

FOR PUBLICATION

**APPEAL NO. 01-030-GA**

**IN THE SUPREME COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**

*Plaintiff-Appellee,*

v.

**PETER LUCAS,**

*Defendant-Appellant,*

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**OPINION**

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**Cite as: *Commonwealth v. Lucas*, 2003 MP 9**

Criminal Case No. 98-0175

Submitted without hearing: September 12, 2002

Decided May 27, 2003

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BEFORE: DEMAPAN, Chief Justice; ATALIG and BELLAS, Justices *Pro Tempore*

BELLAS, Justice *Pro Tempore*:

¶1 Appellant Peter Lucas (“Lucas”) appeals his conviction of Illegal. Subcontract Employment, 3 CMC § 4361(g). We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102(a). We affirm.

### ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 1. Did the Superior Court err in overruling Lucas's objection to the testimony of witnesses Marcelina Nanglihan, Veronica Raymundo, and Bertillia (or Berthilia)<sup>1</sup> Malaki?

Whether the trial court correctly construed the hearsay rule is a question of law reviewable de novo. See *United States v. Olafson*, 213 F.3d 435, 441 (9th Cir. 2000). We review the trial court's decisions to admit evidence under exceptions to the hearsay rule, however, for an abuse of discretion. *Id.*; see also *Commonwealth v. Palacios*, 4 N.M.I. 330, 333 (1996). Similarly, the exclusion of evidence under the hearsay rule is also reviewed for an abuse of discretion. See *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000).

¶3 2. Did the trier of fact have sufficient evidence to convict Appellant of violating 3 CMC § 4361(g)?

On a challenge to the sufficiency of evidence, we review the evidence in the light most favorable to the government and determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Commonwealth v. Kaniki*, 2 N.M.I. 353, 357 (1991).

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<sup>1</sup> It is unclear whether Ms. Malaki's first name is "Bertillia" or "Berthilia" - Lucas and the Commonwealth use different spellings in their briefs, and neither party included the portion of the trial transcript where Ms. Malaki would have instructed the court as to the correct spelling of her name.

## FACTUAL AND PROCEDURAL HISTORY

¶4 Sometime in or around July, 1998, Lucas agreed to go into business with Edna Badajos (“Badajos”) and Remy Diaz (“Diaz”), whose manpower business, Exodus, recruited workers from the Philippines to work illegally in Saipan.<sup>2</sup> Lucas testified that Badajos and Diaz asked him to go into the manpower business with them, but that he refused.<sup>3</sup> Lucas was, however, indisputably involved with Exodus, insofar as he picked up from the airport, collected fees for, housed and fed, and delivered to employers, Exodus's illegal workers.

¶5 On October 1, 2001, a jury found Lucas Guilty of Illegal Subcontract Employment, a violation of 3 CMC § 436 l(g), and acquitted him on all other charges.<sup>4</sup> The trial court entered an order on this matter on November 2, 2001. Lucas timely appeals.

## ANALYSIS

### **I.. Did The Trial Court Abuse Its Discretion in Admitting the Testimony of Three Nonresident Workers?**

¶6 Lucas argues, and the Commonwealth agrees, that the trial court abused its discretion in admitting into evidence the inadmissible hearsay testimony of Marcelina Nanglihan (“Nanglihan”), Veronica Raymundo (“Raymundo”), and Bertilla (or Berthilia) Malaki (“Malaki”), all nonresident workers to whom

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<sup>2</sup> Lucas was charged, among other things, with violating 3 CMC § 4361(g) (prohibiting any person from offering or subcontracting aliens for employment within the Commonwealth without an approved or authorized agreement).

<sup>3</sup> Lucas had lost a great deal of money on a previous manpower venture which involved bringing illegal workers from the Philippines to Saipan, and had subsequently been banned by the Commonwealth Labor Department from bringing further aliens into the CNMI.

<sup>4</sup> The jury found Lucas not guilty of Harboring Illegal Aliens, Assisting an Illegal Entry, Immigration Fraud, Conspiracy, and Theft.

Lucas was found to have illegally subcontracted employment.<sup>5</sup> We will examine each witness's testimony in turn.

### A. Nanglihan's Testimony

¶7 Lucas objected to Nanglihan's testimony that while in the Philippines, Badajos had named Lucas as Exodus's Saipan connection:

Q: And you said you spoke to Edna Badajo (oh.)... (unintelligible), did she talk to you at all about - - how did she say they had the ability to give you a job in Saipan? Did they have any connection in Saipan?

A: Yes sir.

Q: What was that?

A: Ahh, he (ph.) said the she got a partner named, Peter Lucas, sir.

Q: And what was he, that he was - -

MR. CUSHNIE: Your Honor, objection, move to strike. That's hearsay testimony.

THE COURT: Overruled.

Transcript ("Tr.") at 4/20-5/4.

¶8 Commonwealth Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Com. R. Evid. 801(c). Testimony meeting this definition is inadmissible, unless it falls under a hearsay exception<sup>6</sup> or qualifies under Rule 801(d) "Statements Which Are Not Hearsay." Com. R. Evid. 801(d).

¶9 Pursuant to Rule 801(d)(2)(E) of the Commonwealth Rules of Evidence, a statement "offered against a party" and made "by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Rule 801(d)(2)(E) has not previously been interpreted by this Court. However,

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<sup>5</sup> Lucas properly objected to the admission of the testimony at trial, and the trial court overruled his objections.

<sup>6</sup> See Com. R. Evid. 803 and 804 for exceptions to the hearsay rule.

Rule 801(d)(2)(E) is modeled on Federal Rules of Evidence 801(d)(2)(E), which contains identical language to its counterpart in the Commonwealth. In the absence of local law, we turn to counterpart federal law for guidance. *Tudela v. Marianas Pub. Land Corp.*, 1 N.M.I. 179, 184 (1990).

¶10 Pursuant to Federal Rule of Evidence 801(d)(2)(E), a co-conspirator's statement is admissible if the government shows by a preponderance of the evidence that: (1) a conspiracy existed at the time the statement was made; (2) the defendant had knowledge of, and participated in, the conspiracy; and (3) the statement was made in furtherance of the conspiracy. FED. R. EVID. 801(d)(2)(E). *See also Bourjaily v. United States*, 483 U.S. 171, 175, 107 S. Ct. 2775, 2778, 97 L. Ed. 2d 144, 152 (1987). To invoke this evidentiary exception, however, the movant must first establish, by a preponderance of the evidence and without relying upon the statement at issue, that a conspiracy embracing both the declarant and the defendant existed and that the declarant uttered the statement both during and in furtherance of the conspiracy. *See United States v. Silverman*, 861 F.2d 571, 576-79 (9th Cir. 1988).

¶11 The elements necessary to establish the evidentiary foundation are not present here. While there is more than enough evidence showing that a conspiracy between Badajos and Lucas existed,<sup>7</sup> the Government failed to establish by a preponderance of the evidence that the conspiracy was in existence at the time the co-conspirator's statement was made.

¶12 Nanglihan testified that in February of 1997, Badajos told her that "she got a partner named Peter Lucas..." Tr. at 3/8 - 4/25. While it is clear from the testimony that this statement was made in furtherance

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<sup>7</sup> Before the court admitted the co-conspirator testimony, Nanglihan had already testified that Lucas had picked her up from the airport when she arrived in Saipan from the Philippines; that he took fifty dollars from her; that he delivered her to Nick Benjamin ("Benjamin"); and that Lucas instructed her that Benjamin was her employer. Excerpts of Record at 9-10. Additionally, by Lucas's own admission, it was established that Lucas and Badajos were business partners; and Lucas was involved, in various ways, with the illegal workers Badajos sent to Saipan, including picking them up from the airport, delivering them to their Saipan employers, collecting fees for their services, and housing and feeding them. Opening Brief at 3-5.

of Badajos's manpower agency, and while it is clear that by July of 1997, Lucas and Badajos had entered into a conspiracy, we have been given no proof that in February, 1997, Lucas had entered into a conspiracy with Badajos.<sup>8</sup>

¶13 Because Nanglihan's statements are not admissible as co-conspirator's statements and do not fall under any hearsay exception, the trial court erred in admitting them. We conclude, in addition, that the trial court also erred in overruling Lucas's objections without hearing arguments on exceptions to the hearsay rule. For reasons discussed more fully below, however,<sup>9</sup> we conclude that there was sufficient evidence to convict Lucas even without the improperly admitted testimony. Accordingly, we determine that the admission of Nanglihan's statements and the trial court's refusal to entertain argument thereon constitute harmless error.<sup>10</sup>

### **B. Raymundo's Testimony**

¶14 Lucas also objects to the trial court's admission, over his objection, of two parts of Raymundo's testimony.

¶15 In the first, Raymundo testifies that Badajos told her that Lucas was her partner in Saipan:

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<sup>8</sup> Because neither party provided this court with a full transcript of the trial proceedings, we cannot say that no such evidence exists, only that there is no evidence of Lucas's involvement with a conspiracy in February, 1997, in the parts of the trial transcript that were provided.

<sup>9</sup> See discussion *infra* at ¶29.

<sup>10</sup> "Harmless error" is a concept developed by appellate courts to embody and implement the truism that no litigant is assured of a perfect trial, but only a fair one. *See, e.g., United States v. Hasting*, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 1980, 76 L. Ed. 2d 96, 106 (1983); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S. Ct. 845, 848, 78 L. Ed. 2d 663, 669 (1984). Since some errors will almost inevitably occur in the pressure cooker that typifies virtually every contested trial, it would be impossible to administer a judicial system in which every trial court error, no matter how minor or how noncritical to the outcome, would automatically trigger a new trial, let alone a reversal. *See Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35, 53 (1999). Accordingly, when applied to evidence that has been improperly admitted at trial, the doctrine of harmless error enables a reviewing court to excise the evidence subject to objection and then examine the untainted evidence to see whether the same result would assuredly follow.

A: Ahh, I talked to Jessica Badajos, and Edna Badajos.  
Q: Okay, and which one of these individuals, if it was either of these that talked to you about the connection in Saipan.  
A: Edna Badajos.  
Q: And what did she tell you about their connection in Saipan?  
A: She said not to be worried because ahh, she has a partner here in Saipan.  
MR. CUSHINE: Objection your honor, this is hearsay testimony.  
THE COURT: Overrule.

DIRECT EXAMINATION CONTINUED  
BY MR. PICKERING

Q: Go ahead.  
A: She has a partner here in Saipan, ahh, name is PRE Agency office enterprises.  
Q: Did she mention anyone by name as far as being - -  
A: Yeah.  
Q: Who was that?  
A: Peter Lucas, Remy Diaz, and Edna Badajos that's PRE.

Tr. at 38/15 - 39/5.

¶16 The trial court did not abuse its discretion in admitting this testimony, as it is co-conspirator testimony that is not hearsay.

¶17 From the meager and patchy portions of the trial transcript provided by the parties, it is impossible for this Court to determine exactly when it is that Badajos told Raymundo that Lucas was her partner in Saipan. However, we deduce that the conversation must have taken place during or after July 1997,<sup>11</sup> and, as discussed above, there is sufficient evidence to establish by a preponderance of the evidence that, by this point, a conspiracy to import illegal workers existed between Badajos and Lucas. There is, moreover,

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<sup>11</sup> See Tr. at 36/6-11.

Q: You said you went to Exodus (ph.) approximately ten times. Why did you go there so many times?  
A: Because ahh I applied for the - July 1997, and then, until June 1998. That's why I keep going there.  
Q: And you paid the money in July 1997?  
A: Yes.

ample evidence establishing that Lucas knew of and participated in the conspiracy. In addition to Lucas's own testimony establishing his participation, Raymundo testified that during the early stages of her relationship with Exodus, she spoke with Lucas - who was in Saipan - on the phone, and was told that Exodus had found her an employer in Saipan. *See* Tr. at 36/15-37/2.<sup>12</sup> We determine, accordingly, that there was ample evidence from which to conclude that a conspiracy existed and that the co-conspirator statements were made to further the conspiracy.

¶18 In the second piece of Raymundo's objected-to testimony, Raymundo testified that her employer, Anicia Sonoda, mentioned Lucas's name in the context of explaining why Raymundo was not being paid:

Q: Did you ever ask Ms. Sonoda for your money?

A: Yes.

Q: Did she give you an answer?

A: Yah.

Q: What was that?

MR. CUSHNIE: Objection your honor that's hearsay testimony.

THE COURT: Overruled.

#### DIRECT EXAMINATION CONTINUED

BY MR. PICKERING

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12 Q: Did you ever talked to anyone in Saipan from Manila at the Exodus (ph.) Agency?  
A: Yes.  
Q: Who was that?  
A: I talked to Edna Badajos and Pete Lucas also at the phone, long distance?  
Q: Were they in Saipan?  
A: Yeah.  
Q: And what was the substance to that conversation? What did you talked about?  
A: I talked about my ma- my application because the man's done, and I did not go yet. I'm asking them if I can take my money back. That they promised me that I already got ahh employer here, no need to back up.  
Q: Do they tell you who that employer was?  
A: Ahh, excuse me sir.  
Q: Do they tell you who that employer was and everything at all?  
A: Yeah.  
Q: Who was that?  
A: Anicia Sonoda.



A: She told me that she gave money for Pete Lucas that's why she don't wanna pay me.

Tr. at 49/21 - 50/6.

¶19 For reasons we cannot fathom, neither party has presented this Court with the page of the transcript (page 49, according to Lucas's brief, which we cannot verify) on which the testimony in question is recorded. Absent the transcript, Lucas does no more than make the conclusory allegation that this testimony is hearsay, and that the testimony of Raymundo is "inherently untrustworthy." Opening Br. at 10. For its part, the Commonwealth agrees that Raymundo's statements (and all the other objected-to testimony) "were hearsay and that Appellant's counsel properly objected, but the trial court overruled without hearing arguments on exceptions to the hearsay rule. For this reason, the Commonwealth agrees that the judge abused his discretion in permitting the hearsay testimony." Appellee's Op. Br. at 8.

¶20 Rule 30(c)(1) of the Commonwealth Rules of Appellate Procedure requires that "[w]hen an appeal is based upon a challenge to the admission or exclusion of evidence or any other ruling or order, but not otherwise, a copy of the relevant pages of the transcript at which the evidence, offer of proof, ruling, or order and any necessary objection are recorded should be included" in the excerpts of record. Com. R. App. P. 30(c)(1). The relevant pages of the transcript are more than merely the pages on which the testimony in question is recorded; the Appellant must provide this Court with the pages of the transcript which prove to the Court that the evidence was improperly admitted. It is not sufficient to point to a snippet of testimony and then ask this Court to agree that the excerpt qualifies as improperly admitted hearsay. *See In re Estate of Deleon Castro*, 4 N.M.I. 102, 108 n.19 (1994).

¶21 Out-of-court statements are not inadmissible per se,<sup>13</sup> and without a proper context for evaluating the statements in question, this Court cannot rule that the trial court abused its discretion in admitting Malaki's testimony. *See, e.g., Am. Special Risk Ins. Co. v. City of Centerline*, 2001 U.S. Dist. LEXIS 16418 at \*16 (E.D. Mich. Aug. 10, 2001); *New Jersey v. Galiano*, 793 A.2d 96,100 (N.J. Super Ct. App. Div. 2002); *Ohio v. Chavis*, 1996 Ohio App. 5848 at \*21 (Ohio Ct. App. Dec. 26, 1996); *Ohio v. Broen*, 1983 Ohio App. LEXIS 11972 at \*28 (Ohio Ct. App. 1983).

¶22 The record that the parties submitted, however, contains sufficient evidence for the trial court to have determined Lucas violated 3 CMC § 436 l(g). Accordingly, and for reasons discussed infra in paragraph 29, we conclude that the trial court's decision to admit this testimony qualifies as harmless error.

### C. Malaki's Testimony

¶23 Lucas contends that the trial court erred in admitting the part of Malaki's testimony in which Malaki testified, over Lucas's objection, that her sister had paid money to Lucas:

Q: And you also mentioned that your sister paid some money to Peter Lucas?

A: Yes sir.

Q: Were you present at the time that your sister paid this money to Peter Lucas?

A: No sir.

Q: Is this something your sister told you?

A: Yes sir.

MR. CUSHNIE: Your honor with respect to the testimony of the witness regarding payment to Peter Lucas move to strike, it's hearsay testimony.

MR. PICKERING: Your honor, it's not hearsay, the witness will be available as next witness .... (indiscernible).

THE COURT: Overrule. Objection overrule.

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<sup>13</sup> "Hearsay," under the Commonwealth Rules is statement made out of the presence of the court, that also is used for the truth of the matter asserted. *See* Com. R. Evid. 801(c). Absent sufficient material enabling the Court to determine the use of the statement, therefore, the Court is unable to conclude whether a particular statement qualifies as hearsay.

Tr. at 141/7- 24.

¶24 Lucas has failed to present any pages of testimony which would provide some context for this objected-to testimony. So while it is true that the sister’s availability as a witness does not render her out-of-court statements “not hearsay,”<sup>14</sup> in light of the ample record evidence independently establishing Lucas's guilt, we conclude that the admission of Malaki’s statement was, at the worst, harmless error.

## II. Did the Trial Court Have Sufficient Evidence to Convict Lucas?

¶25 Based upon the foregoing challenges, Lucas contends that the Commonwealth presented insufficient evidence to find that Lucas violated 3 CMC § 4361(g), which provides that “[a]ny person who offers for employment or employs an alien within the Commonwealth by means of any unapproved or unauthorized agreement, contract, subcontract, or exchange with another employer shall be guilty of illegal subcontract employment . . . .” 3 CMC § 4361(g).

¶26 In support of his challenge to the sufficiency of the evidence establishing whether his guilt was proved beyond a reasonable doubt, Lucas points to the absence of a written agreement between himself and Badajos, Diaz, or any of the six persons recruited for employment. Lucas further emphasizes that of those five recruits who appeared in court, the testimony was simply “that they signed something, in blank, at the Exodus Agency in Manila.” Opening Br. at 11. Finally, Lucas points to the absence of any evidence of an oral manpower agreement between Lucas and any of the six female recruits. Lucas essentially argues that there was insufficient evidence to implicate him in the wrongful recruitment of alien workers, and

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<sup>14</sup> In certain situations when the declarant is “unavailable” as defined by Rule 804(a), an out-of-court statement may be admitted to prove the truth of the matter asserted. *See* Com. R. Evid. 804(b). In admitting that it intended to call the declarant as a witness, however, the Government conceded that the Rule 804 exceptions to the hearsay rule did not apply.

contends that the sole evidence of his partnership with Edna Badajos and Remy Diaz appears, if at all, through the inadmissible “hearsay testimony of Marcelina Nanglihan and Veronica Raymundo.” Opening Br. at 11.

¶27 The Court disagrees. As the Appellant in this proceeding, it is Lucas who must convince this Court that prejudicial error occurred. Pursuant to Rule 10(b)(2) of the Commonwealth Rules of Appellate Procedure, when “the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.” Com. R. App. P. 10(b)(2). Contrary to the dictates of Rule 10(b)(2), the trial transcript provided by Lucas is, at best, spotty and unpersuasive. Lucas’s failure to present the entire transcript makes it extremely difficult, if not impossible, for him to meet his burden of convincing this Court, absent a review of all the testimony, that the trier of fact lacked sufficient evidence to convict Lucas of violating 3 CMC § 436 l(g).

¶28 Despite the meager portion of the transcript that the parties saw fit to provide, that record does establish, to our satisfaction, that the trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Among the evidence establishing Lucas’s guilt is:

- Raymundo’s testimony that: Lucas was intimately involved in her illegal stay in Saipan. Unobjected-to testimony establishing that: Raymundo contacted Lucas in Saipan regarding her work papers (Tr. at 50/17-22); when she left the illegal employment of Florine Hofschneider, Raymundo went to live with Lucas for three days (Tr. at 50/24 - 51/7); and Lucas delivered her to Max Olopai, one of her illegal employers (Tr. at 51/25 - 52/1).
- Johanna Danglay’s testimony that: Lucas picked her up from the airport when she arrived in Saipan from the Philippines on a tourist visa; Lucas brought her to the Saipan manpower

agency office; Lucas introduced her to her illegal employer Pauline Kapileo; Lucas drove her to her employer's house; and Lucas drove her to her next employer's house when she left her first employer (Tr. at 102/1 - 105/22).

Unobjected-to testimonial evidence that: Lucas drove other illegal workers to meet employers Exodus had arranged for them (Tr. at 127/17 - 19); one illegal worker was told that part of her wages had been paid to Lucas (Tr. at 131/15 - 20); Lucas "connected" an illegal worker with her employer (Tr. at 170/1 - 12); Lucas promoted his services as a manpower provider; and Lucas accepted \$600 for the provision of an illegal worker as a housekeeper (Tr. at 178/9 - 179/17).

### CONCLUSION

¶29 Notwithstanding Appellant's evidentiary objections, there is ample evidence from which the trier of fact could have found Lucas guilty of the statutory violation with which he was charged. For the reasons stated above, we therefore **AFFIRM** Lucas's conviction.

IT IS SO ORDERED on this 27th day of May, 2003.

/s/ \_\_\_\_\_  
Miguel S. Demapan, Chief Justice

/s/ \_\_\_\_\_  
Pedro M. Atalig, Justice *Pro Tempore*

/s/ \_\_\_\_\_  
Timothy H. Bellas, Justice *Pro Tempore*