



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ADAM JAMES MESSIER,
Defendant-Appellant.

Supreme Court Case No.: CRA16-001
Superior Court Case No.: CF0084-12

OPINION

Cite as: 2018 Guam 11

Appeal from the Superior Court of Guam
Argued and submitted on July 7, 2016
Hagåtña, Guam

Appearing for Defendant-Appellant:

James M. Maher, *Esq.*
Law Office of James M. Maher
238 Archbishop Flores St., Ste. 300
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:

Yoav S. Sered, *Esq.*
Office of the Attorney General
Prosecution Division
590 S. Marine Corps Dr., Ste. 706
Tamuning, GU 96913

E-Received

8/30/2018 12:22:15 PM

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

MARAMAN, J.:

[1] This is the second time that this matter has come before us. In *People v. Messier*, 2014 Guam 34 (hereinafter, “*Messier I*”), the People appealed from the trial court’s grant of Defendant-Appellant Adam James Messier’s motion for a new trial. We reversed and reinstated Messier’s conviction. Upon remand, a final judgment was entered convicting Messier of Second Degree Criminal Sexual Conduct, Fourth Degree Criminal Sexual Conduct, and Child Abuse and sentencing him to five years’ imprisonment, all suspended. Messier appeals from this final judgment. On appeal, Messier argues that the prosecutor made numerous statements in violation of Messier’s Fifth Amendment right against self-incrimination and challenges other statements on various grounds. For the reasons stated below, we reverse Messier’s convictions and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] “Messier was indicted on one count of Second Degree Criminal Sexual Conduct (as a First Degree Felony), one count of Fourth Degree Criminal Sexual Conduct (as a Misdemeanor), and one count of Child Abuse (as a Misdemeanor).” *Messier I*, 2014 Guam 34 ¶ 2. At trial, the alleged victim, C.S., and her sister, S.S., testified that they stayed at Messier’s house to babysit his children while he and his wife, who is C.S. and S.S.’s cousin, were at a Christmas party. “The victim [C.S.] testified she awoke to Defendant touching her upper and lower intimate areas, and the victim’s sister [S.S.] testified she witnessed this occur.” *Id.* ¶ 5 (quoting Record on

¹ The signatures in this opinion reflect the titles of the Justices at the time this matter was argued and submitted.

Appeal (“RA”), tab 116 at 2-3 (Dec. & Order, Feb. 26, 2014)); *see also* Transcripts (“Tr.”) at 104-05 (Jury Trial, Jan. 18, 2013); Tr. at 52-53 (Jury Trial, Jan. 22, 2013). The witnesses’ mother testified that S.S. called her around 4:00 a.m. on the day of the incident requesting to be picked up. The mother also testified that she observed S.S. hugging her crying sister, C.S., in the car on the way home.

[3] C.S. and S.S. admitted at trial to concocting sexual assault allegations against their father and brother on a prior occasion “to gain more freedom from parental oversight . . . even knowing that their father and their brother could be prosecuted and incarcerated for the sexually-related acts that the two young women fabricated.” *Messier I*, 2014 Guam 34 ¶ 5 (quoting RA, tab 116 at 2 (Dec. & Order, Feb. 26, 2014)). They made false verbal and written statements against their father and brother to both Guam Child Protective Services and the police. Messier’s counsel questioned C.S. and S.S. at length regarding the prior allegations against their father and brother, which they admitted were false.

[4] During opening statements and closing arguments, the prosecution made several statements Messier now claims were improper. Messier lists twenty-two such statements, labeled A through V, including:

- (I) “Motive to lie. There has been no evidence presented of any motive to lie, any reason that they would make this up. Why would they do that? That’s something to assess the credibility of both [C.S.] and [S.S.]. Why would they wake up at 4:00 in the morning? Why then would they call their mom? Why then, when she didn’t answer, would they continue to try to get in contact with them? Why then would they ask to be picked up right then and there? Why then would they tell her to come get her (sic), would they fake sounding scared, would they - - would [C.S.] fake crying in the car, then at home, then fake it again when the defendant came over the next time, and then continue to tell what happened to her to a number of different people: to a counselor, to her mom, to her sister, to CPS, to Healing Hearts, the police, the attorney

general's office, and to you here in this jury box?" Tr. at 119-20 (Jury Trial, Jan. 29, 2013).

(J) "All of it has to be fake, if they're lying. So what evidence was shown that they have any such motive to do that? And not only did [C.S.] have to do it, [S.S.] had to go along with it as well. So ask yourself, when assessing the credibility of the Government's witnesses, specifically [C.S.], specifically [S.S.], ask yourself if there is any motive that they would make this up, if there's any evidence shown of that." *Id.* at 120.

(L) "In the December 2011, incident, again there's no evidence shown of any motive to lie." *Id.* at 121.

(U) "First, again, where is the evidence of motive to lie." *Id.* at 131.

[5] After being convicted of all counts against him, "Messier . . . moved for acquittal or new trial." *Messier I*, 2014 Guam 34 ¶ 2. The trial court denied the motion for acquittal, but granted the motion for new trial because it "found 'a myriad of contradictions and inconsistencies between the admitted evidence and the testimonies of the victim and the witnesses.'" *Id.* ¶ 4 (quoting RA, tab 116 at 2, 10 (Dec. & Order, Feb. 26, 2014)). These inconsistencies between the victim and her sister/eyewitness "were split into two lists—one collecting inconsistencies between the testimony of the victim and her sister/eyewitness, and the other collecting inconsistencies between the victim's testimony and evidence of her prior statements." *Id.*

[6] The People appealed the trial court's grant of Messier's motion for a new trial, and this court reversed the trial court's decision and remanded for sentencing. *Id.* ¶¶ 9, 41. Messier petitioned this court for rehearing, but we denied the petition. *People v. Messier*, CRA14-002 (Pet. Reh'g at 1 (Dec. 18, 2014)); *People v. Messier*, CRA14-002 (Order at 9 (Mar. 24, 2015)).

[7] Upon remand, the trial judge disqualified himself from sentencing, indicating he believed the jury made a mistake and expressing that he would have difficulty sentencing Messier given the quality of the evidence and a personal belief of reasonable doubt regarding guilt. The matter

was reassigned to another judge. Messier moved to vacate and set aside the disqualification, but the motion was denied. Messier subsequently sought acquittal, and that motion was denied as well. He was sentenced to five years of probation, with five years' imprisonment suspended, and required to register as a Level One Sex Offender. Judgment was entered, and Messier timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over appeals from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-223 (2018)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] We review alleged violations of the Fifth Amendment *de novo*. *People v. Cruz*, 2016 Guam 15 ¶ 16 (citation omitted). “A conviction should be affirmed if the reviewing court concludes that, on the whole record, a constitutional error was harmless beyond a reasonable doubt. It is the reviewing court’s duty to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.” *Id.* (citation omitted).

IV. ANALYSIS

[10] We have previously ruled on issues surrounding a prosecutor’s statements concerning a defendant’s silence in *People v. Cruz*, 2016 Guam 15. Consistent with our prior precedent in *Cruz*, we will reverse Messier’s convictions. We acknowledge that Messier challenges several statements on appeal on various grounds, but in light of our finding of reversible error for violations of his Fifth Amendment right against self-incrimination, we find it unnecessary to engage in analysis of the other challenged statements. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶

33 (“As a general appellate principle, a court will not address issues unnecessary to the resolution of the case before it.” (collecting cases)).

A. Statements I, J, L, and U Violated Messier’s Fifth Amendment Right Against Self-Incrimination

[11] “No person . . . shall be compelled in any criminal case to be a witness against himself” U.S. Const. amend. V; 48 U.S.C.A. § 1421b(d), (u) (Westlaw through Pub. L. 115-223 (2018)). Both direct and indirect comments on a defendant’s failure to testify are forbidden under the Fifth Amendment. *See Cruz*, 2016 Guam 15 ¶ 19. Indirect comment “can violate the defendant’s right not to testify if the prosecutor states the People’s evidence is ‘uncontradicted,’ ‘undenied,’ ‘unrebutted,’ or ‘undisputed,’ when ‘the only person who could have contradicted, denied, rebutted or disputed the government’s evidence was the defendant himself.’” *Id.* (quoting *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996)). In other words, a defendant’s Fifth Amendment right is violated when the challenged “remark was of such a character that the jury would ‘naturally and necessarily’ take it to be a comment on the defendant’s silence.” *Id.* (quoting *Cotnam*, 88 F.3d at 497).

[12] In *Cruz*, this court held that certain statements made by the prosecutor in closing argument were “improper because they either directly commented on [the defendant’s] failure to testify and the implication the jury could draw from that silence, or involved comments only [the defendant] could contradict or refute.” 2016 Guam 15 ¶ 20. Here, statements I, J, L, and U were improper because they involved comments only Messier could contradict or refute, as the only eyewitnesses to the alleged incident, C.S. and S.S., had both testified at trial. The only other person present during the incident, besides C.S. and S.S., was Messier. Therefore, the only person who could refute C.S. and S.S.’s account of the night in question was Messier, and

commenting on a lack of evidence of C.S. and S.S.’s motive to lie, thereby, violated Messier’s Fifth Amendment right against self-incrimination.

[13] This violation of Messier’s Fifth Amendment right requires reversal of his convictions unless the error was harmless beyond a reasonable doubt. *See People v. Muritok*, 2003 Guam 21 ¶ 23 (citations omitted).

B. Reversal of Messier’s Convictions is Required because the Error was Not Harmless

[14] This court considers the following three factors in determining whether improper testimony regarding a defendant’s silence is harmless: “(1) the extent of the comments made; (2) whether an inference of guilt from silence was stressed to the jury; [and] (3) the extent of other evidence suggesting the defendant’s guilt.” *Id.* ¶ 24 (quoting *United States v. Pino-Noriega*, 189 F.3d 1089, 1099 (9th Cir. 1999)).²

[15] Under the first factor, this court considers the extent of the comments made. *Cruz*, 2016 Guam 15 ¶ 23. Of the various statements that this court found weighed against a finding of harmless error in *Cruz*, two are particularly relevant to the case at hand. First, we found problematic the prosecutor’s statement that there was “no evidence of any type of motive at all for [the witness] to lie about this crime, none. None.” *Id.* We also found inappropriate the prosecution statement that there was “no evidence that [the witness] has been lying. There’s no evidence controverting her testimony.” *Id.* ¶ 24.

² The People argue that because Messier did not object to the now-challenged statements at trial, this court should review the statements for plain error. Appellee’s Br. at 31 (June 16, 2016). While the defense did not object to each and every statement now identified as improper, it did object during opening statements when the prosecutor suggested that Messier was required to put on evidence and rebut the People’s case. Tr. at 180 (Jury Trial, Jan. 17, 2013). Given this objection, we will apply the harmless error standard.

[16] Here, the prosecutor stated, multiple times, that there was no evidence presented of any motive to lie. *See* Tr. at 119-21, 131 (Jury Trial, Jan. 29, 2013). Such statements were improper because “the only person who could have contradicted, denied, rebutted or disputed the government’s evidence was the defendant himself.” *Cruz*, 2016 Guam 15 ¶ 19 (quoting *Cotnam*, 88 F.3d at 497). Both the victim and her sister—the only witness to the incident between C.S. and Messier—testified at trial. Therefore, only Messier could contradict C.S. and S.S.’s account of the incident. Taken together, the improper statements were extensive, and this factor weighs against finding the error harmless.

[17] Under the second factor, this court considers whether an inference of guilt from a defendant’s silence was stressed to the jury. *Id.* ¶ 25 (citation omitted). “Thorough curative instructions can weigh in favor of finding harmless error” under this factor. *Id.* (citation omitted). Here, an inference of guilt was stressed to the jury. A significant theme of the prosecutor’s closing argument suggested that the jury draw an inference from Messier’s failure to present contradictory evidence on issues that only he could rebut. *See* Tr. at 119-121, 131 (Jury Trial, Jan. 29, 2013). Moreover, the trial court did not provide curative instructions. *See* Tr. at 132 (Jury Trial, Jan. 29, 2013). Therefore, this factor weighs against finding harmless error.

[18] Under the third factor, this court considers the extent of other evidence suggesting the defendant’s guilt. *Cruz*, 2016 Guam 15 ¶ 30 (citation omitted). Although not required to sustain a conviction, *see, e.g.*, 9 GCA § 25.40 (2005); *Bell v. State*, 497 N.E.2d 556, 556-57 (Ind. 1986) (finding sufficient evidence of robbery where “[t]he State’s case was based exclusively on the victim’s testimony”), very little evidence introduced at trial corroborated C.S. and S.S.’s

testimony. C.S.’s mother testified that she received a phone call from S.S. at 4:00 a.m. in the hours following the alleged criminal sexual conduct, asking to be picked up because “something happened.” Tr. at 14-15 (Jury Trial, Jan. 18, 2013). The mother also testified that C.S. was crying on the car ride home, that C.S.’s demeanor changed in the weeks after the night in question, and that C.S. “freaked out,” “yell[ed],” and went to her room for the rest of the day when she was told that Messier would be stopping by C.S.’s home. *Id.* at 16-17, 19, 20-21. This evidence is not extensive enough to overcome the error in this case. *Cf. Cruz*, 2016 Guam 15 ¶¶ 32-33 (holding that testimony regarding a text message sent by the defendant to the victim’s father was not extensive enough to overcome error in the case).

[19] Given that the improper statements were extensive, an inference of guilt was stressed to the jury, no curative instruction was given, and there is little other evidence suggesting Messier’s guilt, we cannot say that the error was harmless beyond a reasonable doubt. Accordingly, Messier’s convictions must be reversed.

V. CONCLUSION

[20] “As the people’s representative in our system of justice, a prosecutor must adhere to the rules and principles that ensure that a jury determines a defendant’s guilt based on the evidence before it.” *People v. Mendiola*, 2010 Guam 5 ¶ 36. Where, as here, the verdict hinges on witness credibility, a prosecutor “must be especially careful to stay within the bounds of proper conduct.” *Id.* In that context, implicitly commenting on a defendant’s silence endangers the defendant’s constitutional right to a fair trial. Because the trial judge did not provide curative instructions that effectively mitigated that danger, we conclude that the Fifth Amendment

