IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

FAUSTINO JAMES FEJERAN MATEO,
Defendant-Appellant.

Supreme Court Case No.: CRA15-036
Superior Court Case No.: CF0632-14

OPINION

Cite as: 2017 Guam 22

Appeal from the Superior Court of Guam
Argued and submitted on August 11, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Faustino James Fejeran Mateo appeals from a final judgment of conviction, which was entered following a jury trial where he was found guilty of one count of Possession of a Schedule II Controlled Substance With Intent to Deliver (as a First Degree Felony) and one count of Possession of a Schedule II Controlled Substance (as a Third Degree Felony). For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Mateo was operating a motor vehicle near the House of Liberty Game Room in Barrigada when Guam Police Department ("GPD") Officers Benny T. Babauta and Aaron Brown pulled his vehicle over. During the traffic stop, Officer Babauta found a hunting knife in the vehicle, which prompted him to search Mateo's person. During this search, Officer Babauta found a pouch containing what Mateo said were two "ice pipes" and a plastic bag containing smaller bags full of what the officers believed to be "ice," the street name for crystal methamphetamine. Transcripts ("Tr.") at 47-49 (Jury Trial, Aug. 31, 2015).

[3] After being advised of his rights, Mateo told the officers he wanted to cooperate with GPD's narcotics unit, which Officer Babauta understood to mean that Mateo wanted to "give information to take down other people." *Id.* at 49. Mateo was brought to the Hagåtña Precinct where he was again advised of his rights, which he again agreed to waive (this time in writing). He admitted to possessing "ice" and that he had smoked about $50 worth of it the day prior with

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

an individual named Joseph Sablan. *Id.* at 67. Mateo further admitted that he was a "collector" for Sablan and that earlier that night the two of them went to the House of Liberty Game Room looking to sell "ice." *Id.* at 68. According to Mateo, the drugs he was carrying belonged to Sablan, but they were provided to him for safekeeping. Some of these details were left out of his written statement, but he nevertheless admitted in writing to possessing "ice" and two pipes. *Id.* at 70-71; Tr. at 5-7 (Jury Trial, Sept. 1, 2015). That written statement was admitted into evidence at trial. The People also placed into evidence photographs of the objects found on Mateo by the arresting officers, including a "series of lattes containing suspected crystal methamphetamine, . . . two ice pipes[,] . . . [a] crystalline substance, . . . and . . . two cutlery knives . . . ." Tr. at 15 (Jury Trial, Sept. 1, 2015).

[4] Officer Matthew P. Cepeda, assigned to the Special Investigation and Drug Unit, conducted five field tests on the substance found on Mateo's person, which tested "presumptive[ly] positive" for methamphetamine. *Id.* at 14, 20-22, 64, 78-80, 89-91. Officer Cepeda testified that the total weight of the substance found on Mateo, including the weight of the bags that the substance was in, was about 3.8 grams. He further stated that based on his knowledge of drug-related cases, a gram was selling in November 2014 for about $700.

[5] Mateo made several filings regarding the personnel files of the arresting officers. First, Mateo filed what he termed a "written request for prosecution examination of officer personnel files." Record on Appeal ("RA"), tab 26 (Written Req. for Prosecution Examination of Officer Pers. Files, Jan. 28, 2015). He soon followed with a motion requesting that the Superior Court "conduct an *in camera* review" of the officers' personnel files. RA, tab 30 at 1 (Notice of Mot. for *In Camera* Review of Officer Pers. Files, Jan. 30, 2015). Mateo relied upon the Ninth Circuit's decision in *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), and 8 GCA §

70.15(a) to support his motion, arguing that "the outcome of a [sic] trial hinges solely on the credibility of Officers Babauta and Brown," as there were no other civilian witnesses that could testify as to what happened at the time of Mateo's arrest. *Id.* at 2-3. Furthermore, Mateo highlighted a civil complaint—ultimately dismissed on sovereign immunity grounds—that alleged Officer Babauta committed several intentional torts in 2010 while carrying out an unrelated arrest. Mateo argued that this civil complaint suggested there may be discoverable impeachment evidence in Officer Babauta's personnel file. The People opposed this motion, asserting that Mateo had failed to make the required materiality showing that this court outlined in *People v. Tuncap*, 1998 Guam 13 ¶¶ 16-18. The People maintained that witness credibility is important in any case, so alleging that evidence is necessary to impeach witnesses cannot by itself establish the materiality of evidence. Additionally, the People argued that existence of a civil complaint, much like the existence of a criminal charge, is not to be taken as evidence of the truth of the facts detailed therein.

[6] The trial court denied Mateo's motion. In so ruling, the trial court held that personnel files are not required to be turned over under 8 GCA § 70.10, that *Henthorn* "is inconsistent with Guam law," and that Mateo had not shown the required level of materiality necessary to establish that the officers' personnel files should be subject to discovery. RA, tab 37 at 3-4 (Dec. & Order, Mar. 26, 2015). The court further held that "if the credibility of a witness was the sole basis for a Defendant's request for an in camera review of that witness' personnel files, the materiality requirement would be swallowed altogether" and the courts "would be inundated with having to review witness' personnel files." *Id.* at 4.

[7] Following the denial of this motion for *in camera* review, Mateo moved to suppress the statements Mateo made to Officers Babauta and Brown on the grounds that there was no

reasonable suspicion to stop Mateo and the subsequent search of his person was therefore illegal. The People opposed this motion. The trial court held a suppression hearing during which Officers Babauta and Brown were called to testify about the events that led to Mateo's detainment. Officer Babauta described witnessing Mateo's car drive erratically around the House of Liberty Game Room, where he has made approximately fifty other arrests, most of which were related to drug crimes. He testified to following the car through a residential area before initiating the traffic stop upon witnessing Mateo speeding. Officer Brown followed with testimony that corroborated Officer Babauta's recollection of the events leading to the traffic stop. Both officers admitted that their police reports did not contain any specific facts relating to the reason for the stop and that Mateo was not charged with any traffic violations.

[8] The court denied the motion, finding that greater weight is placed on the officers' sworn testimony than on written police reports, and the testimony showed that the officers had adequate reasonable suspicion that Mateo had committed a traffic violation thereby justifying the stop.

[9] At trial, following the close of the People's case-in-chief, Mateo moved for an acquittal. The court denied this motion. Mateo rested without calling any witnesses. The jury returned a guilty verdict on both counts. A Judgment of Conviction was entered, and this appeal timely followed.

II. JURISDICTION

[10] This court has jurisdiction over appeals from a final judgment of conviction rendered in the Superior Court of Guam. 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

[11] Mateo makes four general arguments on appeal. First, Mateo asserts that the trial court erred in denying his motion for an *in camera* review of, and the People committed a *Brady* violation by failing to review and disclose, the arresting officers' personnel files. Second, Mateo posits that the trial court erred in denying his motion to suppress statements he made to GPD. Third, Mateo argues that the presumptive field test should have been excluded from evidence because it was unreliable under *Daubert*. Fourth, Mateo claims that the trial court erred in denying his motion to acquit because the People relied upon field tests that are not scientifically sound and that there was not sufficient evidence regarding his intent to distribute. We consider each of these issues below and conclude that none justify reversal of Mateo's conviction.

A. No *Brady* Violation Occurred in this Case and the Court Properly Denied Mateo's Motion for an *In Camera* Review Because Mateo Failed to Establish that the Arresting Officers' Personnel Files Were Material to His Defense

[12] Mateo first asserts on appeal that the People committed a *Brady* violation in failing to turn over personnel files[2] of the GPD officers who arrested him and that the trial court erred in refusing to review these files *in camera*. *See* Appellant's Br. at 11, 26-30 (Jan. 29, 2016). In opposition, the People argue that Mateo failed to show that the personnel files of the arresting

[2] Mateo also asserts that the People were required to review and disclose all internal affairs reports related to the arresting officers. *See, e.g.*, Appellant's Br. at 26-29 (Jan. 29, 2016). The discovery of internal affairs documents, however, was not addressed by the trial court below, *see* RA, tab 37 (Dec. & Order), and Mateo's motion in the Superior Court only addressed personnel files, *see* RA, tab 26 (Written Req. for Prosecution Examination of Officer Pers. Files); RA, tab 30 (Notice for Mot. for *In Camera* Review of Officer Pers. Files). An appellate court may, at its discretion, "consider[] *Brady* claims raised for the first time on direct appeal but only when the appellate court ha[s] a proper record to consider or where the facts [a]re uncontroverted." *State v. Parker*, 198 S.W.3d 178, 181 (Mo. Ct. App. 2006). Mateo fails to identify what would be in any existing internal affairs report or present evidence in the record to establish the more basic fact of whether any internal affairs complaint was ever actually filed against either officer. Thus, no record evidence exists to determine whether any internal affairs complaint would have been material to Mateo's defense, a requirement under *Brady v. Maryland*, 373 U.S. 83 (1963). We therefore decline to use our discretion to review Mateo's *Brady* claim with respect to internal affairs documents. *See People v. Leslie*, 2011 Guam 23 ¶ 28; *see also People v. Fort*, 44 N.Y.S.3d 595, 598 (App. Div. 2017) ("Defendant's remaining contention . . . is presented for the first time on appeal as a purported *Brady* violation and is, therefore, unpreserved for our review." (collecting cases)); *Smith v. State*, 474 S.E.2d 272, 275 (1996) ("A defendant may not raise an alleged *Brady* violation for the first time on appeal.").

officers were material to his defense and, therefore, such evidence was not required to be disclosed or reviewed. Appellee's Br. at 24-28 (Mar. 16, 2016). We review alleged *Brady* violations *de novo*. *People v. Tedtaotao*, 2015 Guam 31 ¶ 12.

[13] In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). *Brady* evidence "includes impeachment evidence relating to government witnesses . . . ." *People v. Fisher*, 2001 Guam 2 ¶ 12 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). In order to establish a *Brady* violation, a defendant must show that: (i) "the evidence at issue [is] favorable to the defendant" because it is either exculpatory or impeaching; (ii) "the government . . . suppressed the evidence, either willfully or inadvertently"; and (iii) "the suppression of the evidence . . . prejudiced the defendant in that it deprived him or her of a fair trial." *People v. Campos*, 2015 Guam 11 ¶ 29 (citing *People v. Kitano*, 2011 Guam 11 ¶ 21).

[14] Guam has codified the principles of *Brady* at 8 GCA § 70.10 *et seq.* *See People v. Orallo*, 2004 Guam 5 ¶ 12 ("The disclosure of exculpatory evidence is required by section 70.10(a)(7) which codifies and expands upon the constitutional due process requirement, set forth in *Brady* . . . that the prosecution must disclose evidence favorable to the defendant which is material to guilt or punishment."). As relevant to this appeal, 8 GCA § 70.10 requires the People to disclose to the defense "any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor" that is within the Office of the Attorney General's (OAG) "possession or control, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting

attorney." 8 GCA § 70.10(a)(7) (2005). We have previously interpreted this specific subsection of section 70.10 as being co-equal with the mandates of *Brady*. *See People v. Flores*, 2009 Guam 22 ¶ 60 ("The protections afforded by section 70.10(a)(7) are equal to and not greater than those afforded by the Constitutional guarantee articulated by *Brady* and its progeny."); *see also Campos*, 2015 Guam 11 ¶ 27 (citation omitted). Moreover, 8 GCA § 70.10(b), like *Brady* itself, "imposes a general materiality requirement upon items before disclosure." *Tuncap*, 1998 Guam 13 ¶ 18. The prosecution's obligation under section 70.10(a)(7) extends "to any material information in the possession or control of . . . persons who have participated in the investigation or evaluation of the case," 8 GCA § 70.10(b), which generally includes any documents or information in the possession of the GPD, *see People v. Reyes*, 1999 Guam 11 ¶¶ 18-19 (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)); *see also United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (holding prosecutor's responsibilities under *Brady* "cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies" (citations omitted)).

[15] In addition to these mandatory disclosures, the court may order, in its discretion, that the prosecution turn over other evidence upon "a showing of materiality to the preparation of his defense and that the request is reasonable." 8 GCA § 70.15(a). Thus, under both sections 70.10 and 70.15, as well as our holding in *Tuncap*, a threshold showing of materiality must be established before the prosecution is obligated to turn over evidence to the defendant either automatically (under section 70.10 and *Brady*) or following a motion by the defendant (under section 70.15).

[16] Mateo argues that his request for the prosecution to review, and his motion seeking *in camera* review of, the arresting officer's personnel file is governed by the Ninth Circuit's

decision in *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), *cert. denied*, 503 U.S. 972 (1992). In *Henthorn*, the court held that, upon the request of a defendant, and regardless of any showing of materiality, the prosecution must examine the personnel files of testifying officers or turn them over to the court for *in camera* review to determine whether they contain *Brady* material. 931 F.2d at 30-31. While *Henthorn* apparently remains good law within the Ninth Circuit, multiple other jurisdictions at both the state and federal levels have flatly rejected its holding. *See, e.g.*, *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997); *United States v. Lafayette*, 983 F.2d 1102, 1106 (D.C. Cir. 1993); *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985); *United States v. Wilson*, 278 F.R.D. 145, 156 (D. Md. 2011); *State v. Robles*, 895 P.2d 1031, 1035 (Ariz. Ct. App. 1995); *People v. Shakur*, 648 N.Y.S.2d 200, 208 n.7 (Sup. Ct. 1996).

[17] We agree with the trial court that the better approach is that adopted by the overwhelming majority of jurisdictions, which requires a threshold showing of materiality to trigger a mandatory review by the prosecution, or an *in camera* review by the court, of an arresting officer's personnel files. As the trial court correctly found, *Henthorn* is inconsistent with Guam law. As we previously stated in *Kitano*, "*Brady*'s overriding concern [is] with the justice of the finding of guilt, not with the accused's ability to prepare for trial." *Kitano*, 2011 Guam 11 ¶ 21 (alterations in original) (internal quotation marks omitted). "Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden" upon the trial courts. *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984), *cert. denied*, 469 U.S. 1020 (1984).

[18] Mateo alternatively asserts that pursuant to 10 GCA § 77133 the People were required to review the arresting officer's personnel files. *See* Appellant's Br. at 27-28. Under section 77133, the GPD is required to forward a "written complaint . . . alleging the commission of a crime or misconduct on the part of a police officer or employee of the [GPD]" that the GPD finds credible to the OAG, which the OAG is then required to review. 10 GCA § 77133(a), (c) (2005). In addition, the Chief of Police is required to draft a public statement "indicating the preliminary disposition of the allegation." *Id.* § 77133(b). This statute, however, applies only to internal affairs complaints—an issue this court will not consider in the absence of a full record, *see supra* n.2—and does not apply to personnel files of specific officers. Rather, the personnel files of GPD officers, like all public employees of Guam, are confidential and generally not subject to public disclosure. *See* 5 GCA § 10108(c) (as amended by Pub. L. 32-020:2 (Apr. 11, 2013)). Indeed, the presence of a statute blocking personnel files from public disclosure under the open-records law is further reason for this court to reject the application of *Henthorn*. *See Shakur*, 648 N.Y.S.2d at 208 n.7 (rejecting *Henthorn* in part because it failed to consider state statutes that "declare personnel records confidential").

[19] Mateo relies only upon the existence of a civil complaint to establish the potential materiality of the arresting officers' personnel files. Evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Fisher*, 2001 Guam 2 ¶ 13 (quoting *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988)). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Presser*, 844 F.2d at 1281).

[20] Mateo did not meet his burden to establish that the requested personnel files were material to his defense. As an initial matter, the civil complaint pointed to by Mateo named only

Officer Babauta as a defendant; Officer Brown was not a party to that civil litigation. *See* RA, tab 30, Attach. B at 3 n.2 (Notice of Mot. for *In Camera* Review of Officer Pers. Files). There is accordingly nothing in the record supporting a finding that the personnel files of Officer Brown were in any way material to Mateo's defense. Concerning Officer Babauta, the civil complaint asserted that he and other GPD officers illegally entered a personal residence without a warrant, effectuated a warrantless arrest of the plaintiff, and physically assaulted the plaintiff outside of her residence. *See* RA, tab 30, Attach. A at 12-14 (Notice of Mot. for *In Camera* Review of Officer Pers. Files). Even accepting the allegations of the complaint as true, these purported facts are too attenuated from the circumstances of Mateo's detention to be material to his defense. *See State v. Bullard*, 858 So. 2d 1189, 1191-92 (Fla. Dist. Ct. App. 2003) (finding trial court erred in granting new trial under *Brady* where purported *Brady* material "was completely unrelated to [defendant's] case").

[21] As explained in further detail below, there was more than sufficient evidence to convict Mateo, including his admissions regarding his possession and use of methamphetamine. *See infra* Part IV.C. There is no reasonable probability that had Mateo been permitted to use the unrelated events underlying the civil complaint to impeach Officer Babauta on cross-examination the result would have been different. In addition to Mateo's statements inculpating himself, Officer Babauta's testimony both at the suppression hearing and at trial was corroborated by Officer Brown, who could not have been similarly impeached.

[22] For these reasons, no *Brady* violation occurred in this case and the trial court properly denied Mateo's motion seeking an *in camera* review of the arresting officers' personnel files.

B. The Trial Court's Credibility Determination Upon Which Its Decision Denying Mateo's Motion to Suppress Rests Was Not Clearly Erroneous

[23] Mateo next argues on appeal that the trial court erred in denying his motion to suppress the statements he made to the officers following his detainment. Appellant's Br. at 33-34; Appellant's Reply Br. 16-18 (Mar. 29, 2016). Mateo does not allege any legal error committed by the trial court. Instead, he asserts that the arresting officers' testimony was not credible and thus did not serve as a valid evidentiary basis on which to find reasonable suspicion existed to effectuate a stop of Mateo's vehicle. Appellant's Br. at 33-34. The People argue in opposition that the arresting officers' testimony was consistent and supported a finding of reasonable suspicion. *See* Appellee's Br. at 34-35.

[24] We review factual findings made on a motion to suppress for clear error. *See People v. Cundiff*, 2006 Guam 12 ¶ 14. Likewise, this court reviews witness credibility determinations for clear error. *People v. Farata*, 2007 Guam 8 ¶ 25 (holding that "credibility determinations of a trial court should be upheld if such determinations are not clearly erroneous" in reviewing trial court's order on motion to suppress). "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *People v. Calhoun*, 2014 Guam 26 ¶ 8.

[25] Mateo's argument is premised on three separate bases: (i) that the personnel files of the arresting officers would have impeached their testimony; (ii) that the officers gave inconsistent statements regarding Mateo's arrest; and (iii) that the officers failed to indicate in their initial report any reason for pulling Mateo over. Initially, as discussed above, Mateo has not established an entitlement to the arresting officers' personnel files under *Brady*'s materiality standard. The court, therefore, need not address Mateo's first argument further. Concerning Mateo's other assertions, both officers testified at the suppression hearing that they witnessed Mateo speeding. *See* Tr. at 9-10 (Hr'g Mot. to Suppress, June 15, 2015) (Officer Babauta

testimony); *id.* at 34-35 (Officer Brown testimony). In addition, while both officers admitted that their initial report did not include several of the more specific details they each put forth while testifying, *see id.* at 17, 24 (Officer Babauta testimony); *id.* at 38-39 (Officer Brown testimony), nothing in the report is inconsistent with either officers' testimony at the suppression hearing. There were several inconsistencies between the officers' testimony during the suppression hearing and at trial, but these inconsistencies were relatively minor. For example, Officer Babauta testified at the suppression hearing that Mateo was speeding at roughly 35 miles per hour, *see* Tr. at 9 (Hr'g Mot. to Suppress), while at trial he stated Mateo was driving "it obviously looked, 20, 25, or above," Tr. at 42 (Jury Trial, Aug. 31, 2015). Both officers stood by their prior testimony that Mateo was speeding.

[26] As Mateo admitted in his supplemental submission following the suppression hearing, "[i]f the Court accepts [the officers'] testimony [at the suppression hearing] on its face, [Mateo] cannot prevail in his Motion to Suppress." RA, tab 48 at 2 (Def.'s Mem. in Supp. of Mot. Suppress, July 6, 2015). The trial court did indeed accept the officers' testimony and denied Mateo's motion. RA, tab 52 at 3 (Dec. & Order, Aug. 18, 2015). Upon reviewing the record as a whole, this court is not left with a firm conviction that a mistake was made in accepting the veracity of the arresting officers' testimony. Accordingly, we affirm the trial court's denial of Mateo's motion to suppress.

C. The Trial Court Did Not Commit Plain Error in Admitting the Field Tests Indicating a "Presumptive Positive" Result for the Presence of Methamphetamine

[27] Mateo next argues that the trial court improperly admitted into evidence the field tests conducted by GPD that showed a "presumptive positive" result for the presence of methamphetamine. Appellant's Br. at 12-22. Among other claims, Mateo asserts that: (i) the

field test conducted by the GPD was unreliable in the absence of more formal lab testing, *see id.* at 12-13; and (ii) the GPD officer through whom the field tests were admitted was unqualified as an expert to conduct the field testing, *see id.* at 15. The People argue in opposition that the field testing was sufficiently reliable to be admissible. Appellee's Br. at 14-19.

[28] Mateo attempts to bootstrap this claimed error into an analysis regarding the sufficiency of the evidence. He suggests that if the field test evidence was inadmissible, then there was insufficient evidence to convict him of the crime of possession. *See, e.g.*, Appellant's Reply Br. at 3 ("The testimony on the results of the presumptive tests should not have been presented to the Jury and there was insufficient circumstantial evidence to convict."); *see also* Appellant's Br. at 15, 21-22. We recently rejected this analytic framework in *People v. Camacho*, 2016 Guam 37. In *Camacho*, we stated that on appellate review erroneously admitted evidence is nevertheless "properly considered in a challenge to the sufficiency of the evidence." 2016 Guam 37 ¶ 45 (citing *Lockhart v. Nelson*, 488 U.S. 33, 41–42 (1988); *Best v. United States*, 66 A.3d 1013, 1019–20 (D.C. 2013)). When analyzing admissibility claims, we "assess the impact erroneously introduced evidence or other trial errors has on the verdict" under the standard applicable to the claimed evidentiary error. *Id.* We do not "run anew" a sufficiency of the evidence analysis, excluding the improperly admitted evidence from our consideration. *Id.* Rather, when reviewing sufficiency claims, we evaluate all the evidence before the trial court, "even if it was erroneously admitted." *Id.* (quoting *Best*, 66 A.3d at 1019-20). Thus, we must address Mateo's *Daubert* claims separately from his claims regarding the sufficiency of the evidence.

[29] Mateo did not move to suppress the now-challenged evidence or object during trial to its admission. *See, e.g.*, Appellant's Br. at 15 (arguing admitting evidence was "plain error"); Appellee's Br. at 15. We therefore apply a plain error review to his *Daubert* claims on appeal.

See People v. Roby, 2017 Guam 7 ¶ 18 (citation omitted); *see also* 8 GCA § 130.50 (2005). On the facts of this case, we cannot conclude that the trial court committed plain error in admitting the presumptive field tests.

[30] Guam Rule of Evidence ("GRE") 702 permits a witness qualified "by knowledge, skill, experience, training, or education" to testify as an expert where: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." 6 GCA § 702.[3] Expert "testimony is admissible only if it is both relevant and reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)); *see also In the Interest of N.A.*, 2001 Guam 7 ¶ 34 ("[A]n expert witness may testify if he or she is qualified and the proposed testimony would assist the trier of fact to understand the evidence or determine a fact in issue."). When determining whether an expert's methodology is reliable, a court should consider factors such as "testing, peer review, error rates, and 'acceptability' in the relevant scientific community." *Kumho Tire Co.*, 526 U.S. at 141 (citing *Daubert*, 509 U.S at 593-94).

[31] Several courts have held that presumptive field tests are inadmissible in situations where there was no expert testimony regarding the underlying chemical reaction or science upon which the test is based. *See State v. Morales*, 45 P.3d 406, 411-12 (N.M. Ct. App. 2002), *overruled on other grounds*, *State v. Tollardo*, 275 P.3d 110 (N.M. 2012); *State v. Martinez*, 69 A.3d 975, 990-92 (Conn. App. Ct. 2013), *rev'd on other grounds*, 127 A.3d 164 (2015); *Doolin v. State*, 970 N.E.2d 785, 789 (Ind. Ct. App. 2012). Other courts, however, have rejected any

[3] This statute is based upon Federal Rule of Evidence 702, *see* 6 GCA § 702, Source, and we therefore look to federal precedent as persuasive authority, *see Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 7.

challenge to presumptive field tests based upon *Daubert* grounds, finding that such tests are not novel and may be admitted without expert foundational testimony. *See Fortune v. State*, 696 S.E.2d 120, 123-24 (Ga. Ct. App. 2010); *see also Commonwealth v. Fernandez*, 934 N.E.2d 810, 820-21 (Mass. 2010) (not an abuse of discretion to admit presumptive field tests, at least for limited purpose). Whether proper expert foundational testimony is necessary is a question we need not decide today. Although Mateo challenges whether Officer Cepeda had the requisite training, experience, education, etc. to be certified as an expert in the field of chemical analysis,[4] he ignores the fact that other expert testimony in this case laid a sufficient foundation under *Daubert* for admission of the presumptive field tests. The trial court admitted the testimony of GPD criminologist Monica Salas as "an expert witness to deal with drug testing and identification." Tr. at 94 (Jury Trial, Sept. 1, 2015). During her testimony, Salas discussed the scientific basis for the field tests conducted by Officer Cepeda. *See id.* at 95-100. This was sufficient to establish the reliability of the tests under *Daubert*.

[32] Even those cases holding that field testing was inadmissible for lack of a proper foundation do not suggest that field testing can never be admissible. In *Doolin*, for example, the court stated, "our holding today does not represent a conclusion that all field tests of marijuana . . . are, per se, inadmissible; nor do we find that in-court field tests on marijuana may never be used as substantive evidence of guilt . . . ." 970 N.E.2d at 789. Rather, the court's holding was limited to "the facts and circumstances of th[at] case," where there was a "lack of foundation as

[4] Mateo asserts that the evidence was inadmissible because Officer Cepeda "was not formally trained in how to use the test or that he conducted the test under satisfactory conductions [sic] or methods." Appellant's Br. at 16. Contrary to Mateo's claims, however, Officer Cepeda testified that he did have formal training in how to use field drug kits and that accounting for the differences between using individual brands of drug testing kits was a simple matter of reading the directions on the box. *See* Tr. at 76-77 (Jury Trial, Sept. 1, 2015). He further testified that he took precautionary steps not to contaminate the sample. *Id.* at 89-91. Mateo therefore has failed to establish plain error on this basis. *See, e.g.*, *United States v. Tab*, 259 F. App'x 684, 694 (6th Cir. 2007), *cert. denied*, 552 U.S. 1305 (2008).

to [the test's] reliability." *Id.* In a subsequent case, the same court that decided *Doolin* held that "[t]he mere fact that [an expert] could not perform a confirmatory test does not invalidate the [presumptive] test or inhibit its admissibility but rather reflects on the weight of her testimony." *Sciaraffa v. State*, 28 N.E.3d 351, 358 (Ind. Ct. App. 2015); *see also Fernandez*, 934 N.E.2d at 821 (citation omitted) (stating "[t]he reliability of scientific evidence is distinct from its strength" in affirming admission of drug field test). Mateo has cited no case in which the trial court held that presumptive field tests were per se inadmissible as scientifically unreliable.[5] Indeed, courts have specifically permitted the use of the Nark II test at issue in this case in the face of a defendant's challenge to its admission under *Daubert*. *See, e.g.*, *United States v. Perez*, Crim. Nos. 7:11-CR-181, 7:11-CR-170, 2012 WL 243232, at *2 (W.D. La. Jan. 25, 2012) ("Certainty is *not* required, but the scientific evidence must be based on 'good grounds.'" (citation omitted)).

[33] We do not mean to suggest today that field testing is admissible in every case for any reason. To support his position, Mateo relies heavily on statistics contained in news articles, law review articles, and similar material that suggest a high rate of false-positive results from field testing. We are certainly bothered by the statistics regarding false positive results suggested by some of this literature. But even if this court could take judicial notice of these statistics under GRE 201 (a highly questionable proposition), judicial notice is no substitute for building an adequate factual record—including, perhaps, competing expert testimony—establishing that presumptive field tests are not reliable within the meaning of that term under *Daubert*. For these reasons, on the facts of this case, we cannot say that the trial court committed reversible plain error in admitting the presumptive field test into evidence.

[5] The only case law relied upon by Mateo is an unpublished district court opinion from the Northern District of California, *United States v. Diaz*, No. CR 05-167, 2006 WL 3512032 (N.D. Cal. Dec. 6, 2006). As Mateo acknowledges, however, in that case the court upheld the challenged tests as sufficiently reliable under *Daubert*. *See id.* at *10, *13.

D. Motion to Acquit and the Sufficiency of the Evidence

[34] The final argument raised by Mateo on appeal is that the People failed to present sufficient evidence to sustain a conviction on both the charge of Possession of a Schedule II Controlled Substance and the charge of Possession of a Schedule II Controlled Substance with Intent to Deliver. Appellant's Br. at 12-26. At trial, the court denied Mateo's motion for an acquittal at the close of the People's case-in-chief. Tr. at 103-06 (Jury Trial, Sept. 1, 2015).

[35] "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). "[W]e 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. 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)).

1. Possession of a Schedule II Controlled Substance

[36] The first sufficiency claim raised by Mateo is that the government failed to produce sufficient evidence establishing that the substance at issue was a Schedule II controlled substance—namely, methamphetamine. *See, e.g.*, Appellant's Br. at 15. The People argue that there was more than sufficient evidence establishing Mateo possessed an illicit substance, even in the absence of formal laboratory test results. *See* Appellee's Br. at 17-19.

[37] On the facts presented here, there was more than sufficient evidence to convict Mateo on the charge of possession. Among other evidence, Mateo gave two confessions—one in writing—that he was in possession of an illicit substance that he referred to as "ice," as well as two "ice pipes." *See* Tr. at 47-48, 67, 70-71 (Jury Trial, Aug. 31, 2015); Tr. at 5-7 (Jury Trial,

Sept. 1, 2015). He further admitted to the reason that he was in possession of the "ice" (*i.e.*, he was holding it for safekeeping) and that he had used "ice" the night prior, which provided further veracity to his general admission of possession of an illicit substance. Tr. at 67-69 (Jury Trial, Aug. 31, 2015). There was also photographic evidence showing, among other things, "two ice pipes" and a "crystalline substance." Tr. at 15 (Jury Trial, Sept. 1, 2015). All of this was corroborated by the field tests that Mateo also challenges on appeal. Tr. at 14, 20-22, 64, 78-80, 89-91 (Jury Trial, Sept. 1, 2015). As noted above, *see supra* Part IV.C, regardless of whether this evidence was admitted in error, we nevertheless include it in our sufficiency analysis on appeal. *See Camacho*, 2016 Guam 37 ¶ 45. We agree with Mateo that if these field tests were the only evidence that the People relied upon to prove that he possessed a controlled substance, this would not establish guilt beyond a reasonable doubt. But that is not the case. There was considerable circumstantial evidence of Mateo's guilt, and the presumptively positive field tests—though not conclusive—were certainly corroborative of Mateo's possession of a controlled substance.

[38] We recently held in *People v. McKinney* that "'entirely circumstantial' evidence is sufficient to support a guilty verdict." 2016 Guam 3 ¶ 22 (citations omitted). Multiple courts have held that this general rule holds true in drug cases as well. In *United States v. Dolan*, for example, the court held that "lay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identi[ty] of the substance involved in an alleged narcotics transaction." 544 F.2d 1219, 1221 (4th Cir. 1976); *see also United States v. Westbrook*, 896 F.2d 330, 336 (8th Cir. 1990); *United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1988); *United States v. Harrell*, 737 F.2d 971, 978 (11th Cir. 1984); *United States v. Almada-Aldama*, 462 F.2d 952, 952 (9th Cir. 1972). Such evidence can include,

inter alia, "evidence of the physical appearance of the substance" and "evidence that the substance was called by the name of the illegal narcotic by the defendant . . . ." *Dolan*, 544 F.2d at 1221. As the Sixth Circuit has stated, "no court has held that scientific identification of a substance is an absolute prerequisite to conviction for a drug-related offense . . . ." *Schrock*, 855 F.2d at 334. Rather, "courts have held that the government may establish the identity of a drug through cumulative circumstantial evidence." *Id.*[6]

[39] Viewing the evidence in the light most favorable to the prosecution, *see Diego*, 2013 Guam 15 ¶ 30, we find that the People presented sufficient evidence that Mateo illegally possessed a Schedule II controlled substance that a jury could rely upon to find guilt beyond a reasonable doubt.[7] The trial court therefore appropriately denied Mateo's motion to acquit concerning this charge.

2. Possession of a Schedule II Controlled Substance With Intent to Distribute

[40] The next sufficiency claim raised by Mateo is that the People failed to present sufficient evidence regarding his intent to distribute. Specifically, Mateo asserts that there was no evidence

[6] Mateo invites the court to adopt an analysis based upon the six factors that he claims were considered by the Nebraska Supreme Court in *State v. Watson*, 437 N.W.2d 142, 145 (Neb. 1989). *See* Appellant's Reply Br. at 5-6. In *Watson*, the court reviewed dozens of cases in other jurisdictions and identified various factors that other courts have previously relied upon in upholding a drug-related conviction. *Id.* We decline to adopt any formalistic or factored test for determining whether the prosecution has presented sufficient evidence of possession of a controlled substance where there is no chemical analysis admitted at trial. Analyzing the sufficiency of the evidence in this context should be no different than analyzing the sufficiency of the evidence in any other context.

[7] As part of his argument that a "presumptively positive" test is not sufficient to support a guilty verdict on the charge of possession, Mateo claims that certain over-the-counter or prescription drugs, such as Vick's Inhaler, contain chemicals that can give a false positive result in a field test. *See* Appellant's Br. at 18-19. He uses this fact to then argue that in closing arguments, the People stated that Mateo came forward with no evidence of a valid prescription, which violates his right to remain silent. *Id.* at 19. The People argue in opposition that pursuant to 9 GCA § 67.505.2, Mateo bore the burden of proof to establish that he held a valid prescription, as this is an excuse to criminal culpability. Appellee's Br. at 20-22. Mateo made clear in his reply brief, however, that he asserts only a due process violation in that "the OAG tried to convince the Jury that Mr. Mateo had to provide this information" and this "treads on Mr. Mateo's 5th Amendment Right to remain silent." Appellant's Reply Br. at 7. Mateo provides no legal or other support for his position, nor was this issue raised below. Accordingly, we decline to address this issue that was raised only in passing and for the first time on appeal. *See Leslie*, 2011 Guam 23 ¶ 28; *People v. Messier*, 2014 Guam 34 ¶¶ 38-40; *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim.").

of an overt act indicating that he intended to distribute a controlled substance, as opposed to his mere possession, *see* Appellant's Br. at 22-26, and that the People's interpretation of the term "distribute" is not supported in the statute. In opposition, the People argue that Mateo confuses the concepts of "attempt" and "intent" and that there was sufficient evidence that Mateo intended to distribute methamphetamine. Appellee's Br. at 22-24.

[41] Pursuant to 9 GCA § 67.401.1, "it shall be unlawful for any person knowingly or intentionally: (1) to manufacture, deliver or possess with intent to manufacture, deliver or dispense a controlled substance . . . ." 9 GCA § 67.401.1 (2005). Under this statute, the term "[d]eliver or delivery, unless the context otherwise requires, means to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship." 9 GCA § 67.101(f) (2005).[8] Contrary to the arguments put forth by Mateo on appeal, *see* Appellant's Br. at 22-24, nothing in the statutory text suggests that an attempt to distribute is a necessary element of this crime. *Cf. United States v. Redd*, 355 F.3d 866, 872-73 (5th Cir. 2003) (noting that proof of a "substantial step" is necessary "[i]n order to convict [defendant] of the *attempt* charge under 21 U.S.C. § 846 . . . [for] possession with intent to distribute . . . ." (emphasis added)).

[42] Under Guam law, an attempt to commit a criminal act is a crime separate and apart from the crime constituting the actual commission of the criminal act. *See People v. Flores*, 2004 Guam 18 ¶ 12 (referring to "the crime of attempt"); *People v. Angoco*, 2004 Guam 11 ¶ 25 n.8

[8] Mateo admitted that he was "hold[ing]" the substance in question on behalf of Sablan. *See* Tr. at 68 (Jury Trial, Aug. 31, 2015). He argues on appeal that if this was sufficient to establish "delivery" then the statute at issue would be too vague to be enforceable. We disagree. This statute is clear that any "transfer" of an illicit substance constitutes "delivery," and this is true regardless of whether there is an "agency relationship" between the transferor and the transferee. To the extent Mateo asserts that his conviction must be overturned because he was convicted under an unconstitutionally vague statute, we decline to use our discretion to address this issue as it was not raised in the court below or in Mateo's opening brief. *See, e.g.*, *Leslie*, 2011 Guam 23 ¶ 28.

(noting that "[a]ttempted robbery is a lesser-included offense of robbery"); 9 GCA § 13.10 (2005) ("A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime."); 8 GCA § 105.58 (2005) (noting that an "attempt" to commit a crime may be a lesser included offense of the actual crime); *cf. People v. Songeni*, 2010 Guam 20 ¶ 15 ("[I]t is clear that an 'attempted crime' under Guam law differs from *the* crime of which it is an inchoate version *only* insofar as it was not a completed version of *that* crime."). Only the separate crime of attempt requires proof of a "substantial step" in furtherance of its commission. *See* 9 GCA § 13.10 (2005). Here, Mateo was charged with possession with intent to distribute, not *attempted* possession with intent to distribute. *See* RA, tab 7 (Indictment, Dec. 15, 2014). Thus, the People were not obligated to establish that Mateo took a substantial step in furtherance of a delivery.

[43] The "intent" element of a crime is "rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence." *McKinney*, 2016 Guam 3 ¶ 19 (citing *People v. Holt*, 937 P.2d 213, 245-46 (Cal. 1997)). Evidence that has been found to be indicative of intent to distribute includes, among other things, finding a controlled substance packaged in a manner consistent with resale and finding an amount inconsistent with personal use. *See United Stated v. Oleson*, 310 F.3d 1085, 1089 (8th Cir. 2002) ("Some factors that may lead to a conclusion that the drugs were meant for distribution include the quantity of drugs, packaging material, paraphernalia, and the presence of guns." (citation omitted)); *see also United States v. Tebha*, 770 F.2d 1454, 1457 (9th Cir. 1985).

[44] Here, at least three pieces of evidence established Mateo's intent to distribute. First, Officer Cepeda testified that Mateo held about 3.8 grams of methamphetamine, which had a

street value of about $700 per gram. *See* Tr. at 66-68 (Jury Trial, Sept. 1, 2015). Second, the substance in Mateo's possession was found in "a baggie that had broken down smaller baggies of the drug ice inside," along with some additional empty baggies. Tr. at 48-49 (Jury Trial, Aug. 31, 2015). Third, and most damning, Mateo told the arresting officers that "between the hours of 6:00 and 7:00 p.m. that evening him and Mr. Sablan went to the Liberty Game Room along Route-8 to find potential customers to buy the drug ice" and that "two plates were sold." Tr. at 68 (Jury Trial, Aug. 31, 2015). A jury could rely on this evidence to find beyond a reasonable doubt that Mateo had intent to deliver. The trial court therefore did not err in denying Mateo's motion to acquit with respect to the charge of possession with intent to distribute.

V. CONCLUSION

[45] For the reasons discussed above, the Judgment of Conviction is **AFFIRMED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice