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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

PATRICK M. CALVO,
Defendant-Appellant.

SUPREME COURT NO. 2010-SCC-0019-CRM
SUPERIOR COURT NO. 08-0105

OPINION

Cite as: 2014 MP 7

Decided July 25, 2014

G.Anthony Long and Bruce Berline, Saipan, MP, for Defendant-Appellant Patrick M. Calvo
Teresita J. Sablan, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: DAVID A. WISEMAN, Justice Pro Tem; JOSEPH N. CAMACHO, Justice Pro Tem; TIMOTHY H. BELLAS, Justice Pro Tem.

WISEMAN, J.P.T.:

¶ 1 Patrick M. Calvo ("Calvo") was convicted of two bench counts and two jury counts related to sexually touching his daughter. Calvo alleges thirteen errors: three at trial, ten at sentencing. At trial, Calvo claims: the court unconstitutionally denied Calvo a jury trial; the prosecutor improperly asked were-the-other-witnesses-lying questions; and the court improperly denied Calvo's motion for a mistrial or a new trial. At sentencing, Calvo claims the sentence improperly limited his right to seek a sentence modification; violated double jeopardy; and was excessive, not individualized, and statutorily too long in several ways. At sentencing, Calvo also claims the court should not have referred to the original presentence investigation and report. For the reasons below, we AFFIRM the convictions, but VACATE the sentence and REMAND for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 One day in June 2008, Calvo and his daughter, T.A.C., were home alone together. T.A.C. was watching television in her parent's room when Calvo came in and massaged her legs—apparently because T.A.C. had sore legs. T.A.C. told Calvo to stop because it was not making her legs feel better. Calvo responded by climbing on top of T.A.C. and then pulling up her shirt so he could kiss her navel. Again, T.A.C. told Calvo to stop. While T.A.C. was telling Calvo to stop, the phone rang. Calvo left the room to answer it. T.A.C. used the opportunity to go to her room.

¶ 3 After the phone call, Calvo followed T.A.C. to her room. He knocked on the door and T.A.C. let him in. Once inside, Calvo asked T.A.C. if she was afraid of him. She said no. Then Calvo began talking to T.A.C. about sex. Specifically, Calvo told T.A.C. that people would pressure her into having sex and that she should say no. The conversation then turned to masturbation, at which point Calvo asked T.A.C. if he could see her vagina. T.A.C. said no. In response, Calvo told T.A.C. that he wanted her to see something. Then he left the room and returned with a Winnie the Pooh log pillow. Calvo put the pillow on T.A.C.'s bed and then told her to hump it because he wanted her to have an orgasm. T.A.C. asked why; he said just to do it. T.A.C. mounted the pillow, but refused to hump it. Then Calvo grabbed T.A.C.'s hips and pushed her down towards the pillow. Shortly after, Calvo told T.A.C. to get on top of him because it was "[her] turn to make [him] cum." Trial Tr. at 96:17. Once T.A.C. was on top, Calvo began humping her. T.A.C. told him to stop, but Calvo apparently did not stop until he had an orgasm.

¶ 4 Later, T.A.C. told what had happened to other family members, who then contacted police. Authorities arrested Calvo and charged him with four counts: (1) second-degree sexual assault, 6 CMC § 1302(a)(1); (2) second-degree sexual abuse of a minor, 6 CMC § 1307(a)(3); (3) third-degree sexual abuse of a minor, 6 CMC § 1308(a)(1); and (4) disturbing the peace, 6 CMC § 3101(a).

¶ 5 At trial, the prosecution's case-in-chief featured six witnesses: Dr. Gladding, Division of Youth Services Investigator Julian Camacho, T.A.C., T.A.C.'s mom, T.A.C.'s sister, and Detective Ozawa. The doctor testified that T.A.C. exhibited classic signs of post-traumatic stress disorder, Trial Tr. at 9:4, and that "[t]he source of post traumatic stress was the allegations of the abuse by her father." *Id.* at 11:13. Camacho testified that he interviewed T.A.C. shortly after the abuse. During the interview, T.A.C. looked like "she ha[d] a big weight on her." *Id.* at 88:6. T.A.C. testified that Calvo had sexually abused her. T.A.C.'s mother testified that T.A.C. admitted to being touched in a sexually inappropriate way. T.A.C.'s sister, Nicole testified that Calvo had also sexually abused her when she was T.A.C.'s age. Detective Ozawa testified that T.A.C. was timid and emotional following the sexual abuse.

¶ 6 Meanwhile, during the defense's case-in-chief, Calvo categorically denied the charges. On cross, the prosecutor repeatedly asked Calvo if the prosecution witnesses had lied:

> PROSECUTION: "[W]hen Miss Nicole . . . told this jury . . . that you had tried to massage her under her clothes[,] on her breast[,] and her vagina and her butt – buttocks, was she lying?

Trial Tr. 325:11-24.

> PROSECUTION: So when [T.A.C.] took that stand and said that you had started to give her a massage, . . . she was not telling the truth?

Trial Tr. 336:21-24.

> PROSECUTION: So the people who took the stand earlier today and earlier this week and testified differently, they were not telling the truth, is that correct?

Trial Tr. 341:1-2.

¶ 7 At the close of trial, the trial court issued a curative instruction regarding the prosecution's questions. That instruction informed the jury that the questions were highly improper, that the jury should disregard them, and that it was the jury's job alone to determine credibility. Jury-Instruction Tr. at 50:22-51:6.

¶ 8 Following trial, the jury found Calvo guilty of counts one and two; the court found him guilty of counts three and four.

¶ 9 Before sentencing, the trial court ordered the Commonwealth Probation Office to prepare a presentence investigation and report ("PSR"). Calvo made a bias objection because the chief probation officer's husband is in charge of the day-to-day operations of the principal competitor to Calvo's commercial landscaping business. In response, the court ordered a new PSR prepared without the participation of the chief probation officer.

¶ 10 At sentencing, Calvo asked that the convictions for counts one through three (the sexual abuse counts) be merged. The court denied the request and then sentenced Calvo to eight years for second-degree sexual misconduct, eight years for second-degree sexual abuse of minor, and five years for third-degree sexual abuse of a minor. These sentences (as well as the six-month sentence for disturbing the

peace) were then merged into one eight-year sentence—even though the court had just denied Calvo's request to merge the offenses. The court also sentenced Calvo to seven years of probation, 1,500 hours of community service, and restitution for "expenses incurred by the victim, in connection with the conviction hearing." Sent. Tr. at 131:13-15.

¶ 11 In setting the sentence, the court found the eight-year sentence appropriate because the length would deter future child abuse and satisfy the community's need for retribution:

> COURT: Our society has declared a campaign against child abuse. Child abuse is not an activity that is or can be a part of this society's traditions. This is a case where the interests of justice and of this society will be best served by imposing a jail term that will have a deterrent effect on the Defendant upon his release and more importantly, on potential offenders. Furthermore, the jail term will serve as the retribution that society demands.

App. 585: 13-17.

¶ 12 Calvo appeals.

II. Jurisdiction

¶ 13 The Supreme Court has appellate jurisdiction over final orders and judgments of the Commonwealth Superior Court. 1 CMC § 3102(a).

III. Standards of Review

¶ 14 Calvo presents more than a dozen issues.[1] We review Calvo's constitutional claims de novo. *Commonwealth v. Diaz*, 2013 MP 20 ¶ 31 (right to a jury trial); *Commonwealth v. Manila*, 2005 MP 17 ¶ 12 (double jeopardy). We review Calvo's statutory challenges to his sentence de novo. *Commonwealth v. Oden*, 3 NMI 186, 190-91 (1992). We review Calvo's prosecutorial-misconduct claim for whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Commonwealth v. Jing Xin Xiao*, 2013 MP 12 ¶ 18 (internal quotation omitted). And we review Calvo's remaining sentencing claims for abuse of discretion. *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 1 (denial of a motion for mistrial); *see Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶ 13 (noting that sentencing discretion is generally reviewed for abuse of discretion).

IV. Discussion

¶ 15 We will start with the trial issues and then move to the sentencing issues.

A. *Trial Issues*

[1] Calvo offered three additional arguments that we do not reach. We do not reach Calvo's sufficiency-of-the-evidence claim because he abandoned it during oral argument. We similarly do not reach Calvo's claims that the trial court erred by: (1) concluding it did not have discretion to grant a jury trial on bench counts and (2) referring to an earlier presentence report during sentencing. We do not reach these claims because Calvo failed to provide legal authority for either claim during his opening brief. *See Guerrero v. Dep't of Public Lands*, 2011 MP 3 ¶ 24; Calvo Opening Br. at 17 n.3, 39.

¶ 16 Calvo raises three trial issues: (1) the trial court erred by denying him a jury trial on all the counts; (2) the prosecutor erred by repeatedly asking Calvo if the prosecution witnesses had lied; and (3) the trial court erred by denying Calvo's motion for a new trial because of the were-they-lying questions.

1. *Constitutional Right to a Jury Trial*

¶ 17 We start with whether Calvo's Sixth Amendment right to a jury trial was violated when the trial court, rather than the jury, decided two felony charges not punishable by more than five years imprisonment, by more than a $2,000 fine, or both. We review constitutional claims de novo. *Commonwealth v. Diaz*, 2013 MP 20 ¶ 31.

¶ 18 Calvo argues the jury-trial limitation is wrong legally and as a matter of policy. First, it is wrong legally because the jury-trial right is a fundamental right. Fundamental rights trump the Covenant; therefore, neither the Covenant delegation nor the United States Congress had the authority to negotiate the right out of existence.

¶ 19 Second, the jury-trial limitation is wrong as a matter of public policy because the rationales undergirding the limitation have dissipated. According to Calvo, at the Commonwealth's founding, the jury-trial right was limited for three reasons: (1) cost; (2) "the difficulty of finding juries unacquainted with the facts of the case;" and (3) "the fear that the small, closely-knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases." Calvo Opening Br. at 21 (citing *Commonwealth v. Magofna*, 919 F.2d 103, 106 (9th Cir. 1990)).

¶ 20 Calvo claims the concerns over jury selection and inappropriate jury acquittals have receded. Local courts have thirty-five years of experience with jury trials. Federal courts have similar experience with an unadulterated right to jury trials. Those experiences have shown that the courts can consistently find sufficient jurors untainted by pre-knowledge of the case. Moreover, decades of population growth and change have reshuffled the Commonwealth's demographic composition. These changes reinforce what experience has already taught the courts: the criminal system can consistently find open-minded jurors who will mete out justice based on the evidence rather than relationships.

¶ 21 The Commonwealth counters that this Court recently affirmed that the jury-trial limitation is constitutional. *Commonwealth v. Diaz*, 2013 MP 20. In *Diaz*, this Court examined and then upheld thirty years of precedent holding that defendants charged with a felony carrying a maximum punishment equal to or less than 5-years imprisonment, a $2,000 fine, or both do not possess a federal constitutional right to a jury trial. *Id.* ¶¶ 33-36, 46.

¶ 22 In deciding between these two positions, we acknowledge that some of the Ninth Circuit's reasoning in *Magofna* is antiquated. In fact, the Commonwealth has successfully used the jury system for several decades. That experience has dispelled most of *Magofna*'s concerns. Nonetheless, adopting

Calvo's argument would ignore *stare decisis*, a principle that counsels against overturning precedent lightly. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). Deference to precedent "is a foundation stone of the rule of law." *Id.* Following precedent is a foundation of the law "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation omitted). Heeding this guidance, the time is not right to revisit *Diaz*'s jury-trial holding because this Court just decided this question several months ago.

¶ 23 Applying *Diaz*'s holding, the trial court deciding the two lesser counts did not violate Calvo's constitutional right to a jury trial.

2. *Prosecutorial Misconduct*

¶ 24 The next issue is whether the prosecutor acted improperly when he asked Calvo on cross-examination if each of the prosecution witnesses had lied. We review prosecutorial-misconduct claims for whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Commonwealth v. Jing Xin Xiao*, 2013 MP 12 ¶ 18 (internal quotation omitted).

¶ 25 Our case law has not addressed whether a prosecutor may ask a defendant if a prosecution witness was lying; thus, we look to other jurisdictions for guidance. 7 CMC § 3401.

¶ 26 The United States Courts of Appeal generally prohibit parties from asking witnesses if other witnesses lied.[2] Many state courts agree.[3] But some courts unconditionally permit such questions,[4] or allow them under certain circumstances.[5]

¶ 27 Courts that prohibit were-they-lying questions do so, for example, because these "questions have no probative value" and "because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *Pilot*, 595 N.W.2d at 518. On the other hand, courts that allow such questions do so, for instance, if a witness "flatly denies the

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[2] *See Arnold v. Wilder*, 657 F.3d 353, 367-68 (6th Cir. 2011); *United States v. Harrison*, 585 F.3d 1155, 1158 (9th Cir. 2009); *United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006); *United States v. Thomas*, 453 F.3d 838, 846 (7th Cir. 2006); *United States v. Williams*, 343 F.3d 423, 437 (5th Cir. 2003); *United States v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996); *United States v. Boyd*, 54 F.3d 868, 871-72 (D.C. Cir. 1995); *United States v. Richter*, 826 F.2d 206, 208-10 (2d Cir. 1987).

[3] *See State v. Maluia*, 108 P.3d 974, 976 (Haw. 2005); *Scott v. United States*, 619 A.2d 917, 924-25 (D.C. 1993); *State v. Emmett*, 839 P.2d 781, 787 (Utah 1992); *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990); *State v. Casteneda-Perez*, 810 P.2d 74, 79 (Wash. Ct. App. 1990); *People v. Riley*, 379 N.E.2d 746, 753 (Ill. 1978).

[4] *See Fisher v. State*, 736 A.2d 1125, 1161-64 (Md. Ct. Spec. App. 1999); *Whatley v. State*, 509 S.E.2d 45, 51-52 (Ga. 1998).

[5] *See, e.g., People v. Chatman*, 133 P.3d 534, 655 (Cal. 2006); *State v. Johnson*, 681 N.W.2d 901, 909-10 (Wis. 2004); *Daniel v. State*, 78 P.3d 890, 904 (Nev. 2003); *State v. Morales*, 10 P.3d 630, 633 (Ariz. Ct. App. 2000); *State v. Hart*, 15 P.3d 917, 923-24 (Mont. 2000); *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999); *People v. Overlee*, 236 A.D.2d 133, 139-41 (N.Y. App. Div. 1997).

occurrence of events," the question clarifies a line of questioning, or a defendant opened the door by "claiming that everyone else is lying." *E.g.*, *Hart*, 15 P.3d at 924.

¶ 28 Among these competing options, the Commonwealth recommends adopting the permissive approach. In contrast, Calvo champions the Ninth Circuit's bright-line prohibition: "'a prosecutor may not ask a defendant to comment on the truthfulness of another witness.'" Calvo Opening Br. at 7 (quoting *Harrison*, 585 F.3d at 1158). Under Calvo's proposed standard, the remedy for such improper statements is a new trial unless (1) the court gives a curative instruction immediately after the misconduct and (2) the curative instruction specifically references the prejudicial statement or question. *United States v. Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2013).

¶ 29 We agree with Calvo that prosecutors may not ask defendants to comment on the truthfulness of other witnesses. 7 CMC § 3401 generally requires the Commonwealth courts to apply the law "as generally understood and applied in the United States" when local authority is silent. Here, the blanket-ban approach is the majority rule and is, therefore, the law as generally understood and applied regarding were-they-lying questions.

¶ 30 Applying the blanket-ban approach here, the were-they-lying questions were an error. The prosecutor improperly and repeatedly asked these questions. Those questions were not immediately inoculated with a curative instruction.

¶ 31 But not all prosecutorial misconduct requires a new trial. Prosecutorial misconduct requires a new trial only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Jing Xin Xiao*, 2013 MP 12 ¶ 18. To decide whether the were-they-lying questions rise to that level, we look at three factors: (1) "the context's effect upon the prosecutor's remarks;" (2) "the efficacy of any cautionary instruction by the judge;" and (3) "the strength of the evidence supporting the conviction." *Id.* ¶ 19.

¶ 32 Applying these factors, the were-they-lying questions were harmless. First, the context tempered the harm. Most of the questions were blocked by successful objections. The remaining questions represented a small part of the trial and focused on a line of questioning already opened by the defendant when he testified, in effect, that his wife and two daughters had not told the truth.

¶ 33 Second, the court's curative instruction was effective. The instruction specifically addressed the prosecution's were-they-lying questions. It said that the questions were improper, that the jury should disregard them, and that it was the jury's job alone to determine credibility. Jury-Instruction Tr. at 50:22-51:6. We presume that instruction was followed. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987).

¶ 34 Third, the strength of the evidence supporting conviction is strong. T.A.C. testified that Calvo sexually abused her. T.A.C.'s sister, Nicole testified that Calvo had done the same to her years prior. T.A.C.'s mom testified that T.A.C. had admitted to being touched in a sexually inappropriate manner

shortly after the incident. Dr. Gladding testified that T.A.C. exhibited classic signs of post-traumatic stress disorder, the source of which likely was due to Calvo's sexual abuse. And Detective Ozawa testified that T.A.C. was timid and emotional following the sexual abuse. Together, this testimony paints a persuasive picture that both the judge and the jury believed beyond a reasonable doubt.

¶ 35 In sum, although the prosecutor committed misconduct, the misconduct was harmless and, therefore, does not require a new trial.

3. *Denial of Motion for a Mistrial or a New Trial*

¶ 36 The final trial issue is whether the trial court erred in denying Calvo's motion for a mistrial or a new trial. In that motion, Calvo argued that the were-they-lying questions compelled a new trial. We review such denials for abuse of discretion. *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 1. In making that decision, a trial court may grant a new trial to a defendant "if required in the interest of justice." NMI R. CRIM. P. 33.

¶ 37 We find no abuse of discretion for the reasons discussed above. The were-they-lying questions were improper but harmless because of the context, the curative instructions, and the weight of the evidence. Therefore, the court was within its discretion to deny Calvo's motion.

B. *Sentencing Issues*

¶ 38 Having rejected each of Calvo's trial claims, we move to his sentencing claims.

1. *Double Jeopardy*

¶ 39 Calvo's first sentencing claim is that his convictions for second-degree sexual misconduct, second-degree sexual abuse of a minor, and third-degree sexual abuse of a minor violated double jeopardy because each conviction emanates from the same conduct. We review double-jeopardy claims de novo. *Commonwealth v. Manila*, 2005 MP 17 ¶ 12.

¶ 40 Double jeopardy "protects an individual against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Commonwealth v. Peter*, 2010 MP 15 ¶ 5.

¶ 41 When reviewing a claim under the third category, we ask whether the legislature intended to impose multiple sanctions for the same conduct. *Id.* If yes, there is no double jeopardy violation. If not, we apply the test set forth in *Blockburger v. United States, 284 U.S. 299 304 (1931). Id.*

¶ 42 To determine whether the Legislature intended to impose multiple punishments for the same conduct, courts require *clear* legislative intent. *Id.* ¶ 10 (presuming "that where two statutory provisions proscribe the same offense, [the] legislature does not intend to impose two punishments for that offense.") (internal quotations omitted). Legislative intent can be derived from the words of the statute, *see id.* ¶ 12 (examining the words of a statute for legislative intent), or legislative history, *Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9 n.9.

¶ 43 When it is not clear that the Legislature intended multiple punishments, we turn to *Blockburger*. Under *Blockburger*, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test . . . is whether each provision [of the challenged offenses] requires proof of a fact which the other does not.'" *Peter*, 2010 MP 15 ¶ 6 (quoting *Blockburger*, 284 U.S. at 304). To decide that, we compare the pertinent statutes to determine if the elements of the lesser-included offense are "a subset of the charged offense." *Commonwealth v. Kaipat*, 4 NMI 300, 303 (1995) (internal quotation omitted). This review focuses on the elements required for each offense rather than the actual evidence presented at trial. *Commonwealth v. Peter*, 2010 MP 15 ¶ 6.

¶ 44 Here, there is no evidence that the legislature intended to impose multiple punishments for the same conduct; thus, we apply the *Blockburger* test. That test is satisfied because each offense requires an element that the others do not. Sexual assault in the second degree requires sexual contact without consent. 6 CMC § 1302(a)(1). Sexual abuse of a minor in the second degree requires the offender to be the natural parent of the victim. 6 CMC § 1307(a)(3). And sexual abuse of a minor in the third degree requires the victim be 13, 14, or 15 years old. 6 CMC § 1308(a)(1). It also requires the victim be at least three years younger than the offender. *Id.* Because each offense has at least one element the other offenses do not, the three convictions do not violate double jeopardy.

2. *Silence*

¶ 45 Calvo next claims the court erred by noting Calvo's silence during the sentencing hearing as a reason for not finding Calvo remorseful. We review right-to-silence challenges de novo. *See Mitchell v. United States*, 526 U.S. 314, 325-27 (1999) (reviewing the right to silence during sentencing de novo).

¶ 46 The Commonwealth Constitution, NMI CONST. art. I, § 4(c), and the Fifth Amendment to the United States Constitution "prevent[] a person from being 'compelled in any criminal case to be a witness against himself.'" *Mitchell*, 526 U.S. at 327 (quoting U.S. CONST. amend. V).[6] This protection extends to sentencing proceedings. *Mitchell*, 526 U.S. at 324. As a result, when a defendant exercises that right, courts may not draw an adverse inference. *Id.* at 329. But it remains an open question whether the court may decline to draw a positive inference (such as a finding of remorse) that would lead to a sentence reduction. *White v. Woodall*, 134 S. Ct. 1697, 1703 (2014) (discussing *Mitchell* and concluding case law "leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence.").

¶ 47 Against that backdrop, Calvo argues the court adversely used his silence. The use was adverse because the court relied on that silence to withhold a sentence reduction for remorsefulness. In effect, the court imposed a greater punishment than it would have had Calvo testified during his sentencing hearing.

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[6] The right against self-incrimination is identical under the Commonwealth and United States Constitutions. *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* 14 (1976).

That sentencing disparity means Calvo received increased punishment because of his decision to exercise his right to silence.

¶ 48 The Commonwealth, on the other hand, claims the court did not rely on Calvo's silence. Instead, the court merely stated the obvious: It could not identify if Calvo was remorseful because Calvo did not speak at sentencing. Because the court could not determine Calvo's remorsefulness, the court could not use it as a plus factor in Calvo's favor during sentencing.

¶ 49 We agree with the Commonwealth for two reasons. First, defendants bear the burden of proving mitigating factors. *United States v. Archuleta*, 128 F.3d 1446, 1449 (10th Cir. 1997). Calvo did not meet that burden because he did not show remorse at trial or during sentencing. At trial, Calvo denied committing the crimes of which he was convicted. At sentencing, Calvo did not accept responsibility for the crimes. Second, the court did not use Calvo's silence to enhance his punishment. The court merely explained it could not determine if Calvo was remorseful because there was nothing before it to suggest that Calvo was remorseful.[7] *See also United States v. Espinosa*, 771 F.2d 1382, 1404 (10th Cir. 1985) (holding that when court recognized right to silence but explained how it hampered sentencing determination, court's "comments [were] proper and [did] not penalize defendants for exercising their Fifth Amendment rights"). Therefore, the court did not err by mentioning Calvo's silence.

3. *Probation Length*

¶ 50 Calvo next argues the seven-year probationary period was improper because it exceeded the maximum allowed. In support, Calvo turns to *Commonwealth v. Oden*, which vacated a sentence where the term of incarceration plus the term of probation exceeded the total period of incarceration allowed under the criminal statute. 3 NMI 186, 198 (1992).

¶ 51 Calvo's argument fails because *Oden* has been superseded by statute. When *Oden* was decided, the statute governing probation, 6 CMC § 4113, limited probation so that the periods of probation and incarceration together could not exceed the maximum period of incarceration:

> Upon entering a judgment of conviction of any offense not punishable by life imprisonment, the court, . . . may suspend the imposition of a sentence and may direct that the suspension continue for a period of time, *not exceeding the maximum term of sentence which may be imposed*, and upon the terms and conditions which the court determines, and shall place the person on probation, under the charge and supervision of a probation officer or any other person designated by the court, during the suspension.

Id. § 4113 (1992) (emphasis added).

¶ 52 In 2007, the Legislature passed the Probation Reform Act. The Act amended 6 CMC § 4113 with the purpose of "increasing the period of probation the court may impose . . . ." Public Law 15-46 § 2. To

[7] In the sentencing order, the court wrote: "Defendant maintained his silence regarding his responsibility for the convicted crimes. Defendant also maintained this silenced during allocution. Whether or not Defendant is remorseful cannot be readily determined." Sentence and Commitment Order at 2.

further that aim, the amendment deleted the clause "not exceeding the maximum term of sentence which may be imposed." *See* 6 CMC § 4113 (2007). This change eliminated the source of *Oden*'s ruling: the words "maximum term of sentence." *See Oden*, 3 NMI at 198 (relying on "the maximum terms of sentence" to conclude that "any probation period to be imposed upon a defendant following his prison term may not exceed the remaining balance that one may be imprisoned for that offense").

¶ 53 Under the current version of § 4105, a court may impose as much as ten years of probation from the date the defendant was released from prison. *Id.* § 4105(b)(2) ("The court may impose any period of probation, not to exceed: Ten years from the date the probationer is sentenced, or released from any period of incarceration, *whichever is greater*, upon conviction for any felony.") (emphasis added).

¶ 54 Because *Oden*'s probation holding is no longer good law, and § 4105(b)(2) provides that a sentence may include up to ten years of probation from the date the felon is released from prison, the probation length was not an abuse of discretion.

4. *Individualization*

¶ 55 Calvo next argues that his sentence was not individualized because the sentence aimed to deter other potential offenders and to serve as societal retribution. We review sentencing for abuse of discretion. An abuse of discretion occurs when the trial court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 84 (1992).

¶ 56 When a court crafts a sentence, it should tailor the punishment to fit both the crime and the defendant. *Peppers v. United States*, 131 S. Ct. 1229, 1240 (2011). When doing so, courts may also consider deterrence and retribution. *See United States v. Vaughn*, 433 F.3d 917, 924-25 (7th Cir. 2006) (affirming an upward departure from the federal sentencing guideline that was predicated on retribution and deterrence).

¶ 57 Here, the court did not abuse its discretion because the court examined many factors in setting and explaining Calvo's sentencing. In addition to deterrence and retribution, the court considered the nature of the crime, specifically that T.A.C. is Calvo's daughter. Sent. Tr. 129:25-27. The court also considered, among other things, the presentence investigation and report, the testimony at sentencing, and recommendations from others, including many supporting Calvo. *Id.* at 130:11-13. Because the court weighed an array of factors, including many specific to Calvo, the court did not abuse its sentencing discretion.

5. *Excessiveness*

¶ 58 Calvo next claims the eight-year sentence was an abuse of discretion because the evidence did not include aggravating factors such as nudity, penetration, or attempted penetration. We disagree for two reasons. First, the sentence was within the permissible statutory range. *See Commonwealth v.*

Ramangmou, 1996 MP 17 ¶ 12 (affirming a sentence because, in part, it "was within the guidelines of the statute"). And, second, the crime was egregious: Calvo sexually abused his daughter. Therefore, the eight-year sentence was not an abuse of discretion.

6. *Overbreadth and Vagueness of Restitution Requirement*

¶ 59 Calvo next argues the court abused its discretion because the restitution portion of Calvo's sentence is overbroad and vague. According to Calvo, the sentence is overbroad because it refers to "victims" when there was only one victim. And the sentence is vague both because it does not identify who is entitled to restitution and because it is not limited to psychological evaluation, counseling, and treatment flowing from Calvo's conduct.

¶ 60 Beginning with overbreadth, the sentence is not overbroad. The sentence is not overbroad because while the court wrote "victims" in the sentencing order, *Commonwealth v. Calvo*, Crim. No. 08-0105A (NMI Super. Ct. June 11, 2010) (Sentence and Commitment Order at 6), the court said "victim" at the sentencing hearing. Sent. Tr. 131: 13-15. When there is a difference between the sentencing order and the oral pronouncement, the oral pronouncement controls. *Commonwealth v. Santos*, 4 NMI 348, 350-51 (1996). Because the oral pronouncement controls, and the court said "victim" during the oral pronouncement, the sentence refers to a single person, T.A.C. Because the sentence only refers to one person, the sentence is not overbroad.

¶ 61 As for vagueness, the sentence is clear as to identity, but not as to scope. The sentence is clear regarding identity because the court's oral pronouncement referred to one "victim." Thus, the sentence requires Calvo to pay T.A.C. restitution. The sentence is less clear regarding scope because the requirement for Calvo to pay for T.A.C.'s future psychological evaluation counseling "in connection with the conviction hearing," Sent. Tr. 131:13-15, is open ended. It is not clear when, if ever, Calvo could stop paying T.A.C.'s medical expenses.

¶ 62 In sum, the restitution is not overbroad, but it is impermissibly vague as to how long Calvo would have to pay T.A.C.'s medical expenses related to the sexual abuse. On remand, the court must clarify when Calvo can cease paying T.A.C.'s medical expenses related to the sexual abuse.

7. *Lack of Suspension of Sentence*

¶ 63 Calvo next argues that the probation, restitution, and community-service aspects of his sentence were improper because the court did not suspend a portion of his incarceration in exchange for imposing each of these alternative sentences. These claims are a question of law and, therefore, reviewed de novo. *See Commonwealth v. Oden*, 3 NMI 186, 190-91 (1992) (reviewing de novo the excessiveness and/or the illegality of a sentence).

¶ 64 A court can impose probation, restitution, and community service.[8] 6 CMC § 4104. To do so, however, the court must first "suspend[] execution or imposition of any sentence of imprisonment or fine." *Id.* § 4104(a). Put more concretely, a court could issue a sentence for a defendant convicted of Calvo's crimes that includes ten years in jail—with two years suspended—as well as probation, restitution, and community service because two of the ten years in jail were suspended. But a court could not issue a sentence to that same defendant that includes eight years in jail—none suspended—as well as probation, restitution, and community service because none of the sentence was suspended.

¶ 65 Here, the court imposed probation, restitution, and community service without suspending the execution or imposition of any portion of Calvo's term of imprisonment or fine. The sentence does not comply with 6 CMC § 4104 because it does not suspend at least some of the sentence. The defect also leaves the court without a method for enforcing the terms and conditions imposed—except for restitution, which may be converted to a civil judgment. On remand, the trial court must cure this technical defect, but is otherwise within its discretion to issue a substantially similar sentence.

8. *Right to Seek a Reduction or Modification of Sentence*

¶ 66 Finally, Calvo claims the sentencing order improperly restricted his right to appeal because the court issued an order allowing Calvo only ninety days to file a motion to modify the sentence. According to Calvo, the order meant that if Calvo filed an appeal then the trial court would not permit him to file a post-appeal motion to reduce or modify the sentence because the appeal would take longer than ninety days.

¶ 67 We do not reach Calvo's claim because it is not ripe. It is not ripe because it asks us to decide a hypothetical question—whether the trial court *would* err by refusing to hear Calvo's motion to modify if Calvo loses his appeal and then files a motion to modify. *See Marine Revitalization Corp. v. Dept. of Lands and Natural Res.*, 2011 MP 2 ¶ 8 ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Texas v. United States*, 523 U.S. 296, 299 (1998)).

V. Conclusion

¶ 68 For the stated reasons, we AFFIRM the convictions, but VACATE the sentence and REMAND for resentencing consistent with this opinion.

SO ORDERED this 25th day of July 2014.

[8] In fact, probation and restitution are often linked through Article I, § 11 of the NMI Constitution, which generally requires restitution as a condition of probation (and parole).

/s/
DAVID A. WISEMAN
Justice Pro Tem

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

/s/
TIMOTHY H. BELLAS
Justice Pro Tem