FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. **AMBROSIO T. OGUMORO,** D.O.B. 05/21/1958 Defendant.	**CRIMINAL CASE NO. 12-0134** **(formerly CRIMINAL CASE NO. 13-0073B)** **ORDER DENYING DEFENDANT'S AMENDED MOTION FOR STAY PENDING APPEAL**

INTRODUCTION

This MATTER came before the Court on April 13, 2016, at 1:30 p.m. in Courtroom 223A. Defendant, Ambrosio T. Ogumoro, was represented by Attorney Daniel T. Guidotti. The Government was represented by court-appointed Special Prosecutor, George L. Hasselback. The Court heard the matter telephonically.[1]

G. Hasselback
D Guidotti

At the hearing, the Court heard arguments on Defendant's Amended Motion for Stay Pending Appeal. Upon review of the parties' briefs, oral arguments, and applicable law, the Court **DENIES** Defendant's motion because he did not show that the appeal would raise a substantial question of law or fact likely to result in reversal or in an order for new trial.

//

[1] The Court also heard arguments on the Special Prosecutor's oral motion to withdraw as counsel. The Court later denied said motion in a written order, issued on April 18, 2016.

BRIEF PROCEDURAL HISTORY

Defendant was ordered by this Court to report to DOC at 8:00 a.m. on April 13, 2016.[2] On Friday, April 8, 2016, at 4:22 p.m., Defendant filed his eleventh-hour motion to stay execution of his sentence pending appeal. Defendant gave notice of his motion to the Government at 4:34 p.m. on the same day.

While Rule 45(d) typically allows motions to be filed five business days before a hearing, the Court scheduled a hearing to be held just two business days after Defendant's filing of his motion. In this Court's scheduling order, the Court highlighted that some time was necessary to allow the Government to file a substantive brief on the issue.

On Monday, April 11, 2016, at 2:13 p.m., around two hours before close of business, Defendant filed an "amended" motion. In Defendant's own words, he "significantly expanded 'the substantial question' section of the memorandum." The Court's review of the amended motion revealed that Defendant made three additional substantive legal arguments. While Defendant's previous motion addressed four counts of the Information, Counts I–IV, Defendant's "amended" motion addressed all nine remaining counts of the Information, including Counts XI–XV.[3]

---

[2] Defendant reported to DOC in compliance with the Court's Sentencing and Commitment Order.

[3]

Counts	Description of Crime	Statute
I.	Conspiracy to Commit Theft of Services (Jury Trial)	6 CMC § 303(a)
II.	Misconduct in Public Office	6 CMC § 3202
III.	Theft of Services (Jury Trial)	6 CMC § 1607(b)
IV.	Misconduct in Public Office	6 CMC § 3202
XI.	Obstructing Justice: Interference with a Law Enforcement Officer or Witness	6 CMC § 3302
XII.	Misconduct in Public Office	6 CMC § 3202
XIII.	Misconduct in Public Office	6 CMC § 3202
XIV.	Criminal Coercion	6 CMC § 1431(a)(6)

At the hearing held on April 13, 2016, the Court issued a tentative ruling that would not consider the new arguments raised in Defendant's amended motion. Refusing to consider belated new arguments or arguments not raised at the first opportunity is sound prudential practice in this instance for three reasons.

First, the Court relies on well-briefed arguments by advocates in determining the correct ruling. Second, it concerns the Court that Defendant changed the entire scope of his arguments at beyond the eleventh-hour because the Government may have been lulled into arguing the motion differently. Third, defense counsel declared that the additional arguments were necessary because he completed review of the audio transcript "over the weekend." Defendant was sentenced by this Court on March 30, 2016. The sentencing date was already extended for a week to allow new counsel time to adequately prepare. Defense counsel did not explain why he required more than two weeks from when he was retained to listen to the audio transcript.[4]

However, at the hearing, the Government explained that it sufficiently addressed the new arguments raised in the amended motion. Accordingly, the Court addresses all of Defendant's arguments on the merits.

LEGAL STANDARD

Ogumoro seeks a stay of execution and relief pending appellate review, pursuant to NMI Rules of Criminal Procedure 38(a). He further seeks release from custody, pursuant to Rule 46(c). Under either rule, the standard to be applied is a three-factor test:

> A defendant has the burden of establishing that: (1) he will not flee the jurisdiction or pose a danger to any other person to the community; (2) the appeal is not taken for the purpose of delay; and (3) the appeal raises a substantial question of law or fact likely to result in reversal or in an order for a

XV	Misconduct in Public Office	6 CMC § 3202

[4] Defendant's practice deviates from the standard practice promulgated in *Commonwealth v. Martinez*, where the Supreme Court explained that: "(1) upon imposition of sentence, a notice of appeal should immediately be filed; (2) the motion for stay of sentence pending appeal should be filed simultaneously or immediately after filing the notice of appeal; (3) the court should allow the opposing party to respond in writing, and then set an expedited hearing; (4) if, after the hearing, the judge denies the motion, the judge should expeditiously issue a written order setting forth the reason(s) for the denial; and (5) the defendant may renew the motion for stay with the Supreme Court, attaching the trial court's order."). 4 NMI 18, 21–22 (1993).

new trial.

Commonwealth v. Blas, 2004 MP 26 ¶ 5; *contra Commonwealth v. Quemado*, No. 09-01399 (NMI Super. Ct. June 15, 2011) (Order Granting Stay at 6) (applying the "frivolous" standard according to the text of Rule 46(c), based on the pre-1984 version of the Federal Rules of Criminal Procedure). In cases where the unsuspended sentence is brief, the court may also consider whether a sentence would be moot in favor of granting a stay; but only if a convicted defendant shows a strong likelihood of success on the merits. *See Commonwealth v. Martinez*, 4 NMI 18, 21 (1993).

With respect to the third factor, the convicted defendant must meet two elements. First, they must show that the question of law or fact is "substantial." A "substantial question" is one that is "fairly debatable" or "doubtful." *Blas*, 2004 MP 26 ¶ 8 (citing *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985)); *compare Handy*, 761 F.2d at 1283, *with United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (defining "substantial question" as a "close question."). In order for a substantial question to be fairly debatable or doubtful, the proponent of the argument must show that "there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or reason commanding respect that might possibly prevail." *Herzog v. United States*, ___ U.S. ___, 75 S. Ct. 349, 350 (1955) (Douglas, Circuit Justice 1955).

Second, the convicted defendant must also show that if the question of law or fact were to be decided in their favor, the claimed error would not be found harmless or unprejudicial—or would not be found as insufficiently preserved. *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) ("We also agree with the other circuits that the language in the statute which reads 'likely to result in reversal or an order for a new trial' is a requirement that the claimed error not be harmless or unprejudicial."); *Giancola*, 754 F.2d at 900 (requiring that claimed error be also sufficiently preserved).

//

//

//

DISCUSSION

The Court finds that Defendant failed to show that the third factor weighs in favor of release from custody. Accordingly, it will primarily address said factor.[5] Defendant raises four arguments in his amended motion: (1) that the Government did not show enough evidence to prove an element of felony theft of services and conspiracy to commit theft of services; (2) that the Government did not show enough evidence to prove that OPA Investigator Juanette David-Atalig was a law-enforcement officer; (3) the Court should have excluded all evidence of co-conspirator statements; and (4) the Court should not have convicted Defendant of misconduct in public office, as stated in Count XIII of the information, because 6 CMC § 6101 provides that all process should be "issued in accordance with law and the rules of procedure prescribed in accordance with law." The Court addresses each in turn,[6] and finds that relief is denied for the following reasons.

A. First and Second Argument: Sufficiency of Evidence Arguments

In addressing his first two arguments, Defendant argues, citing to portions of the audio transcript, that the Government failed to show evidence to prove elements of Counts I–IV,[7] XI[8] and XII[9] of the

---

[5] As to the first factor, the Court previously found that: (1) Defendant was likely to comply with any imposed supervised release conditions"; and (2) Defendant was "not likely to re-offend." *Commonwealth v. Ogumoro*, No. 12-0134 (NMI Super. Ct. Apr. 1, 2016) (Sentence and Commitment Order at 2). Accordingly, the first factor weighs in Defendant's favor. As to the second factor, Defendant is already in Department of Corrections custody. He is in compliance with the Sentence and Commitment Order. Accordingly, the second factor weighs in Defendant's favor.

[6] Defendant raised an additional argument that jury instructions should have been provided for theft of services for an amount less than $250, pursuant to 6 CMC § 1601(b)(3). However, at oral arguments, Defendant explained to the Court that he waives the issue for the purposes of the motion. Accordingly, the Court does not address Defendant's fifth argument.

[7] Count I of the Information charged Defendant with Conspiracy to Commit Theft of Services, pursuant to 6 CMC § 303(a). Count II charged Defendant with Misconduct in Public Office, pursuant to 6 CMC § 3202. Count III charged Defendant with Theft of Services, pursuant to 6 CMC § 1607(b). Count IV charged Defendant with Misconduct in Public Office, pursuant to 6 CMC § 3202.

[8] Count XI charged Defendant with Obstructing Justice: Interference with a Law Enforcement Officer or Witness, pursuant to 6 CMC § 3302.

[9] Count XII charged Defendant with Misconduct in Office, pursuant to 6 CMC § 3202.

Information. As to specific evidence, Defendant argues that the Government did not prove that OPA Investigator Atalig was a law enforcement officer. In response, the Government raises—without citing to the record—that conflicting facts were raised to the triers of fact. Here, without citations to the full record, the Court does not have sufficient information to determine whether Defendant raises a fairly debatable issue of fact. *See Blas*, 2004 MP 26 ¶ 1 ("Blas provides an inadequate record, therefore the motion [for stay pending appeal] is denied."). Furthermore, Defendant did not show that he sufficiently preserved the issue for appeal by bringing a NMI R. Crim. P. 29 motion during trial at the close of all evidence.[10]

In reviewing a claim for insufficiency of evidence, the Supreme Court construes the evidence in the light most favorable to the government and then determines whether "any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Leon Guerrero*, 2013 MP 3 ¶ 8. Accordingly, reversal on the grounds of insufficient evidence are generally confined to cases where the failure of the prosecution is clear. *United States v. Casper*, 956 F.2d 416, 421 (3rd Cir. 1992).

Moreover, when a party fails to preserve a sufficiency of evidence argument for appeal by timely objection, the Supreme Court reviews the party's arguments for plain error.[11] *Commonwealth v. Hossain* , 2010 MP 21 ¶ 28. To preserve a sufficiency of evidence objection for appeal, a defendant must have raised a NMI R. Crim. P. 29 motion at the close of all evidence. *See, e.g.*, *United States v. Flonnory*, 630 F.3d 1280, 1283 n.2 (10th Cir. 2011) ("A defendant fails to preserve the issue of sufficiency when he does not renew his motion for judgment of acquittal at the close of the case."); *United States v. Frazier*, 595 F.3d 304, 307 (6th Cir. 2010) ("Defendant did not renew his motion for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, at the close of all evidence, which was necessary to preserve his motion for appeal."); *see also Quemado*, No. 09-01399-TR (NMI Super. Ct. June 11, 2011) (Order Granting

---

[10] Defendant was represented by Attorney Edward C. Arriola during the trial proceedings. Attorney Guidotti substituted for Defendant's counsel by Notice of Substitution, dated March 18, 2016.

[11] The Supreme Court will remedy the error on plain error review only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Commonwealth v. Kapileo*, 2016 MP ¶ 11.

Stay at 6) ("In particular, Defendant has consistently disputed the Commonwealth's ability to present evidence of the concentration of alcohol in his breath at the time alleged as determined by analysis of the person's breath.").

Here, while the Court did not decide whether Defendant's issues were substantial questions of fact, his grounds for relief are nonetheless denied on the merits. Defendant did not show by affidavit or by citation to the record that he sufficiently preserved his objection for appeal. Accordingly, Defendant has not shown that his sufficiency of evidence arguments would have been likely to result in a reversal or an order for new trial. Therefore, Defendant's motion for stay pending appeal is denied on this ground.

B. Third Argument: Admission of Evidence Argument on Hearsay Ground

In addressing his third argument, Defendant argues, citing to statements made by Co-Defendant Edward T. Buckingham,[12] former Governor Benigno Fitial,[13] statements made to Peter R. Camacho, and witness testimony from FBI Agent Haejun Park, that the Government failed to show evidence to prove elements of all Counts of the Information—because some or all of the statements should have been excluded as hearsay. In response, the Government again raises—without citing to the record—that conflicting facts were raised at trial to meet the elements of the statements of co-conspirators hearsay exemption, pursuant to NMI R. Evid. 801(d)(2)(E). As discussed above, without citations to the full record, the Court does not have sufficient information to determine whether Defendant raises a fairly debatable issue of fact. However, as also discussed above, Defendant did not show that he sufficiently preserved the issue for appeal by bringing a particularized hearsay objection.

In reviewing a claim for erroneous admission of evidence, the Supreme Court reviews a trial court's admission for abuse of discretion; but it will not reverse a trial court's decision unless the proponent of the

---

[12] Buckingham was convicted and sentenced to three and a half years of incarceration, all suspended, on February 18, 2014. The Honorable Kenneth L. Govendo presided over Buckingham's trial and sentencing.

[13] Fitial was convicted and sentenced to six years of imprisonment, all suspended except for one year, on June 24, 2015. The undersigned judge presided over Fitial's sentencing.

argument shows lack of harmless error. *See Leon Guerrero*, 2013 MP 13 ¶ 8. Moreover, to preserve a erroneous admission of evidence claim for appeal on the basis of hearsay, the objecting party must state specific grounds for the basis of the objection. *E.g.*, *United States v. David*, 96 F.3d 1477, 1481 (D.C. Cir. 1996), cert. den., 117 S. Ct. 1003 (1997) ("That other records should be regarded as hearsay is not sufficient given counsel's impreciseness. This is a very intricate branch of the law of evidence, and counsel will often have to take extra care in explaining the basis of an objection that raises these subtle issues, in order sufficiently to alert the judge as to the nature of the evidentiary problem asserted."). For example, a bare-bones citation to NMI R. 801(d)(2)(E) in objecting to admission of a co-conspirator's statements is not sufficient to preserve the objection for appeal. *Cf. United States v. Burton*, 126 F3d 666, 673 n.8 (5th Cir. 1997).

Here, Defendant only states that he "will argue on appeal that there was insufficient evidence to admit statements made by [co-conspirators]." Ogumoro Mot. at 7. Again, Defendant did not show by affidavit or by citation to the record that he sufficiently preserved his objection for appeal. Without proffers of such evidence, the Court cannot be persuaded that the issue is a substantial question of fact or that Defendant is likely to obtain a reversal or an order for new trial on this issue. Therefore, Defendant's motion is also denied on this ground.

C. Fourth Argument: Legal Argument Based on 6 CMC § 6101

In addressing the fourth and final Defendant's argument, the Court finds that Defendant did not raise a substantial question of law. In essence, Defendant argues that conviction on Count XIII of the Information, misconduct in public office, should be reversed on de novo review.[14] Ogumoro argues that because 6 CMC § 6101 provides that all process should be "issued in accordance with law and the rules of procedure

[14] The Government characterizes Defendant's argument as an objection to an evidentiary ruling based on a motion in limine issued by the Court. The Court is not persuaded by the Government's characterization.

prescribed in accordance with law," where the Court has previously found that the summons was invalid,[15] the Government cannot prove the elements of the crime beyond a reasonable doubt.

6 CMC § 6101 provides, in relevant part, that:

> All process in any criminal proceeding . . . issued in accordance with law and the rules of procedure prescribed in accordance of the law, shall be obligatory upon all police officers . . . having knowledge of it, and any police officer . . . to whom process is given shall promptly make diligent effort to execute or serve it either personally or through another police officer . . . .

While this Court has previously held that the valid service requirement of 6 CMC § 1601 is inapposite to proving the charge of Obstructing Justice: Interference with a Law Enforcement Officer or Witness, made pursuant to 6 CMC § 3302; it has not addressed the specific question of whether a defendant should not be convicted on a misconduct in office charge, due to a service of process later adjudicated to be invalid by a court of law.

However, the Court does not find that Defendant met his burden to show that the issue meets the "substantial question of law" requirement. This Court has relied on case law in this matter that supports the proposition that a person may not contemporaneously refuse to give a court summons its legal effect, even if the document is later found to be invalid. *Commonwealth v. Ogumoro*, No. 12-0134 (NMI Super. Ct. Jan. 20, 2016) (Order at 4) (citing *United States v. Ferrone*, 438 F.2d 381, 390 (3d Cir. 1971) (holding that a person does not have the right to forcibly resist a police officer's execution of a search warrant, even if the warrant were later held to be invalid). While Defendant points to the plain language of the statute, he has not offered case law or policy arguments to support any contrary position. Therefore, the Court also denies Defendant's motion for stay pending appeal on this ground.[16]

---

[15] *Commonwealth v. Buckingham*, No. 12-0134 (NMI Super. Ct. Jan. 31, 2014) (Order Granting in Part and Denying in Part Def.'s Mot. to Dismiss at 18) (citing *Commonwealth v. Buckingham*, No. 12-0134 (NMI Super. Ct. Sept. 4, 2013) (Order Denying Def.'s Mot. to Dismiss at 2)).

[16] Defendant has not shown that his issues for appeal have a strong likelihood of success on the merits. Accordingly, the Court does not reach the issue of mootness.

CONCLUSION

For the foregoing reasons, Defendant's Amended Motion for Stay Pending Appeal is **DENIED**.

SO ORDERED this 25th day of April, 2016.

David A. Wiseman, Associate Judge