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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ROLAND VINCENT BORJA,
Defendant-Appellant.

Supreme Court Case No. CRA16-008
Superior Court Case No. CF0068-15

OPINION

Cite as: 2017 Guam 20

Appeal from the Superior Court of Guam
Argued and submitted on February 23, 2017
Dededo, Guam

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

CARBULLIDO, J:

[1] Defendant-Appellant Roland Vincent Borja was convicted of First Degree Criminal Sexual Conduct ("CSC") (As a First Degree Felony), two counts of Second Degree CSC (As a First Degree Felony), and Child Abuse (As a Misdemeanor). Borja appealed, presenting several arguments. First, he argues he received ineffective assistance of counsel as a result of his trial counsel's failure to object to the admission of improper character evidence and failure to request a limiting instruction once the evidence was admitted. Borja alleges his trial counsel should have objected on the grounds that the prosecution failed to provide notice of the evidence pursuant to Guam Rule of Evidence ("GRE") 404(b) and the danger of unfair prejudice outweighed the evidence's probative value and therefore should have been excluded under GRE 403. Second, Borja argues the trial court improperly replaced a juror with an alternate juror because it did so after the jury retired to consider its verdict. Finally, Borja argues Plaintiff-Appellee People of Guam (the "People") failed to provide advance disclosure of prior sexual conduct evidence, in violation of GRE 413(b), but we find he has conceded this issue as discussed below.

[2] For the reasons stated herein, we affirm the trial court's judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] An officer of the Guam Police Department ("GPD") responded to a sexual assault complaint concerning a minor, T.A.B. Between 2014 and 2015, T.A.B., who was then under fourteen years old, lived with her mother, her mother's boyfriend, her older sister L.B., L.B.'s three children, and her older brother S.B., in a two-bedroom apartment. Borja was a regular overnight guest at their home.

[4] The family's regular sleeping arrangement was for the mother and mother's boyfriend to sleep in one room, while T.A.B., L.B., L.B.'s children, and S.B. slept in the living room. Borja would also sleep in the living room when he stayed overnight. S.B. occasionally slept on a mattress in a second bedroom that was used for storage. The officer who visited the home reported this room contained garbage, open alcohol and food containers, and was in an unsanitary condition, as was the rest of the apartment.

[5] In opening arguments and through questioning, defense counsel implicated T.A.B. was subjected to a substandard home environment as a result of her living conditions, her mother and sister's possible prostitution activities, her forced absence from school, and her responsibility to care for L.B.'s three children. The defense presented this picture to support the theory that T.A.B. lied about the assault to draw attention to her situation, hoping it would get her removed from the home.

[6] L.B. recalled the night of the assault, explaining that she did not notice anything out of the ordinary about T.A.B. She discussed various aspects of their lives, including the family's living and sleeping arrangements; T.A.B.'s extended absence from school; T.A.B.'s role in caring for her kids; and various male visitors to the household. Of particular relevance to Borja's arguments on appeal, L.B. also testified that, prior to the night of the assault, she engaged in sexual intercourse with Borja on the same couch that T.A.B. identified as the couch where the assault took place. According to L.B., Borja told her that he would stop providing her with food and other necessities if she did not have sex with him. This occurred in the middle of the night while her three children were asleep on the bed beside the couch and her mother and her mother's boyfriend were asleep in the bedroom.

[7] T.A.B. also gave lengthy testimony, including recalling the assault and identifying Borja as the perpetrator. She recalled the assault took place in the middle of the night on a brown couch in the living room, while several family members were at home sleeping. T.A.B. testified Borja left the apartment after the assault. On cross-examination, the defense elicited certain seeming inconsistencies in T.A.B.'s testimony. The defense also asked questions regarding T.A.B.'s feelings about her home life in general, including whether she wanted to watch L.B.'s children "all the time," why she did not go to school for two years, and the period when her family lived in a motel. Transcript ("Tr.") at 69-73 (Trial, Apr. 26, 2016).

[8] Multiple witnesses testified, in addition to T.A.B. and L.B. These included: T.A.B.'s brother, S.B.; two GPD officers; a serologist in the GPD Forensic Science Division who tested the substances from the couch covers for semen and reported the confirmatory test results came back negative, offering various explanations for that result; an FBI forensic analyst who stated that the DNA testing of the couch covers came back inconclusive; the program manager at Healing Hearts Crisis Center who conducted the intake of T.A.B.'s case; two of L.B.'s friends, who were also neighbors, to whom T.A.B. confided about the assault; and T.A.B.'s judicial therapist.

[9] Following the two days of testimony, both parties rested their cases. The parties returned the following morning for jury instructions. Defense counsel did not have any objections to the instructions and did not request any limiting instructions as to L.B.'s testimony regarding her sexual encounter with Borja that took place on the same couch where T.A.B. was assaulted. In closing, the prosecution referenced L.B.'s encounter with Borja as a means of explaining how sexual intercourse could occur undetected in a small room with other people sleeping nearby. The defense closed by highlighting inconsistencies in the evidence and questioning T.A.B.'s

credibility, on the theory that she was motivated to lie as a means of escaping her home life. During closing, the defense also specifically referred to L.B.'s sexual intercourse with Borja, as an alternative explanation for the semen and blood found on the couch where the assault occurred.

[10] After reading instructions to the jury, the judge told the jury, "You shall now retire . . . ." Tr. at 56 (Closing Args., Jury Instrs., Apr. 27, 2016). Shortly thereafter he realized T.A.B.'s date of birth was omitted from the instructions as read. He called a bench conference to explain the matter to counsel. After the bench conference, the judge informed the jury of T.A.B.'s date of birth. The court then gave the jurors a "smoke break" and stated it would fix the jury instructions and put together the exhibits before the jury began deliberations. *Id.* at 58. The jury was then excused.

[11] During the break, the court received a note from a juror regarding his inability to write in English and his difficulty understanding English. The juror was called in and questioned by the court with counsel present. After discussion with counsel, the court decided to excuse the juror and explicitly clarified in response to counsel's questioning that no deliberations had taken place. Defense counsel objected, arguing that the juror was competent, but did not otherwise object to the procedural timing employed by the court in substituting the juror with an alternate juror. The jurors were then given final instructions to retire to the jury room and were told they would be given the "exhibits and [their] notebooks so that [they] can begin [their] deliberations." *Id.* at 76-77. The jury returned a verdict, finding Borja guilty on all charges. Tr. at 3-4 (Trial, Apr. 28, 2016). A judgment was entered, and Borja timely appealed.

II. JURISDICTION

[12] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[13] Ineffective assistance of counsel claims are reviewed *de novo*. *People v. Katzuta*, 2016 Guam 25 ¶ 19 (citing *People v. Meseral*, 2014 Guam 13 ¶ 13). The court will review such claims where the record is sufficiently complete to make a proper finding. *People v. Leon Guerrero*, 2001 Guam 19 ¶ 12 (citing *People v. Root*, 1999 Guam 25 ¶ 14).

[14] Although Borja's trial counsel objected to the recusal of the replaced juror generally, he did not object at trial to the timing of the court's replacement of the excused juror, which is the specific issue that Borja argues on appeal. *See* Tr. at 58-77 (Closing Args., Jury Instrs.); Appellant's Br. at 8-10 (Nov. 21, 2016) (arguing the alternate jurors should have been dismissed because the jury had "retired"); Reply Br. at 6-7 (Jan. 12, 2017) (arguing the jury had "retired" within the meaning of 8 GCA § 85.45). Issues not raised by defendant at trial are reviewed for plain error. *Katzuta*, 2016 Guam 25 ¶ 15 (citation omitted). Plain error is error that is clear or obvious under current law and so affects the defendant's substantial rights such that reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.* Under the plain error standard, the defendant bears the burden of demonstrating that reversal is warranted. *Id.* (citation omitted).

IV. ANALYSIS

A. Whether the Failure to Object to Improper Character Evidence or Request a Limiting Instruction Amounted to Ineffective Assistance of Counsel

[15] To bring a successful claim of ineffective assistance of counsel, a defendant must demonstrate two elements: (1) that counsel's performance was deficient and (2) that this deficiency prejudiced his or her defense. *People v. Quintanilla*, 1998 Guam 17 ¶ 8 (adopting the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The benchmark for judging an ineffective assistance claim is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Although an ineffective assistance claim is better heard under a writ of habeas corpus because it usually requires an evidentiary inquiry beyond the record, a court may hear an ineffective assistance claim directly on appeal where the record is sufficiently complete to make a proper finding. *E.g.*, *People v. Ueki*, 1999 Guam 4 ¶ 5.

[16] To establish the first element of deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Quintanilla*, 1998 Guam 17 ¶ 9 (quoting *Strickland*, 466 U.S. at 687). We review the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* (quoting *Strickland*, 466 U.S. at 690). Considering the totality of the circumstances, the court must determine whether counsel's conduct was "outside the wide range of professionally competent assistance." *Id.* (quoting *Strickland*, 466 U.S. at 690). The court must keep in mind that counsel's function "is to make the adversarial testing process work in the particular case," and we give deference to defense counsel's strategic decisions by "strongly presuming" counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (quoting *Strickland*, 466 U.S. at 690); *see also United States v. Snyder*, 872 F.2d 1351, 1358 (7th Cir. 1989).

[17] In cases involving the specific question of counsel's failure to object to improper character evidence, some courts have found deficient performance where the evidence is irrelevant or unfairly prejudicial. *E.g.*, *Hall v. State*, 161 S.W.3d 142, 154 (Tex. App. 2005). However, courts have also found a failure to object can be a matter of sound trial strategy. *See, e.g.*, *Meseral*, 2014 Guam 13 ¶ 52 (no deficiency for failure to repeatedly object when objection already made); *Snyder*, 872 F.2d at 1358 (no deficiency where failure to object was for legitimate reason and objection unlikely to be sustained); *Graves v. State*, 994 S.W.2d 238, 248 (Tex. App. 1999) (no deficiency where objection would have drawn attention to damaging statement).

[18] To demonstrate the second element of prejudice, the defendant must establish that there is a reasonable probability the result of the proceeding would have been different but for counsel's errors. *Quintanilla*, 1998 Guam 17 ¶ 15 (citing *Strickland*, 466 U.S. at 694). For criminal cases, the standard is whether there is a reasonable probability that, but for the errors, the fact-finder would have had a reasonable doubt as to the defendant's guilt. *Id.* (citing *Strickland*, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

[19] As a threshold matter, we find the record is sufficiently complete that we may hear Borja's ineffective assistance claim directly on appeal. *See Ueki*, 1999 Guam 4 ¶ 5. We need to find only one element lacking to dispose of the claim. *Strickland*, 466 U.S. at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). *Arguendo*, we nevertheless address each element of

Borja's ineffective assistance claims related to his trial counsel's failure to object to specific testimony and the failure to request a limiting instruction regarding such testimony.

1. Failure to object to improper character evidence

[20] Here, Borja takes issue with L.B.'s testimony that she had intercourse with Borja on the same couch where the assault occurred because Borja threatened to stop providing "food and stuff." Appellant's Br. at 12-13. Borja argues his trial counsel rendered ineffective assistance by failing to object to L.B.'s testimony on two grounds: "first, that the Government failed to provide the requisite notice under GRE 404(b); and second, that the evidence was prejudicial and would mislead the jury under GRE 403." Reply Br. at 2. The People contend the decision not to object was strategic because L.B.'s testimony supported the defense's theory that T.A.B. lied about the assault in order to be removed from the home. Appellee's Br. at 20-21, 23-25 (Dec. 15, 2016). Because Borja asserts his trial counsel should have objected on two separate grounds—first, on the basis of GRE 404(b) and second, on the basis of GRE 403—we address each of these evidentiary grounds for objection in turn.

a. Failure to object on the basis that the People failed to provide notice under GRE 404(b)

i. Deficient performance

[21] Here, Borja argues the People failed to provide notice of the disputed evidence as required by GRE 404(b). Reply Br. at 2-3. Rule 404(b), however, only requires notice "upon request by the accused." GRE 404(b). There is nothing in the record to show that Borja made such a request. But, even if Borja's counsel had objected to the People's failure to give notice, it is highly unlikely it would have been sustained on this basis alone. So, we address Borja's broader argument that the evidence was inadmissible character evidence of other bad acts under GRE 404(b).

[22] Decisions not to object can be sound trial strategy. *Meseral*, 2014 Guam 13 ¶ 52 (citing *People v. Moses*, 2007 Guam 5 ¶ 43); *Snyder*, 872 F.2d at 1358. Counsel's decision not to object to L.B.'s testimony was based at least in part on the legitimate need for the evidence to support the defense's core theory. Borja acknowledges as much in his briefing. *See* Appellant's Br. at 12-13; Reply Br. at 8. However, he parses his argument further by asserting that at no time did the defense's theory allude to any force or coercion by Borja in his sexual interaction with L.B.—in other words, he takes issue with her specific statement that he said if she did not have sex with him, he would stop providing "food and stuff." Appellant's Br. at 13; *see also* Tr. at 124-25 (Trial, Apr. 25, 2016). On appeal, Borja similarly maintains it was deficient performance—and not strategy—for his counsel to fail to object to this portion of her testimony.[1]

[23] In *Snyder*, the Seventh Circuit rejected an ineffective assistance claim that was similarly grounded on a failure to object to evidence submitted in alleged violation of Rule 404(b) of the Federal Rules of Evidence ("FRE")[2] and a failure to request a limiting instruction once the evidence was admitted. 872 F.2d at 1358. During the trial, the government introduced evidence from co-conspirators and witnesses regarding Snyder's activities, without any objection from the defense. *Id.* at 1353. The *Snyder* court held that while "*never* objecting to improper questions may constitute ineffective assistance," there are also legitimate grounds for not objecting, including the belief that a witness's answer will be helpful or the possibility that frequent objecting may irritate the jury or imply the defendant is hiding the truth. *Id.* at 1358. The *Snyder* court held the timing and decisions of counsel's objections could reasonably be viewed as a

[1] We note that Borja is effectively raising the same argument made by his trial counsel, who filed a post-verdict motion for new trial on the ground that his failure to object to the pertinent portion of L.B.'s testimony constituted ineffective assistance. The motion was denied.

[2] "Generally, Guam courts view federal caselaw concerning the Federal Rules of Evidence ('FRE') as persuasive, given the similarities between the GRE and the FRE." *People v. Roten*, 2012 Guam 3 ¶ 16 (citing *People v. Jesus*, 2009 Guam 2 ¶ 32 n.8).

matter of trial strategy and the failure to object to FRE 404(b) evidence was insignificant where it was unlikely the objection would have been sustained. *Id.*

[24] For the first element—similarly to the court in *Snyder*—we find that Borja's assistance cannot reasonably be characterized as deficient. Any possible objection as to the *motivation* behind L.B.'s sexual encounter with Borja—after she already testified as to its *occurrence*—could have created a number of speculative thoughts or irritations in the minds of jurors that Borja's defense counsel reasonably wished to avoid. *Cf. Snyder*, 872 F.2d at 1358. Therefore, the failure to object at trial did not constitute deficient performance, and, considering the totality of the circumstances, Borja's trial counsel's conduct was not outside the range of professionally competent assistance.

ii. Prejudice

[25] Assuming, *arguendo*, that trial counsel's failure to object were deficient, we nonetheless fail to see how the second element of prejudice is satisfied. As noted above, to demonstrate prejudice by counsel's deficient performance, Borja must establish that there is a reasonable probability that, but for counsel's errors, the jury would have had a reasonable doubt as to his guilt. *See Quintanilla*, 1998 Guam 17 ¶ 15 (citing *Strickland*, 466 U.S. at 694, 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). Borja contends his counsel's failure to object was prejudicial because it caused the jury to consider improper propensity evidence. Appellant's Br. at 13; Reply Br. at 5, 9. He contends "the only inculpatory evidence were the statements and testimony of T.A.B. . . . [which] was drastically inconsistent with other evidence and testimony." Appellant's Br. at 13. He asserts "L.B.'s testimony was classic 'bad man' evidence that Borja

had a propensity for sexually assaulting women and the jury was essentially permitted to consider the propensity evidence as substantive evidence." Reply Br. at 5.

[26] Notwithstanding the inconsistencies in the evidence identified by Borja, we do not agree that there is a reasonable probability that, but for counsel's failure to object to L.B.'s testimony, the jury would have had a reasonable doubt as to Borja's guilt. The key evidence against Borja was T.A.B.'s testimony, which was detailed and lengthy. She testified with specificity as to Borja's actions during and after the assault, the location and time of the assault, the general conditions of the apartment at the time, including the individuals who were home, what she did afterwards, and the two neighbors she confided in afterwards. *See* Tr. at 38-56 (Trial, Apr. 26, 2016). These two neighbors testified in detail as to T.A.B.'s demeanor after the assault and what T.A.B. told them about it. Tr. at 148-55, 160-65 (Trial, Apr. 25, 2016). In light of this evidence, Borja has not met his burden of proving a reasonable probability that absent L.B.'s statement explaining why she had intercourse with Borja, the jury would have had a reasonable doubt as to his guilt. The evidence independent of L.B.'s statement was sufficient to support Borja's conviction. *See, e.g.*, *Leon Guerrero*, 2001 Guam 19 ¶ 18; *Musladin v. Lamarque*, 555 F.3d 830, 849 (9th Cir. 2009) (citing *Strickland*, 466 U.S. at 694); *cf. People v. Wusstig*, 2015 Guam 21 ¶ 26 (finding sufficient evidence to establish guilt notwithstanding inconsistencies in the evidence). Therefore, Borja fails to demonstrate how counsel's conduct caused prejudice to his defense.

[27] We find Borja fails to establish either of the two elements required for a claim of ineffective assistance. He does not establish deficient performance based on the failure to object to the admission of L.B.'s testimony on the grounds that the People failed to provide notice under GRE 404(b), because it does not appear from the record that he requested such 404(b)

evidence, and, further, the decision not to object can be characterized as sound trial strategy. Nor does he establish prejudice showing a reasonable probability that but for the admitted testimony, the result would have been different.

b. Failure to object on the basis of GRE 403

[28] Borja also argues, for the first time in his Reply Brief, that his trial counsel's failure to object to L.B.'s testimony on the basis of GRE 403 amounted to ineffective assistance. Rule 403 prohibits admission of relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice." GRE 403. Issues raised for the first time in a reply brief are deemed waived unless we decide to review them in the exercise of our discretion. *Estate of Concepcion v. Siguenza*, 2003 Guam 12 ¶¶ 10-11. Borja's argument is therefore waived based on this procedural defect, and we elect under the circumstances not to exercise our discretion to review it.

2. Failure to request a limiting instruction

[29] Borja also asserts the failure to request a limiting instruction regarding L.B.'s testimony regarding her sexual encounter with Borja constitutes ineffective assistance. Appellant's Br. at 14; Reply Br. at 5. The issuance of a limiting instruction can cure the potential unfair prejudice that might otherwise arise from the admission of 404(b) evidence. *See People v. Evaristo*, 1999 Guam 22 ¶ 17; *Snyder*, 872 F.2d at 1358 (holding any prejudice that might have resulted from failure to request limiting instructions was cured by the court giving limiting instructions anyway); *United States v. Pittman*, 319 F.3d 1010, 1012 (7th Cir. 2003) (finding any risk jury would have considered prior bad acts to infer propensity was lessened by limiting instruction).

a. Deficient performance

[30] The decision not to request a limiting instruction is generally within the acceptable range

of strategic litigation tactics aimed at mitigating damaging evidence. *E.g.*, *Musladin*, 555 F.3d at 846 (citing *United States v. Gregory*, 74 F.3d 819, 823 (7th Cir. 1996)). The Constitution, in general, does not *require* counsel to request a limiting instruction any time one can be given because counsel may reasonably conclude that such request may draw unwanted attention to a defendant's prior bad acts. *Id.* (citing *Albrecht v. Horn*, 485 F.3d 103, 127 (3d Cir. 2007)). Here, Borja's failure to request a limiting instruction is within the acceptable range of strategic litigation tactics, because doing so may have drawn unwanted attention to Borja's sexual interaction with L.B. In this particular instance "the decision not to request a limiting instruction is solidly within the accepted range of strategic tactics employed" by counsel and it was "perfectly rational to decide not to draw further attention" to the pertinent evidence. *See Gregory*, 74 F.3d at 823. By contrast, deficient performance has been found where counsel fails to request a limiting instruction where, in closing arguments, the *prosecution* directly draws the jury's attention to the damaging evidence and the jury is invited to make the precise inference the limiting instruction would have forbidden. *E.g.*, *Musladin*, 555 F.3d at 846-47.

[31] In *Musladin*, the defendant was convicted of premeditated murder. The damaging testimony came from a witness who was told by the defendant's three-year-old son that defendant said he "was going to shoot [the victim] with [his gun]." *Id.* at 845. This testimony was a minor portion of an eleven-day trial, and the court noted that the decision not to request a limiting instruction at the time this statement was admitted may have been reasonable trial strategy. *Id.* at 846. But the court held that the "reasonable strategic basis . . . vanished when, during closing arguments, the prosecutor pointed to [the] statements as uncontroverted evidence of premeditation." *Id.* Thus, "[t]he jury's attention was directly drawn to the evidence, so a limiting instruction did not risk highlighting evidence the jury might have forgotten. More

significantly, the jury was invited to draw the precise inference—that [the son's] statement was true—that a limiting instruction would have prohibited." *Id.*

[32] Concerning the failure to request a limiting instruction, *Musladin* provides a useful counterexample to the present case. Here, after eliciting the disputed testimony from L.B. on direct examination, Tr. at 124-25 (Trial, Apr. 25, 2016), the prosecution did not again broach the topic during the evidentiary phase of trial. The prosecution's closing arguments did *not* specifically draw attention to Borja's threat to L.B. or invite the jury to draw the inference that because of his prior sexual interaction with L.B., Borja was the type of person who would rape T.A.B.—in fact, the prosecution limited its reference to L.B.'s testimony solely to explaining how it was possible to have sex undetected in a small living room with several people home. Tr. at 22-23 (Closing Args., Jury Instrs.). Not once in closing did the prosecution imply that L.B.'s intercourse with Borja was coerced. *See id.* Therefore, distinguishable from *Musladin*, here the failure to request a limiting instruction does not amount to deficient performance because the jury's attention was never drawn to L.B.'s explanation for *why* she had sex with Borja, and they were never invited to draw any inferences therefrom.

b. Prejudice

[33] Assuming, *arguendo*, Borja established deficient performance, then he must still establish the element of prejudice—that is, but for the failure to request a limiting instruction, the outcome would have been different. *Quintanilla*, 1998 Guam 17 ¶ 15 (citing *Strickland*, 466 U.S. at 694). The standard is whether there is a reasonable probability that, but for the errors, the jury would have had a reasonable doubt as to defendant's guilt. *See id.* (citing *Strickland*, 466 U.S. at 695).

[34] Borja's prejudice argument on this point is essentially identical to his prejudice argument regarding the failure to object to improper character evidence and is similarly flawed. *See* Part

IV.A.1.a.ii, *supra*. Even if there were a limiting instruction, the presence of other credible evidence undermines any claim that there was "a reasonable probability that, absent the errors," the jury "would have had a reasonable doubt respecting guilt." *See id*. The court in *Musladin* similarly held that, even though the defendant established deficient performance, he had failed to establish prejudice where there was "strong and independent evidence" that supported the conclusion that there was no "reasonable probability that . . . the result of the proceeding would have been different." 555 F.3d at 849 (citing *Strickland*, 466 U.S. at 694). For similar reasons, we find the failure to request a limiting instruction did not cause unfair prejudice.

B. Whether the Court Improperly Replaced a Juror Under Circumstances Contrary to Guam Law

[35] Under Guam law, alternate jurors "shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties." 8 GCA § 85.45 (2005) (emphasis added). Although Borja's trial counsel objected to replacement of the excused juror on the basis that he was competent, on appeal Borja does not argue that the excused juror was competent. Instead, on appeal Borja argues that the court erred procedurally, specifically because it replaced the excused juror *after* the jury had retired to consider its verdict. *See* Appellant's Br. at 10; Reply Br. at 6-7. The People counter that the substitution took place *before* the jury had retired to consider its verdict. Appellee's Br. at 15-17.

[36] The question, then, is what amounts to the "jury retir[ing] to consider its verdict" for the purposes of 8 GCA § 85.45. Section 85.45 is modeled after Federal Rule of Criminal Procedure ("FRCP") 24(c), prior to its amendment in 1999. Fed. R. Crim. P. 24(c) (1987). Thus, cases interpreting the federal rule provide appropriate guidance. *See Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 7. Such cases instruct that a jury "retires to consider its verdict" once

deliberations have begun. *E.g.*, *United States v. Davis*, 15 F.3d 1393, 1409 (7th Cir. 1994); *Martin v. United States*, 691 F.2d 1235, 1237-38 (8th Cir. 1982); *United States v. Cohen*, 530 F.2d 43, 48 (5th Cir. 1976). This rule protects against the risk that a latecomer would not be able to deliberate on par with all other jurors, which would lead to the defendant possibly not receiving the full jury of peers to which he or she is entitled. *Davis*, 15 F.3d at 1408 (citing *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985)).

[37] In *Davis*, the Seventh Circuit held that a jury retires to consider its verdict once deliberations begin. *See* 15 F.3d at 1409. In that case, the judge read final instructions to the jury late one afternoon and then excused two alternate jurors, and as the jurors were preparing to enter the jury room the judge informed them they could deliberate for an hour or so, but recommended that they wait to start deliberations until the following morning. *Id.* at 1403. Within minutes of the jury retiring to the jury room, the court realized that it had failed to explain the verdict forms and ordered the jury to return. *Id.* The court finished its instructions and again excused the jury, after which the jurors told the marshal that they wanted to go home for the day and to commence deliberation the following morning. *Id.* The jurors were then promptly dismissed. *Id.*

[38] As the jury left, the assistant U.S. attorney observed, and later reported to the court, that one of the jurors left with a woman who had been present throughout trial. *Id.* The court determined the woman was the juror's wife and then ordered the first alternate juror to return to court in the morning. *Id.* The following morning, the court met with both attorneys and the juror to determine whether to disqualify the juror. *Id.* at 1403-04. The judge ultimately decided to remove the juror and seat the alternate juror and "then instructed the jury (including [the alternate]) to begin its deliberations." *Id.* at 1404.

[39] Davis argued, among other things, that substituting the alternate juror violated FRCP 24 because the juror was substituted after deliberations began. *See id.* at 1405. However, the Seventh Circuit noted that because the jury had not deliberated the night before, the alternate had missed no part of the deliberations when he joined the jury, and he was able to deliberate on par with all other jurors. *Id.* at 1409. The Seventh Circuit held that the court did not err because "although the jury had retired, it had not as yet begun to consider its verdict when the . . . court decided to replace [the juror] . . . ." *Id.*

[40] A similar question and outcome are found in *Martin v. United States*, 691 F.2d 1235. In that case, Martin argued the trial court erred in substituting a juror after the jury retired, where the problematic juror was discharged and replaced with an alternate prior to the jury beginning deliberations. *Id.* The Eighth Circuit held that, under these circumstances, the jury had not "retired" because deliberations had not commenced. *Id.* at 1237-38.

[41] In *United States v. Cohen*, the Fifth Circuit came to the same conclusion when considering the question of when a jury retires. *See* 530 F.2d at 48. Cohen argued the substitution of a problematic juror was in error under FRCP 24(c) because the substitution took place after the jury had been instructed to retire. *See id.* The Fifth Circuit regarded Cohen's argument as "too formalistic," finding that although the jury had been ordered to retire, it had not done so because the jurors had not begun deliberations. *Id.*

[42] Here, the timeline is similar to the factual sequence in *Davis*, *Martin*, and *Cohen*. In all three cases, the judge had finished giving jury instructions. *Compare* Tr. at 55-57 (Closing Args., Jury Instrs.), *with Davis*, 15 F.3d at 1403, *Martin*, 691 F.2d at 1237, *and Cohen*, 530 F.2d at 48. The juries were then excused from the courtrooms. Tr. at 59; *Davis*, 15 F.3d at 1403; *Martin*, 691 F.2d at 1237; *Cohen*, 530 F.2d at 48. An issue involving a problematic juror was

then brought to the attention of the court. Tr. at 60-65 (Closing Args., Jury Instrs.) (juror could not read English well); *Davis*, 15 F.3d at 1403 (juror left in company of woman); *Martin*, 691 F.2d at 1237 (juror exhibited bizarre behavior); *Cohen*, 530 F.2d at 48 (juror slept during instructions). In all cases it was clear no deliberations had taken place. *See* Tr. at 58-60, 74 (Closing Args., Jury Instrs.); *Davis*, 15 F.3d at 1403-04; *Martin*, 691 F.2d at 1237; *Cohen*, 530 F.2d at 48. The juries were then recalled, and the problematic juror was replaced. Tr. at 75-76 (Closing Args., Jury Instrs.); *Cohen*, 530 F.2d at 48; *see also Davis*, 15 F.3d at 1404; *Martin*, 691 F.2d at 1237. Finally, the juries were excused with specific instructions to begin deliberations. Tr. at 76-77 (Closing Args., Jury Instrs.); *Davis*, 15 F.3d at 1404; *Martin*, 691 F.2d at 1237; *see also Cohen*, 530 F.2d at 48.

[43] The instant case involves two additional facts further supporting our view that the jury did not retire to consider its verdict—in other words, that it did not begin deliberations. The first relates to the physical placement of the jurors. Borja's jury was excused to take a "smoke break." Tr. at 58-59 (Closing Args., Jury Instrs.). Even if not all jurors left the courthouse to smoke, those who did would have exited the courthouse.[3] The second is that the jury could not have begun deliberating because the court had not yet provided it with instructions, exhibits, or the juror's notebooks. *Id.* at 58, 74, 76-77. The court explained that it was "prepar[ing] the exhibits" and "fix[ing] some of the[] instructions," and *after* the jurors returned from their break, they would be given the material to "*start* [their] *deliberations*." *Id.* at 58 (emphasis added). Underscoring this second fact is a specific exchange between the People and the court regarding the start of deliberations:

[3] Guam law prohibits smoking within the courthouse and within twenty feet of the courthouse entrance. *See* 10 GCA §§ 90104 (2005), 90105(a) (amended by Pub. L. 33-121:5 (Feb. 4, 2016)), 90105(c)(2) (amended by Pub. L. 33-121:6 (Feb. 4, 2016)).

> THE COURT: [W]e will excuse the juror and we'll replace him with the alternate number one, and they'll begin their deliberations.
>
> [PEOPLE]: So it's my understanding, Your Honor, that they haven't even started deliberating at this point?
>
> THE COURT: No, because we haven't given any of the exhibits.

Id. at 74.

[44] Once back on the record with all jurors present, the court excused the subject juror and replaced him with the alternate. *Id.* at 76. The judge addressed the twelve jurors, saying "you'll be the 12 jurors now, who will be deciding this matter. . . . [Y]ou shall retire and select one of your number to act as the foreperson. He or she will preside over your deliberations." *Id.* It was not until this point that the court expressed that it would "send in the exhibits and [the jurors'] notebooks so that [they could] *begin* [their] deliberations." *Id.* at 76-77 (emphasis added).

[45] Like Cohen's argument, Borja's argument is "too formalistic." *Cf. Cohen*, 530 F.2d at 48. Here, despite the judge's instructions and his statement to the jury that "[y]ou shall now retire," the next event was for the jury to take a break. Tr. at 56, 58-59 (Closing Args., Jury Instrs.). Without final instructions, without exhibits, and without being inside the courthouse—much less inside the jury room—the Borja jury could not have begun deliberating. As the Eighth Circuit pointed out, "the [FRCP] 'are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances.'" *Martin*, 691 F.2d at 1238 (quoting *United States v. Phillips*, 664 F.2d 971, 993 (5th Cir. 1981)). Instead, the rules are intended to provide a "just determination of every criminal proceeding and shall be construed to secure simplicity, fairness and the elimination of unjustifiable expense and delay." *Id.* at 1239.

[46] For the foregoing reasons, we hold that a jury does not retire to consider its verdict until it has begun deliberations. Because the Borja jury had not yet done so, the court's replacement of the juror was not error.

C. Whether the Evidence of Borja's Prior Sexual Encounter with L.B. Was Introduced in Violation of GRE 413

[47] In cases of criminal sexual conduct, GRE 413 admits evidence of a defendant's commission of other criminal sexual conduct offenses, provided the People disclose such evidence to the defendant at least fifteen days prior to trial. GRE 413(a)-(b). Borja argues L.B.'s testimony regarding her sexual encounter with Borja constituted GRE 413 evidence and was introduced in violation of GRE 413 because the People failed to provide prior notice. Appellant's Br. at 10-11. The People counter that this statement was first given to GPD Officer William Naval during the investigation and was documented in his report, which was transmitted to Borja's attorney in the course of the case. Appellee's Br. at 19; *see also* Appellee's Mot. Expand Record, Ex. 1 (Dec. 15, 2016) (moving to expand record to include Officer Naval's initial GPD statement that L.B. agreed to have intercourse with Borja; granted without objection, *People v. Borja*, CRA16-008 (Order (Jan. 11, 2017)). The People add that Borja was aware of this evidence because his attorney (1) incorporated the evidence into his theory of the case—i.e., it supported the defense's theory that T.A.B. lied about the assault in order to be removed from the home and provided an alternative explanation for the physical evidence on the couch where the assault occurred; (2) mentioned the evidence in opening statements; and (3) cross-examined the witness about the encounter. Appellee's Br. at 19-20. We find that Borja has conceded this point because he incorporated L.B.'s testimony into the heart of his defense theory at trial. We are unpersuaded Borja was prejudiced by the introduction of this evidence when his counsel relied on it in framing a defense. Therefore, we do not address this issue.

V. CONCLUSION

[48] Based on the preceding, we find that Borja did not receive ineffective assistance of counsel. Additionally, we hold, for purposes of 8 GCA § 85.45, that a jury retires to consider its verdict at the time it begins deliberations and the trial court did not err in substituting the juror with an alternate juror. Accordingly, we **AFFIRM** Borja's judgment of conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice