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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MATIAS SALASIBAN,
Defendant-Appellant.

SUPREME COURT NO. 2013-SCC-0038-CRM
SUPERIOR COURT NO. 13-0018

OPINION

Cite as: 2014 MP 17

Decided December 9, 2014

Benjamin K. Petersburg, Saipan, MP, for Defendant-Appellant Matias Salasiban
James B. McAllister and Margo Badawy, Assistant Attorneys 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; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant-Appellant Matias Salasiban ("Salasiban")[1] appeals the sentence he received following a guilty plea. In support, Salasiban alleges three errors. First, the trial court needed to, but did not, order a presentence investigation and report. Second, the sentence improperly relied on alleged facts not admitted to as part of the plea. And, third, the sentence was mechanical—the trial court gave Salasiban the same sentence it gives every defendant: the maximum, a pattern that demonstrates the court is not using its statutory discretion to impose individualized sentences. For the reasons below, we VACATE and REMAND for resentencing.

I. Factual and Procedural Background

¶ 2 Salasiban and others stole power tools from a warehouse. After an investigation, the Commonwealth filed a First Amended Information charging Salasiban with seven felonies, including the burglary charge at issue here. The burglary charge, count II, alleged that Salasiban unlawfully burglarized a warehouse between "30 minutes past sunset and 30 minutes before sunrise . . . in violation of 6 CMC § 1801(a) and made punishable by 6 CMC § 1801(b)(2)(A) . . . ." *Commonwealth v. Salisban*, Crim. No. 13-0018C (NMI Super. Ct. Jan. 3, 2013) (First Amended Information at 1-2).

¶ 3 Later, Salasiban signed a plea agreement consistent with NMI Rule of Criminal Procedure 11(e)(1)(C).[2] Under the agreement, Salasiban pled guilty to count II and agreed to serve ten years in prison with 5 years suspended and no restrictions on parole. As part of the deal, Salasiban also agreed to help the government prosecute his co-defendants.

¶ 4 Following the agreement, the trial court held a change-of-plea hearing. At the hearing, the court rejected the plea agreement as too lenient because it did not require sufficient prison time.

¶ 5 After a short recess, the parties amended the plea agreement so that it now fell under NMI Rule of Criminal Procedure 11(e)(1)(B).[3] Everything else in the agreement remained the same. Thereafter, the Commonwealth read the following stipulated factual basis of the plea into the record:

> On or about December 18, 2012 to December 19, 2012, on Saipan, CNMI, the defendant Matias Salasiban, entered a warehouse formerly known as Onu Modu (sic) Factory in Afetnas without consent to enter and with the intent to commit Theft once inside. Upon

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[1] At the trial level, the filings referred to the defendant as both Salisban and Salisiban. On appeal, the defendant referred to himself as Salasiban. Accordingly, we use Salasiban.

[2] If a court accepts a Rule 11(e)(1)(C) plea, the court must enter the sentence agreed to in the plea unless exceptional circumstances compel otherwise. *Commonwealth v. Castro*, 2002 MP 13 ¶ 13.

[3] If a court accepts a Rule 11(e)(1)(B) plea, the court may, but does not have to, enter the sentence recommended in the plea.

entering the factory without consent, defendant stole various power tools from the factory, in violation of 6 CMC § 1801(a).

Trial Tr. at 7. The court, Salasiban, and Salasiban's counsel then acknowledged that the maximum penalty of imprisonment was ten years.

¶ 6 After accepting Salasiban's guilty plea, the court moved straight to sentencing. During that hearing, neither Salasiban nor the court raised whether the court should order a presentence and investigation report ("PSI").

¶ 7 Salasiban appeals.

II. Jurisdiction

¶ 8 We have jurisdiction over Superior Court final judgments and orders. 1 CMC § 3102(a).

III. Standards of Review

¶ 9 Salasiban raises three issues, but we only reach one:[4] Whether the trial court violated NMI Rule of Criminal Procedure 32 by sentencing Salasiban without ordering a PSI. We review for plain error because Salasiban neither requested a PSI nor objected to the court's failure to order one. *See Commonwealth v. Guerrero*, 2014 MP 15 ¶ 10 (applying plain-error review to a claim that was not preserved during a sentencing hearing).

IV. Discussion

¶ 10 Under plain error, Salasiban must show the court's failure to order a PSI was an error that was plain and affected his substantial rights, *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29. If each element is met, we have "the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation omitted); *Hossain*, 2010 MP 21 ¶ 29.

¶ 11 A court errs if it deviates from a legal rule that has not been intentionally relinquished or abandoned by the appellant. *United States v. Olano*, 507 U.S. 725, 732-33 (1993) (distinguishing between waiver and forfeiture). The error is plain if it is not subject to reasonable dispute, *Puckett*, 556 U.S. at 135, at the time we review the error. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 27. The error is substantial if there is a "reasonable probability" it affected the outcome of the proceeding. *United States v. Marcus*, 560 U.S. 258, 262 (2010).[5]

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[4] We leave undecided whether the sentence relied on facts not admitted to, was mechanistic, or both. We do so because the PSI error yields the same relief the remaining issues would garner if granted.

[5] The addition of "reasonable probability" updates the rule set forth in *Olano*, 507 U.S. at 732-34—a case we relied on for our standard in *Hossain*, 2010 MP 21 ¶ 29. The modification resolves confusion over the required probability that an error affected the proceeding's outcome. *Marcus*, 560 U.S. at 262.

A. *Error*

¶ 12 When a defendant is found guilty in the Commonwealth, NMI Rule of Criminal Procedure 32(c)(1)[6] generally requires a trial court to order a PSI as a part of the sentencing process. *See* NMI R. CRIM. P. 32(c)(1) (establishing a PSI as the default procedure). But a court need not order a PSI in two circumstances: (1) when a defendant waives—with the court's permission—the right to a PSI, or (2) when the court finds and explains why the record is sufficient to enable the meaningful exercise of sentencing discretion. *Id.*

¶ 13 Salasiban argues that the trial court did not meet these requirements. The first exception was not met both because he did not affirmatively waive his right to a PSI and because the court never gave him permission to do so. Meanwhile, the second exception was not met because the court did not find or explain why a PSI was unnecessary. Indeed, the court never even mentioned the possibility of a PSI.

¶ 14 We recently addressed a similar issue in *Commonwealth v. Fu Zhu Lin*, 2014 MP 6.[7] There, the defendant asked for a PSI. *Id.* ¶ 5. The court denied the request without explaining why the record was sufficient to enable meaningful exercise of sentencing discretion. *Id.* The lack of an explanation, we held, was an error because Rule 32 requires courts to provide their reasons for refusing to order a PSI on the record. *Id.* ¶ 42.

¶ 15 This case, by contrast, adds a wrinkle: Salasiban did not request a PSI. Thus, we must determine whether silence by both Salasiban *and* the court equals a waiver by him and permission from the court.

¶ 16 We think not because although silence can be a waiver, *Del Rosario v. Camacho*, 2001 MP 3 ¶ 56. Silence rarely constitutes consent, *People v. Compton*, 490 P.2d 537, 541-42 (Cal. 1971) (concluding defendant's silence did not equal consent to declare a mistrial). For example, when evaluating the effect of silence under the admission-by-a-party-opponent rule, courts require the defendant to manifest an adoption or belief in the statement's truth. NMI R. EVID. 801(d)(2)(B). A defendant adopts a statement only if "the circumstances are such that a dissent would in ordinary experience have been express if the communication had not been correct." *United States v. Flecha*, 539 F.2d 874, 877 (2d Cir. 1976) (emphasis omitted) (internal quotation omitted). Outside these narrow circumstances, silence is not consent because, while the defendant's silence could indicate agreement, it could also reflect dissent or ignorance. *Id.*

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[6] NMI Rule of Criminal Procedure 32(c)(1) states, in part:

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

[7] *Fu Zhu Lin* was issued after this case was appealed.

¶ 17 Applying these principles here, the dual requirements necessary for a defendant to waive a PSI were not met. They were not met because while the defendant's silence may have been a waiver under *Del Rosario* (a question we do not answer), the court's silence did not constitute permission under *Flecha* because the silence is open to multiple interpretations. For example, the court could have recognized and accepted the defendant's alleged waiver. But the court could have also forgotten about the PSI in the haste of the expedited sentencing.

¶ 18 Because Salasiban did not waive the PSI, and the trial court did not explain why a PSI was unnecessary, the trial court erred by not ordering a PSI.

B. *Plain*

¶ 19 Having decided that the omission of a PSI was an error, we must next consider whether the error was plain—that is, whether the error violates the law at the time we review it. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 27.

¶ 20 NMI Rule of Criminal Procedure 32(c)(1) requires trial courts to order a PSI except for when the defendant waives it or the court explains on the record why the PSI was unnecessary. Above, we held that silence by the defendant and the court does not constitute waiver. *Supra* ¶¶ 14-16. Meanwhile, in *Fu Zhu Lin*, we held that a court must explain its reasoning for not ordering a PSI. *Fu Zhu Lin*, 2014 MP 6 ¶ 42. If those requirements are not met, the sentence is vacated and remanded for the preparation of a PSI followed by resentencing. *Id.* ¶¶ 46, 53.

¶ 21 Here, the error was plain. The court could bypass the PSI only if the defendant waived it or the court explained on the record why it was unnecessary. Neither took place.

C. *Substantial Rights*

¶ 22 Moving to the third step, we assess whether the absence of a PSI affected Salasiban's substantial rights. *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29. In other words, we must examine whether the error affected the outcome of the proceeding. *Id.*

¶ 23 The Commonwealth argues that Salasiban cannot make such a showing because his same-day sentencing actually helped him. Not only did he present all the mitigating information a PSI would have uncovered, he also avoided having the trial court learn about additional aggravating factors that did not come out during the sentencing hearing, but would have in the PSI.

¶ 24 But this argument overlooks an important benefit that likely would have materialized from a PSI: the realization that Salasiban received a sentence for a crime he did not commit. Salasiban pled guilty to burglarizing a warehouse, Trial Tr. at 7, but was sentenced for burglarizing a dwelling at night.[8] *Compare* 6 CMC § 1801(b) (establishing a five-year maximum for burglarizing a non-dwelling and a ten-year

[8] A "dwelling" is a "house or other structure in which a person lives." BLACK'S LAW DICTIONARY 524 (7th Ed. 1999).

maximum for burglarizing a dwelling) *with Commonwealth v. Salasiban*, Crim. No. 13-0018C (NMI Super. Ct. Aug. 6, 2013) (Judgment and Commitment Order at 2) (sentencing Salasiban to ten years in jail). This oversight doubled the maximum punishment allowed.[9]

¶ 25 Once aware, the trial court would have likely done one of two things. It would have either corrected the sentence, as provided in NMI Rule of Criminal Procedure 35, or set aside the sentence and permitted Salasiban to withdraw his plea, as provided in NMI Rule of Criminal Procedure 32(d). In either scenario, Salasiban would have received a sentence of no more than five years (rather than the ten years he actually received).

¶ 26 In sum, because ordering a PSI would have likely unearthed the mistake (either because the probation service would have noticed the oversight during its investigation, or because the court or the parties would have noticed it during the gap between the plea and sentencing hearings), we conclude that there is a reasonable probability the error affected the proceeding's outcome.

D. *Fairness, Integrity or Public Reputation of Judicial Proceedings*

¶ 27 That leaves one question: whether the error warrants reversals because it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Hossain*, 2010 MP 21 ¶ 29. The answer is yes; fairness requires reversal. There is no evidence in the record suggesting the warehouse was a dwelling. Yet the prosecutor drafted a plea agreement charging Salasiban with burglarizing a dwelling at night. *Commonwealth v. Salasiban*, Crim No. 13-0018C (Aug. 2, 2013) (Plea Agreement at 2) (setting forth a maximum sentence consistent with burglarizing a dwelling at night). The public defender reviewed the proposed plea and apparently agreed that while the plea accused Salasiban of burglarizing a warehouse, he should be sentenced for burglarizing a dwelling a night. *See* Trial Tr. at 8 (recommending a sentence appropriate for burglarizing a dwelling at night, but beyond the statutory maximum for burglarizing a warehouse). The prosecutor and the public defender then took the plea to the court, which also reviewed and ultimately approved of the agreement. At each step, it appears that no one recognized that the plea agreement had Salasiban pleading guilty to burglarizing a dwelling at night even though the factual basis of the plea said he had burglarized a warehouse. This oversight doubled Salasiban's penalty. Thus, we remand the case for resentencing.

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[9] Burglarizing a dwelling at night carries a greater risk of violence than burglarizing a warehouse (because people usually occupy their homes at night). Thus, the punishment for burglarizing a dwelling is greater than that for a non-dwelling.

V. Conclusion

¶ 28 For the stated reasons, we VACATE and REMAND for resentencing consistent with this opinion.

SO ORDERED this 9th day of DECEMBER 2014.

/*s*/
ALEXANDRO C. CASTRO
Chief Justice

/*s*/
JOHN A. MANGLONA
Associate Justice

/*s*/
PERRY B. INOS
Associate Justice