



By order of the Court, Associate Judge Joseph N. Camacho

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FOR PUBLICATION

E-FILED
CNMI SUPERIOR COURT
E-filed: Oct 28 2021 04:13PM
Clerk Review: Oct 28 2021 04:13PM
Filing ID: 67050488
Case Number: 20-0119-CR
N/A



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

COMMONWEALTH OF THE)
NORTHERN MARIANA ISLANDS,)
)
Plaintiff,)
)
v.)
)
STACEY LANI LANIYO,)
)
Defendant.)
_____)

CRIMINAL CASE NO. 20-0119

**ORDER DENYING DEFENDANT’S MOTION
FOR A NEW TRIAL**

I. INTRODUCTION AND BACKGROUND

THIS MATTER came before the Court on a Motion for a New Trial Hearing on October 15, 2021 at 10:00 a.m. at the CNMI Superior Court Guma’ Hustisia, Courtroom 220A. The Commonwealth of the Northern Mariana Islands (“Commonwealth”) was represented by Assistant Attorney General Coleen St. Clair. Stacey Lani Laniyo (“Defendant”) was present and appeared under custody of the Department of Corrections with her court-appointed counsel Mark Scoggins.

The facts of this case are well-known to the parties so the Court will restate only the most pertinent procedural history that forms the basis of the instant motion, as follows:

1. On July 23, 2020 the Defendant was charged by information with one count of child abuse in violation of 6 CMC § 5312(a)(1) along with co-defendant (at that time) Lynn Fitial.
2. The Commonwealth filed a Second Amended Information on January 21, 2021 following an Order to Sever the Co-Defendants and an Order Granting the Commonwealth’s Motion for Leave to File Second Amended Information. Commonwealth’s Second Amended Information charges the Defendant Stacey Lani Laniyo with one count of child abuse as follows:

1 On or about March 1, 2020, through March 16, 2020, on Saipan, Commonwealth
2 of the Northern Mariana Islands, Defendant, STACEY LANI LANIYO, did
3 willfully and intentionally strike or beat or by other acts inflict physical pain,
4 injury, or mental distress upon J.K.F. (DOB: 11.30.2016), a child under the age
5 of eighteen (18) and who was in the Defendant's custody or over whom
6 Defendant occupied a position of authority, resulting in injury clearly beyond
the scope of reasonable corporal punishment and harming or threatening the
child's physical or mental health and wellbeing, to wit: By striking J.F.K. [sic]
with a tree branch, a broom, her hand, biting him, or by acts inflicting physical
pain, injury, and mental distress, in violation of 6 CMC § 5312(a)(1), and made
punishable by 6 CMC § 5312(c).

- 7 3. On June 9, 2021 the Court filed its pretrial Order "Order for a limiting instruction pursuant to
8 NMI rules of evidence 401, 402 and 403 to give guidance for the jurors on the alleged victim's
9 unavailability to testify at trial, and the alleged injuries related to the charge of child abuse are
10 separated from his death from natural causes."
- 11 4. A jury trial commenced on June 14, 2021. During the trial when the Government rested its
12 case in chief, the Defendant made an oral motion for judgment of acquittal, which the Court
13 denied. The Defendant at no point during the jury trial made a motion for a mistrial.
- 14 5. On June 24, 2021 the jury reached a unanimous verdict and found the Defendant "Guilty" of
15 one count of child abuse, as charged in Count I of the Amended Information.
- 16 6. On July 1, 2021 Defendant filed her Motion for a New Trial. The basis for the motion alleges
17 prosecutorial misconduct throughout the jury trial amounting to a violation of the Defendant's
18 right to due process under the Fourteenth Amendment to the United States Constitution.¹

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21 ¹ Following Defendant's Motion for a New Trial, the undersigned initially recused himself out of an abundance of caution
22 concerning whether, based on the instant motion, he would need to vacate the jury verdict when one of the jurors was his
23 brother. To be clear, both parties conducted *voir dire* and had full knowledge and disclosure of the relationship between
24 the undersigned and Juror #2. Neither party struck for cause or used their preemptory challenge to remove juror #2. Both
the Prosecutor and Defense Counsel were satisfied with Juror #2's answers. At the time, there was no legal conflict with
the judge presiding over the case and a sibling of the judge sitting on the jury. On September 27, 2021 this matter was
reassigned back to the undersigned Judge following Superior Court Judge Kenneth L. Govendo's Order finding there was
no conflict that required the undersigned to recuse himself from hearing the instant motion.

1 7. On September 20, 2021 the Commonwealth filed its Opposition to Defendant’s Motion for a
2 New Trial arguing there was no prosecutorial misconduct and that the Defendant was afforded
3 a fair trial.

4 8. On October 7, 2021 the Defendant filed her Reply to Commonwealth’s Opposition to Motion
5 for a New Trial, alleging instances of prosecutorial misconduct during Defendant’s jury trial.

6 **II. LEGAL STANDARD**

7 A Motion for a New Trial is made pursuant to Commonwealth Rule of Criminal Procedure
8 33 which states “A motion for a new trial . . . shall be made within seven (7) days after verdict or finding
9 of guilty or within such further time as the court may fix during the seven (7) day period.” NMI Crim.
10 P. R. 33. The court may grant a new trial “in the interest of justice.” *Id.* The Commonwealth’s Rules
11 of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, so interpretations
12 of the federal rules are instructive. *Commonwealth v. Ramangmau*, 4 N.M.I 227 (1995).

13 A motion for new trial is directed to the discretion of the trial court, which [it] should grant it
14 only in an exceptional case in which the evidence weighs heavily against the verdict. *Commonwealth*
15 *v. Saimon*, 3 N.M.I. 365, 398 (1992); *see also Commonwealth v. Camacho*, Crim. No. 98-175 (NMI
16 Super. Ct. June 21, 1999) (Order Denying Defendant’s Motions for New Trial and for Judgment of
17 Acquittal), *aff’d*, 2002 MP 6 ¶ 104, 6 N. Mar. I. 382. In making its decision, the trial court has the
18 discretion to disbelieve witnesses and to weigh the evidence. *Commonwealth v. Islam, et al.*, Crim.
19 No. 07-0088 (NMI Super. Ct. Dec. 15, 2008) (Order Denying Defendant’s Motion for New Trial)
20 (*citing United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002)). However, the court’s power to
21 correct a miscarriage of justice should be used sparingly and with caution. *Id.*

22 The Defendant’s Motion for a New Trial is based on allegations of prosecutorial misconduct
23 during the jury trial which violated her right to due process under the Fourteenth Amendment to the
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1 United States Constitution. "To constitute a violation of a defendant's right to due process under the
2 Fourteenth Amendment to the United States Constitution, prosecutorial misconduct must be of
3 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Commonwealth*
4 *v. Camacho*, 2002 MP 6 ¶ 104, 6 N. Mar. I. 382 (quoting *Greer v. Miller*, 483 U.S. 756, 765, 107 S.
5 Ct. 3102, 97 L. Ed. 2d 618 (1987)). "In reviewing this claim, we must determine whether the
6 prosecutor's conduct was improper; and if so, whether the Defendant suffered prejudice.
7 *Commonwealth v. Xiao*, 2013 MP 12 ¶ 13 (quoting *United States v. Stinson*, No. 07-50408, No. 07-
8 50409, 2011 U.S. App. LEXIS 17979, at *33-34 (9th Cir. Aug. 26, 2011)).

9 To show prejudice, the defense must demonstrate how the lack of error would probably have
10 change the results of the trial. *Commonwealth v. Islam, et al.*, Crim. No. 07-0088 (NMI Super. Ct.
11 Dec. 15, 2008) (Order Denying Defendant's Motion for New Trial) (citing *United States v. Wilkerson*,
12 251 F.3d 273 (1st Cir. 2001). If errors were harmless, it is an abuse of discretion for the trial court to
13 grant a motion for a new trial. *Id.*

14 If prosecutorial misconduct is held to be improper, the Court next analyzes three factors: (1)
15 the context's effect upon the prosecutor's remarks, (2) the efficacy of any cautionary instruction by
16 the judge, and (3) the strength of the evidence supporting the conviction. *Commonwealth v. Xiao*,
17 2013 MP 12 ¶ 19.

18 III. DISCUSSION

19 To begin, the Court will reiterate what it explained to the parties multiple times during this
20 jury trial: Defendants are not guaranteed a perfect trial, just a fair one. *See Commonwealth v. Xiao*,
21 2013 MP 12 ¶ 83. While the Court understands parties may be frustrated that they did not get to have
22 a perfect trial, a motion for a new trial is not the appropriate vehicle to air any and all grievances
23 against opposing counsel. Also, while the Court notes the Commonwealth's response to allegations
24 of misconduct by Defendant's counsel is to also make allegations of misconduct by the defense

1 counsel, however the basis for the instant motion is prosecutorial misconduct. As such, allegations of
2 defense counsel’s misconduct are not a proper defense in opposing a motion for a new trial—simply
3 put the Commonwealth’s counterpoint that two wrongs make it right is not an acceptable justification
4 to allegations of prosecutorial misconduct.

5 That being said, the Court notes that any possible misconduct as alleged by the Defendant
6 was not made in a vacuum. *See United States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir, 1999) (“the
7 prosecution's alleged misconduct cannot be viewed in a vacuum, but must be viewed in the context
8 of the entire trial.”) This jury trial involved many instances of back-and-forth, belligerent arguments
9 between counsel, and the Court had to remind parties multiple times to address their arguments to the
10 judge instead of to each other. *See United States v. Kallen-Zury*, 629 Fed. Appx. 894, 897
11 (“Prosecutorial comments that would otherwise be improper may be harmless if they were invited by
12 defense counsel and offered as a fair response.”)

13 The Court will address what Defendant has alleged as a “non-exhaustive list” of alleged
14 prosecutorial misconduct. *See* Def.’s Motion at 2. The Defendant lists thirteen (13) allegations of
15 prosecutorial misconduct which, for sake of clarity, this Court has organized into three (3) main
16 issues: (a) conduct during trial; (b) evidentiary issues regarding hearsay and impeachment evidence;
17 and (c) closing arguments. While the Court will address each issue in turn, it notes that several of
18 Defendant’s claims of prosecutorial misconduct are general grievances that are difficult for the Court
19 to analyze without reference to specific allegations during trial.²

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24 ² The Court also notes that at the motion hearing, the Defendant requested the Court make a decision on the pleadings.

1 **a. Conduct of the Prosecution During Trial**

2 The Defendant makes several claims about the conduct of the Prosecutor throughout the trial,
3 including allegations of improper contact with a witness, making a sarcastic remark during *voir dire*,
4 and attempting to inflame the passions of the jury by relying heavily on the fact that the victim in this
5 matter died of natural causes.

6 To begin, Defendant’s accusation that the Prosecutor “very possibly” had contact with a
7 witness in the middle of her testimony is unsubstantiated and Defendant does not support this
8 allegation with any factual support. Nonetheless, while the Prosecutor told the Court at trial she had
9 met with the witness before the trial began, both the Prosecutor and its witness told the Court neither
10 had any contact with the other during the witness’ testimony at trial. Additionally, the Defendant does
11 not state the nature or circumstances of the alleged “contact” and does not demonstrate how lack of
12 this “contact” would have changed the outcome of the trial. With no factual support, whether through
13 an exhibit and/or affidavit, this claim of prosecutorial misconduct is without merit and the Court finds
14 there was no improper conduct.

15 Next, the Defendant claims the Prosecutor made a sarcastic remark about defense counsel
16 during *voir dire*. Defendant seems to be addressing defense counsel asking a potential juror if she had
17 an opinion about him, to which the Prosecutor remarked “I do.” In terms of prosecutorial misconduct,
18 courts have held that “although sarcasm may be used as an occasional rhetorical device, it cannot be
19 used in such a way that it distracts the jury from its charge, demeans the adversarial trial process, or
20 becomes unprofessional to the point of jeopardizing a verdict.” *State v. Foster*, 493 P.3d 283, 285.

21 Here, the simple two-word remark, while lacking professional courtesy towards the
22 Defendant’s attorney during his *voir dire* of a potential juror, had no prejudicial effect on the
23 Defendant. The jury had not been empaneled and the Prosecutor did not actually give an explicit
24 opinion and/or characterization of defense Counsel. Though this conduct should be avoided as it lacks

1 professional courtesy, in this limited context, the sarcastic remark does not rise to a level of
2 jeopardizing a potential verdict in this matter that would prejudice the Defendant.

3 Lastly, the Defendant claims “throughout the trial, [the Prosecutor was] relying heavily on the
4 fact that the boy died to inflame the passions of the jury.” Def.’s Mot. for a New Trial at 3. As this
5 was an issue that was argued at length pre-trial, the Court will not address this *ad nauseum*. The
6 Defendant in this matter was charged with one (1) count of child abuse and was not charged in any
7 way in relation to the victim’s death. To that end, the Court provided a limiting instruction that was
8 recited to the jury both at the beginning and end of the trial. This limiting instruction made it clear
9 that the victim died of natural causes and that the Defendant was not being charged in any way relating
10 to the victim’s death, but that the symptoms the victim exhibited prior to his death could be relevant
11 to the acts of abuse charged.

12 The Prosecutor asked questions to several witnesses on direct examination relating to the
13 illness and ultimate death of the victim. As explained by the Court in its pre-trial order, the victim’s
14 illness and symptoms would be relevant as to “whether the alleged abuse was beyond the reasonable
15 scope of corporal punishment, and whether the alleged abuse harmed or threatened the alleged
16 victim’s physical or mental health and well-being.” *Commonwealth v. Laniyo*, Crim. No. 20-0119
17 (NMI Super. Ct. June 9, 2021) (Order for a limiting instruction pursuant to NMI rules of evidence
18 401, 402 and 403 to give guidance for the jurors on the alleged victim’s unavailability to testify at
19 trial, and the alleged injuries related to the charge of child abuse are separated from his death from
20 natural causes at 4).

21 The role of the prosecutor is to prove each essential element beyond a reasonable doubt, so it
22 was relevant for the Commonwealth to examine its witnesses about the victim’s illness and death,
23 such as to provide an explanation as to why the victim was not present to testify himself. The
24 Prosecutor mentioned to the jury in *both* opening and closing statements that the victim died of natural

1 causes and that the Defendant was not being charged with the death of the victim. Along with the
2 limiting instructions read aloud by the Court, taking all these into account the Prosecutor did not
3 pervasively or improperly attempt to inflame the passions of the jury to the extent that the Defendant
4 was prejudiced. *See Commonwealth v. Calvo*, 2014 MP 7 ¶ 33 (a jury is presumed to have followed
5 an instruction).

6 **b. Evidentiary Issues Regarding Hearsay, Impeachment and Photographic Evidence**

7 In her Motion for a New Trial, the Defendant makes several claims of prosecutorial
8 misconduct in relation to hearsay, impeachment and photographic evidence that were all at issue
9 during the jury trial. The Court will address these in turn.

10 1. Evidentiary Issues Regarding Witness Testimony of Lynn Fitial and Lulu Fitial

11 First, the Defendant makes several arguments about the Commonwealth’s “disregard” of the
12 rules of evidence, specifically the hearsay rule and rule against leading questions. The Defendant
13 does not point out to specific instances of these allegations and instead makes a sweeping generality
14 regarding the Prosecutor’s application of the NMI Rules of Evidence. In regards to both hearsay
15 testimony and leading questions on direct examination, the Defendant followed the correct procedure
16 in making an objection, at which point – if sustained – the Court asked the Commonwealth to rephrase
17 a leading question, or strike elicited hearsay testimony and instruct the jury to disregard the statement
18 received.

19 Next, the Defendant alleges multiple instances of misconduct in relation to both Lynn Fitial
20 and Lulu Fitial’s testimony including improper use of hearsay and impeachment testimony. The
21 Commonwealth called Lynn Fitial as its own witness after giving her derivative-immunity in
22 exchange for her testimony. The Court will point out that *several* oral arguments regarding this
23 testimony were made outside the presence of the jury. When the jury was no longer in the courtroom,
24 parties argued hearsay and impeachment evidence, refreshing recollection, as well as repeated

1 arguments to treat the witness as hostile. When the jury returned to the courtroom, the Court reminded
2 the jury multiple times that arguments of counsel are not evidence.

3 There were certain difficulties occurring throughout Lynn Fitial’s testimony regarding the
4 proper procedure to both refresh a witness’s memory as well as impeach a witness’s credibility. The
5 Commonwealth was repeatedly frustrated in its direct examination of Lynn Fitial when the witness
6 could not remember certain events, or did not know the answer to specific questions that were
7 answered by the witness in a hearsay police report that was not initially admitted into evidence. To
8 that effect, the Commonwealth repeatedly requested to either impeach the witness or treat her as
9 hostile. The Court reminded parties that outside evidence are only “allegations” and that the only
10 evidence at issue is the testimony being given by the witness at trial under oath. The Court also
11 needed to remind the Commonwealth that even though Lynn Fitial was at one point a co-defendant,
12 she was not on trial during her testimony. In addition, in an effort to move the trial along, the Court
13 had to demonstrate several times (outside the presence of the jury) that impeachment evidence is not
14 substantive evidence and cannot be used to prove the truth of the matter asserted, but only to call the
15 witness’s credibility into question.

16 As testimony of Lynn Fitial progressed, the Commonwealth did impeach the witness by
17 introducing evidence of a prior inconsistent statement. The Court at this point reiterated several times
18 the difference between using prior inconsistent statements for impeachment purposes and for
19 substantively proving underlying facts as distinguished by the NMI Supreme Court in *Commonwealth*
20 *v. Johnson*. See *Commonwealth v. Johnson*, 2015 MP 17. When this occurred, the Court also
21 presented a proposed jury instruction regarding the credibility of witnesses and the proper way to
22 consider impeachment evidence against Lynn Fitial specifically – to which the Defendant declined
23 to have the proposed instruction given to the jury.

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1 In addition, the Court parsed out evidentiary issues regarding the witness testimony of Lulu
2 Fitial. During cross-examination of the witness, the Defendant elicited four instances of impeached
3 testimony, including testimony regarding the alleged punch and split lip, the elbowing of the victim's
4 hands, the illness in regards to vomiting and the instances and duration the victim spent in the
5 Defendant's room. The Commonwealth sought to introduce substantive evidence of a prior consistent
6 statement to rehabilitate the witness under NMI Rule of Evidence 801(d)(1)(B). The Court ordered
7 parties file briefs, and heard oral arguments in regards to prior inconsistent statements, which all
8 occurred *outside the presence of the jury* – in the middle of the trial. The Court then made its decision
9 and granted the Commonwealth's request to admit a portion of a police report in question, which was
10 properly redacted to only include the prior consistent statement in question.

11 While evidentiary issues during a jury trial are expected, properly raised objections and
12 subsequent instruction from the court will normally cure violations of the kind of hearsay evidence
13 that was at issue here. *See e.g. State v. King*, 2009 Minn. App. Unpub. LEXIS 492, *1 (inconsistencies
14 in testimony and conflicts in evidence do not require reversal; they are merely factors to consider
15 when making credibility determinations, which is the jury's role.) The Court will note that the
16 examination of Lynn Fitial alone lasted four (4) days in an effort to carefully parse through the
17 evidentiary issues that arose during her testimony. Between curative instructions from the Court, as
18 well as oral arguments as to these evidentiary issues being made outside the presence of the jury, the
19 prosecutor's conduct throughout witness examination did not rise to a level of being improper.
20 Therefore, the Court finds the Defendant did not suffer sufficient prejudice during witness
21 examination of both Lynn Fitial and Lulu Fitial.

22 2. Evidentiary Foundation for Photographs of the Victim.

23 In regards to the photographs of the victim, the Prosecutor properly laid the foundation for
24 admitting the photographs through the testimony of Department of Public Safety Lieutenant Mary

1 Lou Tanaka, who took the photographs at the hospital the day the victim died from a stomach and
2 throat infection unrelated to the charge of child abuse. To be clear, asking a question to lay the
3 foundation of a photograph, such as “is this a clear and accurate representation of the photo you
4 took?” goes to the *authenticity and reliability* of the photograph. That is – Lt. Mary Lou Tanaka
5 testified that the photographs the Commonwealth was seeking to admit into evidence were the
6 photographs she took when she was at the hospital.

7 The Defendant claims that after this testimony, it was therefore improper for the
8 Commonwealth to elicit testimony from other witnesses as to whether the injuries on the victim were
9 better or worse when visualized in person than depicted in the admitted photographs. The Defendant
10 claims this is because Lt. Mary Lou Tanaka testified to the photographs being “true and accurate”.
11 As with any other evidence to be considered, the jury has the ultimate role to weigh the evidence
12 presented before it. While Lt. Tanaka’s testimony was required to establish that the photographs were
13 reliably and authentically the same photographs she took at the hospital, the jury is free to give weight
14 to the representations contained in the photographs itself – that is – the nature and extent of the injuries
15 shown on the victim. Furthermore, as the Court has repeated several times, arguments of counsels are
16 not evidence.

17 While the Prosecutor mentioned during closing arguments that the injuries were “much
18 worse” than what was depicted in the photographs, the pictures speak for themselves and the jury has
19 the ultimate role of weighing the evidence before it. For these reasons, the Defendant did not suffer
20 any prejudice in relation to testimony about the admitted photographs.

21 **c. Closing Arguments**

22 The final issue the Defendant raises as grounds for a new trial surrounds allegations of
23 prosecutorial misconduct during closing arguments. These claims include the following: criticizing
24 defense Counsel’s performance by stating his role is to keep evidence from the jury, improperly

1 opining on the credibility of Lynn Fitial, misstating the record and arguing facts not in evidence,
2 interrupting defense counsel’s closing statement to make a remark about certain photographs not
3 presented to the jury, and arguing during closing that January is “on or about” the first-half of March.

4 To begin, counsels are given wide latitude during closing statements and the trial judge has
5 broad discretion in controlling closing arguments. *See United States v. Oliveros*, U.S. App. LEXIS
6 2400, *1 (9th Cir. 1991). To establish prosecutorial misconduct during closing arguments: (1) the
7 remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the
8 defendant. *United States v. Kallen-Zury*, 629 Fed. Appx. 894, 897.

9 Here, the jury was given instructions which were recited both at the beginning and end of the
10 trial regarding what *is* and *is not evidence*. As such, the jury was properly instructed that the
11 arguments of counsel are not evidence. Likewise, the jury was instructed that they were to consider
12 evidence in the form of admitted exhibits, witness testimonies and stipulations of fact. Additionally,
13 both parties made objections during closing statements, at which point the Court repeatedly remarked
14 to the jury that closing statements of counsel are not evidence.

15 Additionally, the Defendant’s claim that the Prosecutor improperly opined on the credibility
16 of a witness did not prejudice the Defendant. While Lynn Fitial’s credibility as a witness was at issue
17 during this trial, the Court reminded both parties and the jury that while it is the role of counsel to
18 present the facts – it is ultimately the job of the jury to weigh the credibility of those facts, including
19 weighing the credibility of witness testimony. Therefore, whether the Prosecutor weighed on the
20 credibility of a witness or not is not dispositive.

21 As mentioned above, the Court also provided a proposed limiting instruction that was for this
22 very purpose – to instruct the jury specifically on the issue of weighing Lynn Fitial’s testimony and
23 how to consider evidence of a prior inconsistent statement. When the Court asked if the Defendant
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1 wanted this limiting instruction included at closing, the Defendant declined the Court's offer as she
2 did not want the instruction given to the jury.

3 Next, the Defendant claims it was misconduct for the prosecutor to comment on evidence not
4 admitted at trial during closing arguments. The Defendant is referring to the Commonwealth's
5 objection during Defendant's closing arguments regarding photographs of the victim's arms and legs
6 that were not admitted into evidence. During closing, Defense Counsel commented on a lack of
7 photographs showing the victim's arms and legs, to which the Commonwealth objected in an attempt
8 to clarify that just because photographs of the arms and legs were not admitted into evidence does
9 not mean the photographs were not taken.

10 It is well established that it is improper for the prosecutor to refer to evidence not admitted at
11 trial. *Commonwealth v. Camacho*, 2002 MP § 97. While the Commonwealth's photographs may have
12 indeed existed, it was improper for the prosecution to comment on the photographs when they were
13 not admitted into evidence. Regardless, the Court instructed the jury to disregard the
14 Commonwealth's statement and that the only evidence it needed to consider was already admitted
15 into evidence. In addition, it is clear that the prosecutor's comments were made in an attempt to
16 respond to the Defendant's emphasis in her closing arguments that equated a lack of photographs to
17 a lack of injuries on the victim. In this way, the prosecutor was not commenting on the injuries or the
18 representations of the photographs, but rather responding to the Defendant's claim the photographs
19 did not exist. *See Commonwealth v. Camacho*, 2002 MP 6 fn 24 (citing *United States v. Sarkisian*,
20 197 F.3d 966, 990 (9th Cir. 1999) (the "invited reply" rule may be invoked when the prosecution is
21 offering a comment that provides a fair response to claims made by defendant). The minor mention
22 of out-of-court evidence here was not prejudicial. Any error which may have existed was harmless
23 after the Court gave a curative instruction for the jury to disregard the prosecutor's comments.

1 Lastly, the Defendant alleges it was improper for the Prosecutor to claim that January is “on
2 or about” the first-half of March in order to have the jury consider evidence that never should have
3 been offered under NMI Rule of Evidence 404(b). Defendant here seems to be referring to witness
4 testimony made during trial relating to an instance that alleges the Defendant smashed the victim’s
5 hand with her elbow in January of 2020. Given the Court’s ruling that denied the Defendant’s request
6 for a specific unanimity requirement in regards to the alleged acts as contained in the Information,
7 the Prosecutor’s reference to one alleged incident occurring in January is not dispositive. Rather, the
8 Court allowed for a general unanimity requirement as the alleged acts could constitute a continuous
9 course of conduct. Therefore, whether the alleged “elbow smash” specifically occurred in January is
10 not a “fatal variance” when considering the Commonwealth’s burden to prove the abuse occurred “on
11 our about mid-march”. When the Court announced its decision regarding unanimity requirements,
12 the Defendant informed the Court she planned to renew her objection at the end of trial – which did
13 not occur.

14 Because the Commonwealth was not required to prove that only this one specific instance of
15 an “elbow smash” occurred, it is not prejudicial to the Defendant for the Commonwealth to comment
16 during closing arguments that January is “on or about” mid-March.

17 **IV. CONCLUSION**

18 In order to prevail on a motion for a new trial, a defendant must show that the alleged error
19 was “deliberate and especially egregious” or combined with a true pattern of misconduct.
20 *Commonwealth. v. Camacho*, 2002 MP 6 § 106. Several of the Defendant’s claims of prosecutorial
21 misconduct were not improper and therefore did not prejudice the Defendant. While there may have
22 been certain technical errors, the error was harmless and the prejudice was marginal given the Court’s
23 curative measures. Many instances of alleged misconduct were subsequently cured through the
24 Court’s rulings on objections, instructions to the jury, excusal of the jury from the courtroom for oral

1 arguments regarding evidentiary issues and repeated instruction to parties regarding application of
2 the NMI Rules of Evidence.

3 Additionally, in considering the potential prejudice of existing error at trial, the Court is not
4 convinced that the Defendant has presented a sufficient showing that a lack of error would have
5 affected the outcome of the trial. There was sufficient evidence regarding the Defendant hitting the
6 victim with a broomstick which the Defendant made a statement against her own interest, which
7 could lead to a jury finding the Defendant guilty beyond a reasonable doubt of one (1) count of child
8 abuse.

9 As the Defendant was not prejudiced by claims of prosecutorial misconduct, the Court finds
10 that the Defendant was not deprived of her right to due process under the Fourteenth Amendment of
11 the United States Constitution. While she may not have received a perfect trial, the Defendant did
12 receive a fair trial and a new trial is not warranted in the interest of justice. Therefore, the Defendant's
13 Motion for a New Trial is **DENIED**³.

14
15 **IT IS SO ORDERED** this 28th day of October, 2021.

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17 _____
18 /s/
19 **JOSEPH N. CAMACHO**, Associate Judge

20 _____
21 ³ Notwithstanding the Court's ruling on Defendant's Motion for a New Trial, it is worth noting that Citizens take time
22 away from their families and jobs to serve as jurors as part of their constitutional right and civic duty. The Court takes
23 this opportunity to impress upon attorneys to be familiar with the Rules of Evidence and the mechanics and procedures
24 to properly refresh memory, how to have exhibits admitted into evidence, and how to correctly impeach witnesses to
avoid unnecessary delays. The jury in this case spent an extremely large portion of time during the two-week trial waiting
idly in the jury room while the Court had to resolve evidentiary issues of hearsay and lack of focus on the essential
elements of the case, and even demonstrate the proper mechanics and differences of refreshing memory, admitting
exhibits, and impeaching witnesses in an effort to move the trial along – the level of unpreparedness is unacceptable and
disrespectful of the jury's time. Future unpreparedness will not be tolerated.