly*, where the Article contained a statement by the prosecutor implicating the defendant. *See* 201 P.3d at 847. With the exception of this final factor, however, all other factors weigh in favor of a determination that the Article was prejudicial. This court therefore finds that the publication of the Article was inherently prejudicial to San Nicolas's defense in this matter.

3. Likelihood of juror exposure

[43] After analyzing whether the media exposure was inherently prejudicial, a trial court should next evaluate the likelihood of juror exposure to the prejudicial publicity, which includes an assessment of:

> (1) the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside materials, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material.

Flores, 2009 Guam 22 ¶ 100 (quoting *Holly*, 201 P.3d at 849). We further noted that "[i]t is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material altogether." *Id.* (quoting *Holly*, 201 P.3d at 849).

a. Prominence of the Article

[44] Both San Nicolas and the People present arguments related to the "prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media in the local community" concerning the likelihood of

juror exposure. *Flores*, 2009 Guam 22 ¶ 100; *see also* Appellant's Br. at 4-5, 13-14; Appellee's Br. at 19.

[45] Like the media publishers at issue in *Harper* and *Holly*, PDN is a local newspaper in a relatively small community and a prominent source of news in Guam. *See Harper*, 817 P.2d at 85; *Holly*, 201 P.3d at 850. The newspaper has both print edition and online editions, and the Article was published in both formats. *See infra* note 3.

[46] As to the conspicuousness of the story, the People compare the headline to *Holly*, in which the court determined the error was harmless. *See* Appellee's Br. at 19; *see also Holly*, 201 P.3d at 850-52. In the People's view, the fact that "[t]he word 'Trial' was emphasized in the reference to the jump line" would require jurors "to go out of [their] way to violate the judge's instruction to read it." Appellee's Br. at 19. The title of the Article was underwhelming, merely stating: "*Murder trial begins*." *See* RA, tab 76 at 4, Ex. A (PDN Article). This on its own, however, is not dispositive. The headlines of articles at issue in prior cases that were reversed were also relatively benign, including the headline in *Flores*, which read "*Best friend of murdered exotic dancer takes the stand*," *Flores*, 2009 Guam 22 ¶ 105, and the article in *Harper* that was entitled "*Trial begins in sexual assault case*[,]" *Harper*, 817 P.2d at 79. Rather, the title and arrangement in the *Holly* case was arguably the most egregious of the referenced cases—with a banner headline containing the defendant's surname and reading: "*Holly Pleads Guilty to Charges*"—even though the court ultimately sustained the defendant's conviction. 201 P.3d at 847, 850.

[47] The Article in question here was thirteen paragraphs long. *See* RA, tab 76 at 4-5, Ex. A (PDN Article). The eleventh through thirteenth paragraphs mention San Nicolas's prior convictions or criminal past. *Id.* This case is therefore like *Harper*, where the short article inside

the newspaper risked inadvertent exposure, because much of the contents appear on the fourth page. *Compare Harper*, 817 P.2d at 82, *with* Manny Cruz, *Murder Trial Begins*, Pacific Daily News, Apr. 8, 2015, at 1, 4.[3] Furthermore, the headline that appeared on the fourth page of the print edition read: "***Trial**: Defendant was on parole at time of shooting*." Manny Cruz, *Murder Trial Begins*, Pacific Daily News, Apr. 8, 2015, at 4.

[48] Taken together, the prominence of the Article and respected profile of the PDN in Guam weigh in favor of a finding that members of the jury were likely exposed to the unfairly prejudicial material.

b. The nature and likely efficacy of the trial court's instructions

[49] The trial court's instructions, their frequency, and their likely efficacy are also considered when assessing whether the material was inherently prejudicial. *See Flores*, 2009 Guam 22 ¶ 100 (quoting *Holly*, P.3d at 849). This consideration should be balanced against the prominence of the publicity. *See id.*

[50] In this case, the judge instructed the jury each day to avoid media coverage. On the first day of trial, the trial court instructed the jurors to avoid the media and warned them of likely impending publicity:

> Please make sure you avoid watching the news, reading newspapers or any stories about this. There was a reporter in here earlier this morning, so there may be some news coverage on it. So please make sure you avoid it.

Tr. at 210 (Jury Trial, Apr. 7, 2015). On the second day of trial, the court again instructed the jury:

[3] At trial, San Nicolas included a printout from the PDN's online edition rather than a copy of the Article found within the newspaper. Appellant's Br. at 5 n.2. San Nicolas requests that we take judicial notice of the print edition. *Id.* The People do not oppose, and spend a significant portion of their brief comparing the physical structure of the print article to *Harper*, *Holly*, and *Flores*. *See* Appellee's Br. at 19-20. The request is accordingly granted.

> Again, please avoid any press, reading any stories or watching any news reports, okay?
>
> . . . .
>
> Okay. So again, you guys know that -- just again, avoid reading any reports or watching the first 10 minutes of the news if they discuss the story, okay?

Tr. at 205-06 (Jury Trial, Apr. 8, 2015).[4] On the third day of trial, the trial court's cautionary instructions highlighted the fact that local media outlets had covered the trial daily:

> Number one, there has been press coverage every day. You'll remember my instructions that you are not to read any stories or watch any reports on the matter. Please make sure you follow those instructions and you continue to follow them.

Tr. at 98 (Jury Trial, Apr. 9, 2015). On the fourth day, the trial court's instructions again referenced the daily media coverage:

> You also have sworn to decide this case solely on the evidence presented and received in this courtroom. So again, you are under my continuing instructions to not do -- not watch or listen or read any news reports about the case. We know that there's been daily coverage, so you avoid that. You also have agreed not to do any independent investigation. So we've heard testimony regarding drug use, you've heard testimony regarding weapons. You are not to go on the internet and do any kind of research involving anything. And please keep off social media until you've been discharged by me.

Tr. at 189 (Jury Trial, Apr. 10, 2015).

[51] The trial court issued similar instructions in *Flores* and *Harper*, yet those cases were still reversed. *See Flores*, 2009 Guam 22 ¶¶ 103-04 (acknowledging that trial court instructed jury to avoid paper altogether, to ignore and walk away from anyone attempting to discuss case when excused for lunch the day the mid-trial publicity was released, and to avoid radio and "any news media reports on th[e] matter" when excused for the day); *Harper*, 817 P.2d at 87 (noting that jurors were instructed to "not read about the case in the newspapers or listen to radio or

[4] At this time San Nicolas's counsel highlighted that the media was "covering" the case. Tr. at 205 (Jury Trial, Apr. 8. 2015).

television broadcasts about the trial" and that trial court admonished them to "base [their] verdict solely on the evidence presented at trial").

[52] In *State v. Bey*, the Supreme Court of New Jersey noted that "the possibility that a nonsequestered juror might inadvertently observe a news article or headline or overhear a television or radio report is hardly remote." 548 A.2d 846, 865-66 (N.J. 1987) (citing *Smith v. Phillip*s, 455 U.S. 209, 217 (1982); *United States v. Perrotta*, 553 F.2d 247, 251 (1st Cir. 1977)). The court further posited that it was not "fanciful to suppose that in the context of such a trial, human nature might on occasion allow a juror's curiosity concerning press reports to get the better of his good sense." *Id.* at 865 (citing *United States v. Williams*, 568 F.2d 464, 468 (5th Cir. 1978); *United States v. Herring*, 568 F.2d 1099, 1103 (5th Cir. 1978)); *see also United States v. Trapnell*, 638 F.2d 1016, 1022 (7th Cir. 1980) (stating that "the news reports appeared in the same community where the trial was being held and thus may reasonably be believed to have come to the attention of jurors"). Thus, it is likely that the instructions were unable to shield the jury from inadvertent exposure in this case.

[53] Even though the issuance of jury instructions weigh against a finding of inherent prejudice, their existence is not determinative because this court has rejected the "rebuttable presumption" test in *Flores* and adopted the ABA standard for mid-trial publicity. *See* 2009 Guam 22 ¶¶ 96-102.

[54] We were cognizant in adopting the ABA standard that it might "impose a significant burden on the trial courts. However, in applying this standard, a trial court maintains a certain degree of discretion and will not be required to poll the jury on every occasion." *Id.* ¶ 102 (citing *Holly*, 201 P.3d at 850). However, "[w]here potentially prejudicial material, if heard, would

presumptively lead to prejudice, it is not within the court's discretion to refuse in some manner to inquire into a jury's exposure to the material." *Id.* ¶ 111.

[55] We conclude that the Article contained information that was inherently prejudicial, and the that trial court should have conducted a thorough analysis of the *Flores* factors relating to inherent prejudice as opposed to indicating that it needed "some other information" to be brought to its attention. Tr. at 18 (Jury Trial, Apr. 9, 2015). The trial court's reasoning appears in line with the "rebuttable presumption" test this court rejected in *Flores*. As in *Flores*, the trial court abused its discretion because, "[b]y declining to question the jurors" about the potential exposure to that article, "the trial court failed 'to lay open the extent of the infection.'" *Flores*, 2009 Guam 22 ¶ 111. Once alerted of the prejudicial material during trial, the trial court should have conducted a general *voir dire* of the jurors. *See id.* Thus, the trial court abused its discretion.

4. Whether the error was harmless

[56] As San Nicolas has established that the Article was inherently prejudicial, and that the trial court abused its discretion in failing to poll the jury, we must now determine whether that error was harmless. *See id.* ¶ 112. San Nicolas argues that the Article undercut his defense that he did not intend to harm or kill Borja. Appellant's Br. at 15; Tr. at 14 (Jury Trial, Apr. 7, 2015) (telling the jury during opening statements that the shooting was accidental rather than intentional or reckless and discussing intoxication at time of the shooting). The People suggest that even if the Article was prejudicial, the error was harmless. *See* Appellee's Br. at 22-25.

[57] In *Flores*, we set forth the harmless error test for mid-trial publicity cases as "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 2009 Guam 22 ¶ 112 (citations and internal quotation marks omitted). The defendant has "[t]he initial burden of demonstrating prejudice," but "[o]nce this burden is satisfied, the

burden shifts to the Government to show the error was harmless beyond a reasonable doubt." *Id.* (citations omitted). Even though "a defendant need not present evidence of actual juror exposure when applying the three-step process, the overall burden of persuasion remains with the defendant to show the material was inherently prejudicial, which in turn gives rise to an inference of prejudice sufficient to require a voir dire." *Id.* (citation omitted). "[T]he strength of the prosecution's case" is considered as a factor within the harmless error analysis, but it must be emphasized that "the central focus of the inquiry is whether there is a reasonable possibility the prejudicial material might have affected the jury's verdict." *Holly*, 201 P.3d at 851 (alteration in original) (citation omitted).

[58] We did not find the error in *Flores* harmless because the cause of the victim's death was critical in light of conflicting expert witness testimony. *See Flores*, 2009 Guam 22 ¶ 115. If jurors were exposed to the news report regarding the victim's healthy lifestyle, they "may have been persuaded by the testimony of Dr. Espinola that blunt force trauma caused [the victim's] death and not believed the defense theory and testimony of Dr. Cohen that [the victim's] drinking habits and bad liver caused her organs to shut down." *Id.* Accordingly, if "the jurors were exposed to the news report describing Flores as a murderer and portraying [the victim] as a fit and athletic person full of life, we believe this prejudicial material potentially could have contributed to the verdict." *Id.* ¶ 114.

[59] We noted that determining the effect that any exposure may have had on the verdict would be speculative "[b]ecause there is no record that any of the prejudicial information actually reached the jury." *Id.* ¶ 115. However, because "Flores' requests to question the jury even after the verdict was returned were denied, he had no other assurances that he was not

denied a fair trial." *Id.* Thus, we held "that the error was not harmless and . . . reverse[d] the judgment." *Id.*

[60] Likewise, the potential for taint due to exposure in *Harper* was exacerbated by equivocal evidence. *See Harper*, 817 P.2d at 85. The victim could not identify Harper as the perpetrator, and there was conflicting evidence regarding whether others had access to the victim. *Id.* Faced with these facts, the court concluded that "[t]he trial court needed to evaluate these factual circumstances to determine the likelihood that the jury had been exposed to this significantly prejudicial material" and "some direct inquiry of the jury was necessary." *Id.* at 86 (citations omitted). "The trial court's complete refusal to inquire about possible contamination constituted reversible error." *Id.* (citing *Gov't of V.I. v. Dowling*, 814 F.2d 134, 141 (3d Cir. 1987); *United States v. Williams*, 809 F.2d 1072, 1093 (5th Cir. 1987), *cert denied*, 484 U.S. 196 (1987); *Bey*, 548 A.2d at 870). The case was reversed and remanded for a new trial. *Id.* at 87.

[61] Here, San Nicolas made several requests to the trial court to poll the jury, but all were denied. Like the defendant in *Flores*, San Nicolas "alerted the trial court to the news article immediately after it was published and requested a voir dire of the jury." Appellant's Br. at 15; *see also* RA, tab 76 at 1 (Mot. to Poll Jury); Tr. at 18 (Jury Trial, Apr. 9, 2015). Both San Nicolas and the People requested the trial court to poll the jurors before issuing jury instructions. *See* Appellant's Br. at 10-11; RA, tab 102 at 5-6 (People's Opp'n Def.'s Mot. New Trial & Mot. J. Acquittal). After the jury returned its verdicts, San Nicolas moved for a new trial, in part based on the trial court's refusal to poll the jurors, but the motion was denied. RA, tab 98 at 2-4 (Mem. Supp. Mot. New Trial).

[62] San Nicolas believes the trial court's failure to poll the jury contributed to the verdict because "[o]ne of the key issues in this case was whether San Nicolas intended to harm or kill

the victim." Appellant's Br. at 15; Tr. at 14 (Jury Trial, Apr. 7, 2015). Because the PDN Article referred to San Nicolas as a "repeat offender," who had a "violent criminal history" with "at least" four family violence cases, this Article could have created an inference that he had a propensity for violence. RA, tab 76 at 4-5, Ex. A (PDN Article). San Nicolas stresses that exposure to the Article before his testimony regarding his relationship with the victim could have created an inference in the juror's minds that the shooting was not accidental prior to hearing his defense. *See* Appellant's Br. at 15. He contends that because he established prejudice, the burden now shifts to the People to show the error was harmless beyond a reasonable doubt. *See* Reply Br. at 4-5 (citing *Flores*, 2009 Guam 22 ¶ 112).

[63] The People, on the other hand, compare this case to *Holly*, and argue that any error is harmless despite a finding of inherent prejudice. *See* Appellee's Br. at 22-24. In applying the ABA factors, the *Holly* court determined that the article in question was "precisely the type of mid-trial publicity that merits an inference of prejudice." *Holly*, 201 P.3d at 850. Ultimately, however, that error was determined harmless. *See id.* at 851-52. The Supreme Court of New Mexico suggested Holly should have requested a juror poll following the verdict to determine whether the article was a contributing factor. *Id.* at 851. The weight of incriminating evidence, including forensic evidence linking Holly's gun to the shooting, eyewitness accounts identifying Holly as the shooter, and witness testimony that Holly acknowledged he was the shooter pointed to the defendant's guilt. *Id.* at 851-52.

[64] The People stress that the evidence in this case supported San Nicolas's conviction as in *Holly*. *See* Appellee's Br. at 24-25. The strength of the prosecution's case, however, is considered as a factor in a mid-trial publicity harmless error analysis but is not dispositive. *See Holly*, 201 P.3d at 851. Furthermore, unlike *Holly*, there is no eyewitness account that can defeat

San Nicolas's defense that he did not intend to harm or kill the victim, and that the shooting was accidental.

[65] Because the Article was released prior to San Nicolas's testimonial defense, we cannot say beyond a reasonable doubt that the jury would convict him of intentional murder, reckless murder, and/or family violence. We also cannot say beyond a reasonable doubt that San Nicolas would not have been acquitted entirely, or that he would have been convicted of the lesser included offense of manslaughter instead of murder, if the jury believed that the shooting was accidental. On the other hand, there is no reasonable doubt that San Nicolas was guilty of the charge of Possession of a Firearm Without an Identification Card (As a Third Degree Felony), as San Nicolas expressly testified that he was (a) in possession of a firearm and (b) did not have an appropriate identification card. *See* Tr. at 104-07 (Jury Trial, Apr. 10, 2015); *see also* 10 GCA §§ 60106, 60121(e) (2005). The PDN Article could not have contributed to the jury verdict on this count when San Nicolas's own admissions on these topics were so clear. Therefore, we determine the error was not harmless and accordingly reverse the judgment for all convictions, with the exception of Possession of a Firearm Without an Identification Card (As a Third Degree Felony) which we affirm.

V. CONCLUSION

[66] We conclude that the trial court abused its discretion in failing to question the jurors about the inherently prejudicial mid-trial publicity, and we cannot say that error was harmless beyond a reasonable doubt. For the foregoing reasons, we **AFFIRM** the judgment of conviction with respect to the one count of Possession of a Firearm Without an Identification Card (As a Third Degree Felony); **VACATE** the judgment of conviction and the corresponding sentences with respect to the one count of intentional Murder (As a First Degree Felony), the one count of

reckless Murder (As a First Degree Felony), and the one count of Family Violence (As a Third Degree Felony); and **REMAND** for a new trial.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice