IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

FRANKLIN FINIK, JR.,
Defendant-Appellant.

Supreme Court Case No.: CRA16-005
Superior Court Case No.: CF0614-14

OPINION

Cite as: 2017 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted on October 27, 2016
Hagåtña, Guam

Appearing for Defendant-Appellant:
Stephen P. Hattori, *Esq.*
Public Defender
Public Defender Services Corporation
779 Route 4
Sinajana, GU 96910

Appearing for Plaintiff-Appellee:
Yoav S. Sered, *Esq.*
Assistant Attorney General
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.[1]

MARAMAN, J.:

[1] Defendant-Appellant Franklin Francisco Finik, Jr. appeals from his Judgment of Conviction. Following trial, a jury convicted Finik of four counts of First Degree Criminal Sexual Conduct and five counts of Second Degree Criminal Sexual Conduct related to five separate alleged incidents. Finik contends on appeal that the trial court erred (i) in denying his motion to acquit made at the close of the People's case-in-chief; and (ii) by impermissibly allowing a prosecution witness to bolster the credibility of the complaining witness. For the reasons set forth below, we affirm both the trial court's denial of Finik's motion to acquit and the Judgment of Conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] For a roughly six-month period ending in late October or early November 2014, Finik lived with the family of his then-girlfriend. Finik's then-girlfriend is the older sister of the complaining witness in this case, a minor referred to as B.M. Finik was charged in a superseding indictment with nine counts of criminal sexual conduct related to five separate instances of sexual contact between himself and B.M.

[3] Before Finik and his then-girlfriend started their romantic relationship, Finik had become close with B.M.'s family due to a past relationship Finik had with B.M.'s cousin. B.M. testified at trial that prior to Finik dating her sister and moving into the shared housing, Finik had inappropriately touched B.M.'s genitals at B.M.'s grandmother's house. This touching turned

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

into a regular occurrence, but only one of these improper touching incidents was charged in the indictment. Finik's misconduct escalated from there.

[4] According to B.M.'s testimony at trial, the first time that Finik penetrated her occurred behind a store called Hill's Market when she was 12 years old. Following this first instance of penetrative sexual assault between B.M. and Finik, Finik drove B.M. back to her house, where Finik was by then also residing. Upon returning to the house, B.M. noticed that she was bleeding from her genital area and was in pain. At the time, B.M. did not tell anyone about this incident "[b]ecause [she] was scared." Transcript ("Tr.") at 160 (Jury Trial, Jan. 12, 2016).

[5] Roughly a week after the Hill's Market incident, Finik again sexually assaulted B.M. This incident occurred in a "jungle area" around Upi Elementary School. *See id.* at 161-62. During this incident, Finik penetrated B.M. both genitally and orally. After this sexual assault, Finik and B.M. drove back to the residence where both Finik and B.M. were living at the time. Again, B.M. testified that she did not tell anybody about this incident because she was scared.

[6] The fourth charged incident of sexual misconduct alleged against Finik occurred several weeks after the Upi Elementary School incident. This incident took place in B.M.'s room during the day-time hours in the house that both B.M. and Finik were sharing. Finik undressed B.M., undid his zipper, and proceeded to sexually assault B.M. After the assault, Finik exited the room. B.M.'s older sister, Finik's then-girlfriend, testified that on several occasions she saw Finik exit B.M.'s bedroom, and when confronted with questions asking why he had been in B.M.'s room, Finik became argumentative and avoided answering the questions.

[7] The fifth incident charged in the superseding indictment occurred several weeks later in a storage area of the premises where B.M. and Finik were living. Finik asked B.M. to follow him

into a storage area near the house, and when B.M. complied, Finik locked the door, undressed both B.M. and himself, and sexually assaulted B.M.

[8] On November 2, 2014, Finik and B.M. exchanged several messages via Facebook. In those messages, Finik said to B.M.: "Of course, my baby, you'll always be in my life. I've got to get to work, okay? I'll let you know when I get my phone and truck, okay? I promise I'll be in touch with you, okay? I love you. Be good. Later, my baby." *Id.* at 117, 144-45. During this exchange, B.M. referred to herself as "Kirida," which is a Chamorro word for "favorite." *See id.* at 143-44. B.M. explained that she used the word "Kirida" in part because she "believed him when he said he loved [her]." *Id.* at 186; *see also id.* at 189.

[9] B.M. testified during trial to another incident of sexual assault, which occurred after the exchange of these Facebook messages. This incident took place in B.M.'s sister's room, was similar in nature to the past incidents, but was not charged in the indictment. This assault occurred just days before Finik moved out of the shared residence.

[10] On November 6, 2014, B.M. revealed to her mother and three of her sisters that Finik had sexually assaulted her. B.M.'s mother drove B.M. to the police station to file a report later that same day. At the police station, both B.M. and her mother provided written statements. The officer handling the initial complaint, Officer Donald Nakamura, referred B.M. to the Victims Advocate Unit of the Guam Police Department. In turn, the Victims Advocate Unit referred B.M. to Healing Hearts Crisis Center ("Healing Hearts"), where she was seen by Valerie Cepeda, a social worker at Healing Hearts. At this initial meeting, Cepeda conducted a "forensic interview" with B.M. *See id.* at 27-28. When asked to describe B.M.'s "demeanor" during that interview, Cepeda testified that B.M.:

> was very thorough on her disclosure, why she came to Healing Hearts. She was able to tell me in time events of what had happened. During the time of her disclosing that she was sexually abused by this male individual known to her, she was very emotional during my interview. She has expressed that she did have flashbacks of the incidents that occurred when she was 12 years old.

Id. at 28. During this initial meeting with Cepeda, B.M. disclosed, among other things, that there was skin-to-skin contact between Finik and B.M. As a result, Cepeda referred B.M. to the medical services at Healing Hearts so that a physical examination could take place.

[11] During B.M.'s physical examination, the nurse conducting the examination, Ann Paro Santos Rios, found a "notch," or a "healed tear," on B.M.'s hymen, which Rios testified "does support [B.M.'s] disclosure [that] something happened." *See id.* at 46-47. Rios testified that this "notch" covered roughly "50 percent of the width of the hymen," which is an "indeterminate finding based on research, but because she disclosed a history of penile penetration, it does support her disclosure." *See id.* at 48.

[12] Officer Glenn C. Ogo from the Guam Police Department interviewed Finik after Finik came to the Dededo precinct on his own volition. During this interview, Finik claimed that "there was no way he could have [sexually assaulted B.M.]" because "his girlfriend at the time [i.e., B.M.'s sister], is always with him, and there's no – he had no chance of doing such a thing." *Id.* at 80, 81. Following this interview, Officer Ogo arrested Finik. *See id.* at 83.

[13] A Magistrate's Complaint issued, charging one count of First Degree Criminal Sexual Conduct. Finik was indicted on three counts of First Degree Criminal Sexual Conduct. A superseding indictment alleged four counts of First Degree Criminal Sexual Conduct and five counts of Second Degree Criminal Sexual Conduct.

[14] A jury trial was held on the nine counts listed in the superseding indictment. On cross-examination of Cepeda, the following colloquy took place, a portion of which Finik now challenges on appeal as improperly bolstering the credibility of B.M.:

[CROSS-EXAMINATION BY DEFENSE COUNSEL]

MR. MILLER.	When you began this interview, did you advise [B.M.] of the importance of telling the truth?
A.	In our standard interviews, yes, but –
Q.	In this interview did you advise her of the importance of telling the truth?
MR. HEIBEL:	I think she's trying to answer the question.
THE COURT:	There was a "but," so – Did you want to finish your answer?
THE WITNESS:	But I can't recall if I asked that question in my interview.
MR. MILLER:	At any point in your interviewing of [B.M.], were you checking for truthfulness?
A.	No, I wasn't.
Q.	Did you ask her any questions that would go to whether she had a motivation to tell you a lie?
A.	Will you repeat that question?
Q.	Did you ask her any questions that would let you know if she had a motivation to tell you a lie?
A.	When I met with her she didn't exhibit any of her –
Q.	No, my question was did you ask her any questions that would go to whether she had a motivation to lie?
A.	No.
Q.	I'm sorry?
THE COURT:	No?
THE WITNESS:	No.
MR. MILLER:	Okay. That's all I have, Your Honor.
THE COURT:	Mr. Heibel?

REDIRECT EXAMINATION

BY MR. HEIBEL:

Q. Ms. Cepeda, when you were trying to answer Mr. Miller's question, you were saying something about she didn't exhibit any – something – and it was in relation to questions about motive to lie. Can you explain what she did or didn't exhibit?

A. *During my interview she was able to tell me, in her words, what the ins- -- what had happened to her, and there were multiple incidents that happened, so she was able from what I had met with her, that she was able to tell me the truth. She didn't show no interaction that she was lying, or any sort of that during my whole interview* [sic].

MR. HEIBEL: Thank you. Nothing further.

THE COURT: Okay. You may step down. Thank you.

(Witness excused.)

Tr. at 31-32 (Jury Trial, Jan. 12, 2016) (emphasis added). Finik's counsel did not object to this testimony at the time of trial.

[15] After the government rested its case, Finik moved for an acquittal "on the grounds that the Government[] failed to sustain their [sic] burden of proof[,]" and the trial court denied this motion. *Id.* at 201-02. The jury returned a verdict finding Finik guilty on all counts. The trial court entered a Judgment of Conviction sentencing Finik to fifteen years for each of the four counts of First Degree Criminal Sexual Conduct and ten years for each of the five counts of Second Degree Criminal Sexual Conduct, with each sentence to be served concurrently. This appeal timely followed.

II. JURISDICTION

[16] This court has jurisdiction over appeals from a final judgment in a criminal case. 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. ANALYSIS

[17] Two issues are raised by Finik in this appeal. First, Finik argues that the trial court erred in denying his motion to acquit made at the close of the prosecution's case-in-chief. Finik posits that the only evidence supporting his conviction was the testimony of B.M., and B.M.'s testimony was insufficient as a matter of law to prove guilt beyond a reasonable doubt. Second, Finik argues that the trial court erred in permitting the testimony of Cepeda on redirect examination, during which she testified that she believed B.M. was truthful during her initial interview at Healing Hearts.

A. Motion to Acquit and the Sufficiency of the Evidence

[18] Finik first argues that the People did not sustain their burden of proving guilt beyond a reasonable doubt because B.M. was not a credible witness and "there was no corroborating evidence of any of the allegations made by B.M." Appellant's Br. at 8-9 (Aug. 22, 2015). According to Finik, "the credibility of the complainant is not sufficient to sustain a conviction." *Id.* at 9. In opposition, the People argue that: (i) corroboration is not required to obtain a conviction for prosecutions under 9 GCA §§ 25.15-25.35, Appellee's Br. at 6-8 (Oct. 5, 2016); (ii) credibility is an issue fully within the province of the jury and B.M.'s testimony was credible, *id.* at 8-10; and (iii) corroborating evidence was nevertheless presented to the jury, which reinforced the credibility of B.M.'s testimony, *id.* at 10-12.

[19] "Where a defendant has raised the issue of sufficiency of the evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*." *People v. Wusstig*, 2015 Guam 21 ¶ 8 (citing *People v. Diego*, 2013 Guam 15 ¶¶ 9, 30). To determine whether a judgment of acquittal should be granted, the court applies "the same standards used to evaluate a challenge to the sufficiency of the evidence." *Id.* (citing *Diego*, 2013 Guam 15 ¶ 30). "Thus, on

appeal we review the evidence in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Diego*, 2013 Guam 15 ¶ 30 (citations omitted). This is "a highly deferential standard of review." *Wusstig*, 2015 Guam 21 ¶ 8 (citing *People v. Tenorio*, 2007 Guam 19 ¶ 9 (internal quotation marks omitted)). "A verdict of guilty removes the presumption of innocence to which a defendant had formerly been entitled and replaces it with a presumption of guilt." *People v. George*, 2012 Guam 22 ¶ 50 (citations omitted).

[20] Pursuant to 9 GCA § 25.40, "[t]he testimony of a victim need not be corroborated in prosecutions under §§ 25.15 through 25.35." 9 GCA § 25.40 (2005). While recognizing the applicability of this provision, Finik argues that "[a]bsent corroboration, the jury would have had to believe B.M.'s testimony beyond a reasonable doubt." Appellant's Br. at 8, 13.

[21] To support his argument, Finik points the court to *People v. Ojeda*, 2011 Guam 27, for the proposition that "[a]bsent corroboration, the testimony and credibility of the complainant are 'key to the overall strength of the prosecution's case.'" Appellant's Br. at 9 (quoting *Ojeda*, 2011 Guam 27 ¶ 33). Finik provides no other authority to support his argument, and the facts in *Ojeda* are readily distinguishable from those presented here. In *Ojeda*, the defendant-appellant was convicted of multiple charges of First and Second Degree Criminal Sexual Conduct. *See Ojeda*, 2011 Guam 27 ¶ 1. On appeal, Ojeda argued that the trial court impermissibly restricted his questioning of the complaining witness regarding past incidents of criminal sexual conduct perpetrated against her by another person and thereby infringed his Sixth Amendment confrontation rights. *See id.* ¶¶ 1-2, 19. While we recognized that a "lack of corroborating evidence directly pointing to [defendant's] guilt meant that [the complaining witness's] testimony and credibility were key to the overall strength of the prosecution's case[,]" the issue

presented to us in *Ojeda* was whether testimony and cross-examination were impermissibly limited by the trial court. *Id.* ¶ 33. In contrast to *Ojeda*, Finik does not complain that he was prevented from questioning the witness's credibility or from presenting any particular evidence; indeed, Finik challenged B.M.'s credibility repeatedly on both cross-examination and in closing. *See, e.g.*, Tr. at 189-92 (Jury Trial, Jan. 12, 2016); Tr. at 28-31 (Jury Trial, Jan. 13, 2016).

[22] "It is not the province of the court, in determining a motion for a judgment of acquittal, to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *People v. Song*, 2012 Guam 21 ¶ 29 (quoting *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)) (internal quotation marks omitted); *People v. Camacho*, 1999 Guam 27 ¶ 40 ("Although there were inconsistencies and contradictions in the testimony of the witnesses, the task of determining the weight of the evidence and inconsistencies of testimony lies within the purview of the jury."). We have previously held that alleging a victim's testimony is not credible because she recanted on the stand, among other conflicts in testimony, does not provide a basis for granting relief for sufficiency of the evidence. *See George*, 2012 Guam 22 ¶ 56. Thus, "[w]hen ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Song*, 2012 Guam 21 ¶ 29 (citing *State v. Weston*, 625 S.E.2d 641, 648 (S.C. 2006)). "[I]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." *Id.* (quoting *State v. Elmore*, 628 S.E.2d 271, 273 (S.C. Ct. App. 2006)); *see also George*, 2012 Guam 22 ¶ 51 (same).

[23] Like the defendant in *George*, Finik "does not challenge any specific element of any of the . . . crimes for which he was convicted[,]" but instead he "broadly challenges the sufficiency

of the evidence by arguing that [B.M.'s] allegations of abuse were not credible . . . and by pointing to other perceived inconsistencies in her testimony throughout the investigation and trial." *George*, 2012 Guam 22 ¶ 53. When previously faced with these same arguments, the court concluded in *George* that appellant had "attempt[ed] to argue the evidence in a light most favorable to the defense" and thus "misconstrue[d] the standard by trying to re-argue that there is reasonable doubt." *Id.* ¶ 55.

[24] The prosecution presented both direct and circumstantial evidence that Finik had sexually assaulted B.M. In addition to the direct evidence of the complaining witness's testimony, the prosecution also submitted Facebook messages between Finik and B.M. in which Finik refers to B.M. as "my baby" and told her that he loved her. *See* Tr. at 117, 144-45 (Jury Trial, Jan. 12, 2016). This corroborates B.M.'s testimony that after several of the incidents of sexual assault, Finik told B.M. that he loved her. *See, e.g.*, *id.* at 197. The testimony of B.M.'s sister was also corroborative of B.M.'s testimony. *See, e.g.*, *id.* at 102-08. Even if there was competing evidence, however, "it was not the province of the trial court—nor is it the province of this court—to resolve these conflicts or to pass upon the credibility of the witnesses or the weight of the evidence." *George*, 2012 Guam 22 ¶ 56. "Merely alleging that [B.M.'s] testimony is not credible does not suffice to raise a challenge to the sufficiency of the evidence and affords this court no basis for granting relief." *Id.* "This is so even though it is possible that a different finder of fact could have reached a different conclusion." *Id.* (citation omitted).

[25] This court has consistently relied upon the holding in *George* in rejecting a convicted defendant's argument on appeal that the evidence was insufficient to establish guilt beyond a reasonable doubt. *See, e.g.*, *Wusstig*, 2015 Guam 21 ¶ 26 ("The job of evaluating and weighing evidence is squarely and exclusively the province of the jury and not of the trial court

determining a motion for acquittal or an appellate court reviewing that determination."); *People v. Mendiola*, 2014 Guam 17 ¶ 28 (same); *Diego*, 2013 Guam 15 ¶ 38 (same); *People v. Enriquez*, 2014 Guam 11 ¶ 22 ("The . . . court is not concerned with the weight of the evidence, but with its existence or non-existence." (citing *George*, 2012 Guam 22 ¶ 51)). Nothing presented by Finik on this appeal justifies a different result in this case. Accordingly, the trial court did not err in denying Finik's motion to acquit.

B. The Testimony of Cepeda

[26] Finik next argues on appeal that the trial court committed reversible error by permitting Cepeda, a prosecution witness, to bolster the credibility of B.M. in stating the following:

> During my interview, she was able to tell me, in her words, what the ins- -- what had happened to her, and there were multiple incidents that happened, so she was able, from what I had met with her, that she was able to tell me the truth. She didn't show no interaction that she was lying, or any sort of that during my whole interview [sic].

Appellant's Br. at 13 (quoting Tr. at 32 (Jury Trial, Jan. 12, 2016)). In response, the People argue that (i) this testimony was permissible because Finik opened the door to Cepeda's testimony on cross-examination, Appellee's Br. at 15-16, and (ii) Cepeda's testimony did not affect Finik's substantial rights, *id.* at 17-19. For the reasons discussed below, the admission of Cepeda's testimony was not erroneous.

1. Bolstering vs. Vouching and the Appropriate Standard of Review

[27] In briefing this issue, both parties rely heavily on this court's "vouching" jurisprudence. This case, however, presents a question of purported "bolstering" by a prosecution witness. Thus, as an initial matter, this court must address the appropriate standard to be used in reviewing the propriety and effect of Cepeda's testimony.

[28] The court has previously explained the distinction between "vouching" and "bolstering" in *People v. Roten*, 2012 Guam 3, where we stated the following:

> Roten phrases these arguments [regarding the testimony of a prosecution witness] in terms of "vouching" rather than as "bolstering" in his briefing. This is technically incorrect, as under Guam law vouching occurs when the government places the prestige of the government behind the witnesses through personal assurances of their veracity and is improper. Vouching, under these standards, concerns improper actions by the government attorney concerning the credibility or truthfulness of a witness, not improper actions or testimony of a government witness (even a law enforcement witness) concerning the credibility or truthfulness of another witness. While the vouching standards found in *Moses* are germane to Roten's allegations concerning the Prosecutor's allegedly improper statement made during closing argument, they do not apply to [witness testimony]. Further, although commentary by one witness concerning another witness may be inappropriate, it does not evoke the "vouching" doctrine as Roten asserts.

Id. ¶ 30 n.5 (emphases and citations omitted). Put differently, "the term 'vouching' is basically restricted to the concept of an attorney personally assuring the truthful nature of the testimony of a witness to the trier of fact[,]" while "'bolstering' constitutes nothing more than 'preemptive rehabilitation' of a witness" through the testimony of another witness. *Nickell v. State*, 885 P.2d 670, 678 (Okla. Crim. App. 1994) (Lumpkin, P.J., concurring) (explaining the history of the terms "vouching" and "bolstering"); *accord United States v. Bowie*, 892 F.2d 1494, 1498-500 (10th Cir. 1990) (analyzing prosecution statements as vouching and witness testimony as bolstering).

[29] Courts throughout this country have not always clearly defined these two distinct doctrines. *See, e.g., Bowie*, 892 F.2d at 1499 n.1 ("A number of courts appear to regard credibility-bolstering as no different from credibility-vouching, and merge the two concepts. We consider these to be different issues; therefore, we analyze them separately." (collecting cases)); *People v. Coughlin*, 304 P.3d 575, 582 (Colo. App. 2011) ("[S]ome courts merge or interchange the concepts." (citation omitted)). Indeed, even this court has not always clearly differentiated

between these doctrines. *See People v. Quenga*, 2015 Guam 39 ¶ 93 (addressing whether the prosecution had impermissibly "vouched" for a witness "by eliciting from the testifying co-defendants the fact that they had agreed to tell the truth as part of their plea agreements"); *People v. Tedtaotao*, 2016 Guam 9 ¶ 26 ("Credibility vouching is also referred to as bolstering and may arise either through comment by the prosecuting attorney, or through a government witness's testimony." (citations omitted)). Despite any past confusion, the distinction between bolstering and vouching is important, and the court today reaffirms the distinction between these concepts as first laid out in *Roten*. *See Roten*, 2012 Guam 3 ¶ 30 n.5.

[30] As set forth in *Roten*, bolstering is an issue of evidentiary error. *See id.* ¶¶ 13, 36. "As a general rule, we review evidentiary rulings for an abuse of discretion." *In re N.A.*, 2001 Guam 7 ¶ 19 (citing *J.J. Moving Servs. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 31); *see also Roten*, 2012 Guam 3 ¶ 13 ("Evidentiary rulings of the trial court are reviewed for abuse of discretion and will not be reversed absent prejudice affecting the verdict."). Even where a trial court abuses its discretion and impermissibly allows bolstering testimony by a witness, reversal is required "only when the testimony 'more probably than not affected the verdict.'" *People v. Vitug*, Crim. No. 90-00081A, 1991 WL 336914, at *3 (D. Guam App. Div. June 13, 1991) (citation omitted). Thus, in *Roten*, this court first determined "that the trial court *abused its discretion* in admitting [the witness's] testimony concerning both his 'conclusions' about what occurred between Roten and the victim, as well as his opinion that the victim's actions were consistent with the phenomenon of delayed reporting." 2012 Guam 3 ¶ 36 (emphasis added). Only after making this initial finding did the court address whether reversal was appropriate—*i.e.*, whether this abuse of discretion affected the verdict. *See id.* ¶¶ 44-49 (finding error

harmless); *accord Vitug*, 1991 WL 336914, at *3 (treating bolstering testimony as evidentiary error and holding that "any error in admitting the testimony was so subtle as to be harmless").

[31] In contrast, vouching is an issue of prosecutorial misconduct. *See generally People v. Moses*, 2007 Guam 5 ¶¶ 11-28; *People v. Mendiola*, 2010 Guam 5 ¶¶ 12-14. While this court has never explicitly stated so in its prior cases, a vouching analysis generally abandons the considerable deference this court gives to a trial court's evidentiary rulings in favor of *de novo* review on the question of whether improper vouching occurred. *See, e.g.*, *Moses*, 2007 Guam 5 ¶¶ 16-19 (providing no deference to trial court). As the United States Court of Appeals for the Sixth Circuit stated, "[w]hether improper vouching amounts to prosecutorial misconduct" is a "mixed question[] of law and fact reviewable *de novo*." *United States v. Tocco*, 200 F.3d 401, 422 (6th Cir. 2000) (citations omitted); *see also United States v. Diaz*, 190 F.3d 1247, 1267 (11th Cir. 1999) ("[T]he standard of review is *de novo* because vouching presents a mixed question of fact and law."). After making this initial determination, the court reviews for harmless error in order to determine whether reversal is required. *See Moses*, 2007 Guam 5 ¶ 18; *see also Mendiola*, 2010 Guam 5 ¶ 13 (citation omitted); *People v. Roby*, 2017 Guam 7 ¶ 40.

[32] In cases of both evidentiary error and prosecutorial misconduct, if a defendant fails to object at trial this court reviews for plain error. *See Ramiro v. White*, 2016 Guam 6 ¶ 17 ("Where a party fails to object to the trial court's admission of evidence, we review the issue for plain error." (citation omitted)); *Mendiola*, 2010 Guam 5 ¶ 13 ("When, however, a defendant fails to object to prosecutorial comments at trial, we review only for plain error." (citation omitted)); *see also* 8 GCA § 130.50 (2005) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). The plain error standard is met when: "(1) there was an error; (2) the error was clear or obvious under current law; (3) the error

affected substantial rights; and (4) reversal is required to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Mendiola*, 2010 Guam 5 ¶ 14 (citations omitted).

[33] In sum, this court provides greater discretion to a trial court's admission of bolstering testimony than it does to a trial court's decision whether prosecutorial comments constitute improper vouching. Nevertheless, in both vouching and bolstering cases, the proper standard for determining whether reversal is required when the defendant has made a timely objection to the alleged trial error is the harmless error standard. *See Roten*, 2012 Guam 3 ¶ 41 (citations omitted); *Moses*, 2007 Guam 4 ¶ 18 (citation omitted). "In harmless error review, the government bears the burden to prove that substantial rights were not violated . . . ." *People v. Quitugua*, 2009 Guam 10 ¶ 43 n.9. Under a plain error standard of review, however, "the defendant bears the burden to prove substantial rights were violated, and also must show that not reversing would lead to a miscarriage of justice/threat to judicial integrity." *Id.*

[34] At issue in this appeal is bolstering of witness testimony, not vouching involving prosecutorial comments. While admission of bolstering testimony is generally reviewed for an abuse of discretion, Finik's counsel failed to object to Cepeda's testimony at trial. *See* Tr. at 31-32 (Jury Trial, Jan. 12, 2016). Therefore, this court reviews the trial court's admission of Cepeda's testimony for plain error.

2. The Trial Court Did Not Commit Error in Admitting the Testimony of Cepeda on Redirect Examination

[35] It is axiomatic that "a witness cannot bolster another witness's credibility, especially in a child sex abuse setting." *Vitug*, 1991 WL 336914, at *3; *see also Roten*, 2012 Guam 3 ¶ 31 ("Courts have held that testimony of one witness which 'bolsters' the credibility of another witness or witnesses, even if it does not contain explicit discussion of credibility, is inappropriate." (citations omitted)). The first question presented to the court in analyzing Finik's

bolstering claim is whether the trial court erred in permitting the testimony of Cepeda. If no error occurred, then the court should affirm the conviction.

[36] The People argue on appeal that "this instance [of] bolstering testimony . . . was elicited by a question originally proffered by defense counsel[,]" and this therefore opened the door to a follow-up question by the prosecution on redirect. Appellee's Br. at 16. The People appear to concede (by failing to argue otherwise) that if Finik's counsel did not open the door, then Cepeda's testimony would be improper bolstering. While the court does not reach this issue, it assumes for purposes of its analysis that Cepeda's testimony was bolstering of B.M.'s credibility.

[37] In cross-examining Cepeda, counsel for Finik asked the following questions: (i) "When you began this interview, did you advise [B.M.] of the importance of telling the truth?"; (ii) "In this interview did you advise her of the importance of telling the truth?"; (iii) "At any point in your interviewing of [B.M.], were you checking for truthfulness?"; (iv) "Did you ask her any questions that would go to whether she had a motivation to tell you a lie?"; and (v) "Did you ask her any questions that would let you know if she had a motivation to tell you a lie?" Tr. at 31-32 (Jury Trial, Jan. 12, 2016). It was in response to this last question that Cepeda initially started to respond with her now-challenged testimony; Cepeda started to respond to this question as follows: "When I met with her she didn't exhibit any of her – . . . ." *Id.* at 32. Finik's counsel, however, interrupted this answer by stating, "No, my question was did you ask her any questions that would go to whether she had a motivation to lie?" *Id.* Then, on redirect examination, the prosecutor presented only the following question: "Ms. Cepeda, when you were trying to answer Mr. Miller's question, you were saying something about she didn't exhibit any – something – and it was in relation to questions about motive to lie. Can you explain what she did or didn't exhibit?" *Id.* at 32. In response, Cepeda gave the testimony now challenged on appeal. *See id.*

[38] In support of its argument that defense counsel invited Cepeda's testimony, the prosecution cites to *United States v. Brooks*, 736 F.3d 921 (10th Cir. 2013), and *United States v. Thomas*, 443 F. App'x 501 (11th Cir. 2011).

[39] In *Brooks*, the prosecution elicited testimony at trial from an F.B.I. agent about the process for determining whether a witness was truthful during their initial interview. *Brooks*, 736 F.3d at 934-35. On appeal, the defendant challenged this testimony as improper. The court, however, rejected this argument, reasoning that the "testimony came in only because Brooks and Quinn opened the door to the proffer process" by attempting to "highlight details in the witnesses' testimonies that had been absent in their original proffers—with the aim of discrediting them." *Id.* at 935. "To counter the perception that the witnesses had embellished their stories, Agent Swanson testified that during the proffer process he would pose questions to which he already knew the answers to gauge whether potential cooperators were inclined to be truthful." *Id.* This, the court held, was permissible because "defendants opened the door to testimony about how the government conducted the proffer process." *Id.*; *see also United States v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006) ("[T]he defendant opened the door to such testimony in his opening statements by implying that the government used a proffer to coerce a witness into giving false testimony. That left the government the necessity of explaining how it uses proffers; it did so without impermissibly referring to the credibility of any witnesses.").

[40] Similarly, in *Thomas*, the court stated that a "defendant may not complain on appeal that he was prejudiced by evidence relating to a subject which he opened up at trial." *Thomas*, 443 F. App'x at 502 (citation omitted). There, the defense counsel asked on cross-examination "whether, in his experience, he was aware that children make stuff up on occasion[,]" which

opened the door for "Agent Fonseca to testify that he did not have any concerns about the victim making up the allegations in this case." *Id.* at 503.

[41] In an analogous case, this court in *Quenga* rejected a defendant's claim of improper vouching and held that where "defense counsel . . . attacked the credibility of the government's co-defendant witnesses in his opening argument, . . . introduction of the co-defendants' plea agreements was properly done on direct examination to bolster their credibility." *Quenga*, 2015 Guam 39 ¶ 96; *cf. People v. Palomo*, Nos. DCA 91-00061A, DCA 91-00062A, 1993 WL 129624, at *17 (D. Guam App. Div. Apr. 8, 1993) ("In the context of the entire trial, the prosecutor's remarks, which were made only after his witnesses' credibility had been attacked on cross-examination, did not amount to improper vouching."). Many other courts have also reached similar conclusions. *See, e.g.*, *People v. Williams*, 840 N.Y.S.2d 815, 816 (App. Div. 2007).

[42] In his reply, Finik points the court to *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997). Appellant's Reply Br. at 4 (Oct. 13, 2016) (citing *Perez*, 116 F.3d at 845). In *Perez*, the court addressed an issue of error in a trial court's jury instructions, analyzed the United States Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), and held that the "invited error" doctrine applies only "to those rights deemed waived, as opposed to merely forfeited." *Perez*, 116 F.3d at 842. In other words, the "invited error" doctrine cannot be applied where a defendant simply failed to object—he must affirmatively invite the error. *Id.* at 845-46. By relying on *Perez*, Finik attempts to frame this issue in terms of his failure to object to Cepeda's testimony. While Finik's failure to object is relevant to this court's review insofar as it affects the standard of review on appeal, *see supra*, it is not relevant to the issue of whether he opened the door to admission of the now-challenged testimony. As the other cases noted above

make clear, the relevant conduct is Finik's questioning of Cepeda on cross-examination, not simply his failure to object on redirect. *See, e.g.*, *United States v. Griffith*, 301 F.3d 880, 883 (8th Cir. 2002) (defendant "invited error" on cross-examination by asking one witness whether another witness was "lying," which permitted prosecution to ask on redirect if the other witness was "telling the truth"); *Bedsole v. State*, 974 So. 2d 1034, 1037 (Ala. Crim. App. 2006) ("We note that the challenged testimony was elicited during defense counsel's cross-examination of Loggins. Accordingly, if any error did occur, it was invited by defense counsel's own actions."); *Washington v. State*, 766 So. 2d 325, 328 (Fla. Dist. Ct. App. 2000) (finding no error in admitting bolstering testimony where "appellant opened the door to this line of questioning on cross-examination"). Finik's reliance on *Perez* is therefore unavailing.

[43] By repeatedly asking Cepeda questions regarding whether B.M. was truthful during her initial interview at Healing Hearts, Finik opened the door to further inquiry on this topic during redirect examination. Indeed, Cepeda initially started to give the testimony now challenged on appeal in response to a question originally posed by defense counsel. Having opened the door to the admission of Cepeda's testimony on redirect examination, Finik should not be able to complain about this testimony on appeal. The court therefore cannot conclude that the admission of Cepeda's testimony on redirect examination was error. The other contentions of the parties therefore need not be addressed, and the Judgment of Conviction is affirmed.

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IV. CONCLUSION

[44] For the reasons set forth above, we conclude that the evidence was sufficient to support Finik's convictions, and, therefore, the trial court did not err in denying Finik's motion for judgment of acquittal. Moreover, the trial court did not commit error in allowing the challenged testimony of Cepeda because the defense opened the door to that testimony during cross-examination. For the foregoing reasons, we **AFFIRM** the trial court's denial of Finik's motion to acquit and **AFFIRM** the Judgment of Conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice