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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

SHAFAQUL ISLAM,
Defendant-Appellant.

SUPREME COURT NO. 2010-SCC-0015-CRM
SUPERIOR COURT NO. 09-0183E

OPINION

Cite as: 2013 MP 4

Decided May 21, 2013

Daniel Guidotti, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Shafaqul Islam
Nicole Driscoll, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; ROBERT C. NARAJA, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Defendant-Appellant Shafaqul[1] Islam ("Islam") appeals his conviction for attempted sexual abuse of a minor in the first degree. Islam claims: (1) the absence of six bench conferences from the transcript of proceedings deprives him of meaningful appellate review; and (2) the evidence was insufficient to show he committed "an overt act which constitutes a substantial step in a course of conduct planned to culminate in the commission" of "sexual penetration with a person who is under 13 years of age." 6 CMC §§ 301(a), 1306(a)(1). For the following reasons, we AFFIRM Islam's conviction for attempted sexual abuse of a minor in the first degree.

I. Factual and Procedural Background

¶ 2 The Commonwealth charged Islam with attempted sexual abuse of a minor, eleven-year-old M.K.Y.,[2] in the first degree, 6 CMC § 301(a), and sexual abuse of a minor, twelve-year-old S.A.Y., in the first degree, 6 CMC § 1306(a)(1).

¶ 3 At trial, both victims testified about their interactions with Islam, who attended the same mosque as the boys. The jury first heard both victims testify that in August 2009, Islam sodomized S.A.Y., which led to the sexual abuse of a minor charge. At the time of the assault, Islam was forty-one and S.A.Y. was twelve.

¶ 4 The jury then heard testimony from M.K.Y. about an incident in September 2009 between M.K.Y. and Islam. M.K.Y. testified that Islam called M.K.Y. into Islam's store. Islam then offered M.K.Y. $2.00 and brought him into Islam's room. Once inside the room, Islam put on a "bad show" that involved "a guy having sex,"[3] Trial Tr. at 29:8-13, approached M.K.Y., and told him to "[j]ust lay down and I will put my penis in your butt hole." *Id.* at 29:8-10. When M.K.Y. did not comply, Islam "kept telling [M.K.Y. to lie down] a lot of times – like he's forcing me." *Id.* at 29:26-27. M.K.Y. ultimately pushed Islam and ran outside.

¶ 5 Based on the victims' testimonies, the jury convicted Islam of both sexual abuse of a minor in the first degree, which Islam does not challenge, and attempted sexual abuse of a minor in the first degree regarding the September incident between Islam and M.K.Y. Following the convictions, the trial court sentenced Islam to twenty years in prison, eight years of which was suspended.

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[1] The trial court spelled the defendant's first name Shafiqul rather than Shafaqul. We use Shafaqul because the notice of appeal and all references by both parties use Shafaqul.

[2] We use initials rather than the victims' names given their young ages.

[3] The Commonwealth failed to ask adequate follow-up questions to determine what M.K.Y. meant by "bad show."

II. Jurisdiction

¶ 6 The Supreme Court has appellate jurisdiction over final judgments and orders of the Superior Court. 1 CMC § 3102(a). Islam filed a timely notice of appeal.

III. Standards of Review

¶ 7 Islam raises two issues on appeal. First, Islam claims the absence of six sidebar discussions from the record on appeal deprives him of his right to a complete record of trial proceedings. The alleged error did not become apparent until the trial court proceedings were transcribed. To prevail, Islam must show: (1) a significant omission from the trial court record; and (2) "prejudice . . . result[ing] from a failure to record a portion of a trial proceeding." *Commonwealth v. Taitano*, 2005 MP 20 ¶ 38 (quoting *Ross v. State*, 482 A.2d 727, 734 (Del. 1984)). Second, Islam asserts the evidence was insufficient to support his conviction for attempted sexual abuse of a minor in the first degree. "In considering the sufficiency of the evidence, the Court must 'consider the evidence in the light most favorable to the government and [then] determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Commonwealth v. Minto*, 2011 MP 14 ¶ 38 (quoting *Commonwealth v. Andrew*, 2007 MP 25 ¶ 4).

IV. Discussion

A. Whether Absence of Six Sidebar Conferences Entitles Islam to a New Trial

¶ 8 Islam correctly notes that the transcript of the trial court proceedings is incomplete because it omits six sidebar bench conferences between the trial court judge and attorneys for Islam and the Commonwealth. Because of these omissions, Islam urges us to: (1) reassess the standard for incomplete record claims set forth in *Taitano*, 2005 MP 20 ¶ 38; and (2) hold that the incomplete record compels reversal of Islam's conviction. We now revisit the standard for incomplete record claims.

1. Standard for Incomplete Record Claims

¶ 9 In *Taitano*, we implicitly held defendants are entitled to a complete record on appeal. *Id*. *Taitano* requires defendants to show that omissions from a record on appeal prejudice defendants in such a way as to require a new trial. *Id.* Islam asks the Court to reconsider the *Taitano* test in cases where a defendant has a new attorney on appeal. Islam points to *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977), where the Fifth Circuit established a two-tier standard of review for determining when an incomplete record on appeal requires reversal. *Id.* at 1306. If defendants have the same counsel at trial and on appeal, the *Selva* test requires them to show both a substantial omission from the record and prejudice. *Id.* If, however,

defendants have new counsel on appeal,[4] they need only show absence of a substantial and significant portion of the trial record. *Id.*

¶ 10 Islam concedes most federal circuits have rejected the *Selva* test because it provides an incentive for a defendant to find new counsel on appeal in order to face a less stringent reversal standard. *See United States v. Huggins*, 191 F.3d 532, 537 (4th Cir. 1999) ("The majority of circuits have maintained that to obtain a new trial, whether or not appellate counsel is new, the defendant must show that the transcript errors specifically prejudiced his ability to perfect an appeal."); *see also id.* at 537 n.2 (collecting cases). Taking this criticism into consideration, Islam supports adopting a "modified *Selva*" test, which would eliminate the requirement to show prejudice "[w]hen an indigent defendant is forced, through no fault of his own, to obtain new appointed counsel during pendency of a criminal appeal." Appellant's Opening Br. at 6.

¶ 11 We decline to adopt Islam's modified *Selva* approach. While defense attorneys who enter a case on appeal may be disadvantaged when portions of the trial court record are not reproduced in the appellate record, this possibility alone cannot require reversal of a criminal conviction, much as serious attorney error does not *ipso facto* call for the same drastic remedy. *See Commonwealth v. Taivero*, 2009 MP 10 ¶ 9 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Criminal convictions result only after the fact-finder is convinced beyond a reasonable doubt that a defendant has transgressed the criminal law. We do not set that finding aside lightly. Prejudice, therefore, remains necessary to support reversal.

¶ 12 In rejecting Islam's modified *Selva* approach, we reaffirm the *Taitano* transcript test. To obtain reversal for an incomplete trial court record, all defendants must show a significant omission from the trial court record that specifically prejudices their ability to perfect an appeal.

2. Application of Taitano to Islam's Record

¶ 13 Turning to the case at bar, Islam does not meet the *Taitano* test. Islam identifies six untranscribed bench conferences in the transcript, the substance of which counsel allegedly could not discern during his review of the audiotapes. Assuming the six bench conferences are not part of the audio record, Islam nonetheless makes no showing that they constitute a significant omission from the trial transcript. We, as a result, are skeptical that six seemingly short bench conferences over a three-day trial constitute a significant omission from the trial transcript.

¶ 14 Even assuming the omitted bench conferences included crucial information, Islam also makes no showing of specific prejudice to his ability to perfect his appeal. The only statement related to prejudice is Islam's conclusory argument that Islam's appellate counsel "cannot tell, by reading the transcript,

[4] We question whether the Public Defender's Office ("PDO") is new counsel on appeal when, as here, they represented the defendant at trial and on appeal (even though different attorneys within the PDO handled the trial and appeal). Because the Attorney General's office conceded this point, however, we do not reach it.

whether plain error occurred during the six unrecorded or unintelligible sidebar conferences." Appellant's Opening Br. at 6. He does not offer any arguments that even suggest a "'likelihood that reversible error occurred during [these] few untranscribed bench conferences.'" *United States v. Haber*, 251 F.3d 881, 890 (10th Cir. 2001) (quoting *United States v. Winstead*, 74 F.3d 1313, 1321 (D.C. Cir. 1996)). While bench conferences should be transcribed, counsel must show more than a mere absence of these bench conferences in the transcript to sustain a finding of prejudice.[5]

¶ 15 Support for our conclusion that omission of bench conferences is not per se prejudice comes from *United States v. Stefan*, 784 F.2d 1093, 1102 (11th Cir. 1986), where the Eleventh Circuit upheld a conviction despite the absence of a one-hour-and-forty-five-minute chambers conference from the record on appeal. The court reasoned that the likelihood of prejudice was small because the omission did not involve anything heard by the jury, such as opening or closing statements. *Id.* It follows that the omission of six (apparently) short bench conferences does not constitute per se prejudice.

B. Sufficiency of the Evidence to Support Islam's Attempt Conviction

¶ 16 Moving to the merits, to determine whether sufficient evidence supports a conviction, we "must 'consider 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. Guerrero*, 2011 MP 13 ¶ 10 (quoting *Andrew*, 2007 MP 25 ¶ 4). The only element of attempted sexual abuse of a minor that Islam challenges on appeal is whether his conduct amounted to "an overt act which constitutes a substantial step in a course of conduct planned to culminate in the commission" of "sexual penetration with a person who is under 13 years of age." 6 CMC §§ 301(a), 1306(a)(1). Islam contends he never committed a "substantial step," and therefore no reasonable fact-finder could find him criminally responsible. *See Guerrero*, 2011 MP 13 ¶ 10. We disagree.

¶ 17 A defendant has taken a substantial step if he commit acts "necessary to the consummation of the crime that were of such a nature that a reasonable observer, viewing the actions in context[,] could conclude beyond a reasonable doubt that the actions were undertaken in accordance with a design to [commit the actual offense]." *United States v. Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (internal quotations omitted). In making that determination, a substantial step is more than "mere preparation," but less than the "last act necessary" to commit the actual substantive offense. *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003) (internal quotation marks omitted). *Cf.* MODEL PENAL CODE § 5.01(2) (1985) (noting that a defendant may take a substantial step by merely "reconnoitering the place contemplated for the commission of the crime," or "possess[ing] materials to be employed in the commission of the

[5] Though counsel cannot know exactly what happened during a short bench conference, a conclusory argument is not enough because context clues from surrounding testimony should provide counsel some idea of the subject matter of the bench conference.

crime"). It requires, at a minimum, action constituting "some appreciable fragment of the crime in progress," *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990) (citation omitted) (internal quotation marks omitted), such that the "'accused's conduct has progressed sufficiently to minimize the risk of an unfair conviction.'" *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980) (quoting *United States v. Monholland*, 607 F.2d 1311, 1318 (10th Cir. 1979)).[6]

¶ 18 Here, the jury heard testimony regarding the following facts, which we must construe in the light most favorable to the Commonwealth: (1) Islam offered M.K.Y. $2.00; (2) Islam told M.K.Y. to go to his room; (3) M.K.Y. went to Islam's room, where Islam put on a "bad show"; (4) Islam told the victim to lay down; (5) Islam said, "I will put my penis in your butt hole"; (6) Islam persisted in soliciting M.K.Y. "a lot of times – like he's forcing me" even though M.K.Y. refused his advances; and (7) M.K.Y. ultimately pushed Islam and ran outside. Trial Tr. at 29:1-28.

¶ 19 With these facts, a reasonable trier of fact could have found that Islam had taken a substantial step towards "sexual penetration with a person who is under 13 years of age." 6 CMC §§ 301(a), 1306(a)(1). Islam lured M.K.Y. into Islam's private room with the promise of money, put on a "bad show" involving guys having sex, and then told M.K.Y. to lie down so that he could "put [his] penis in [M.K.Y.'s] butt hole." Trial Tr. at 29:8-13. When M.K.Y. refused, Islam did not stop. He continued to solicit M.K.Y. Those facts, plus Islam's similar behavior with M.K.Y.'s brother a month earlier, amply demonstrate that Islam intended to sexually abuse M.K.Y. Had M.K.Y. not forced his way out of the room, it appears likely that Islam's attempts would have turned into a *fait accompli*.

¶ 20 Because Islam's many acts, when viewed in context, were necessary and well beyond an appreciable fragment of the crime, such that there is little risk of an unfair conviction, we hold that a reasonable trier of fact could have found beyond a reasonable doubt that Islam's conduct amounted to "an overt act which constitutes a substantial step in a course of conduct planned to culminate in the commission" of "sexual penetration with a person who is under 13 years of age." 6 CMC §§ 301(a), 1306(a)(1).

V. Conclusion

¶ 21 For the foregoing reasons, we AFFIRM Islam's conviction for attempted sexual abuse of a minor.

SO ORDERED this 21st day of May, 2013.

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[6] Notwithstanding paragraph 17, defendants may not be convicted of an attempt crime if they "desist voluntarily and in good faith abandon" their intention to commit the crime "without causing any of the effects proscribed by [the criminal code]." 6 CMC § 301(b).

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT C. NARAJA
Justice Pro Tem