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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MELVIN MONKEYA,
Defendant-Appellant.

Supreme Court No. 2015-SCC-0003-CRM

Superior Court No. 13-0142

OPINION

Cite as: 2017 MP 7

Decided September 5, 2017

Shannon R. Foley, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Jennifer Dockter, Saipan, MP, for Defendant-Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant-Appellant Melvin Monkeya ("Monkeya") appeals his conviction for Sexual Abuse of a Minor in the First Degree. He asks this Court to vacate his conviction and remand this matter for a new trial. Monkeya presents six issues on appeal: (1) whether the trial court erred by denying his pre-trial motion for expert assistance; (2) whether the trial court erred by failing to include a cut-off date in a jury instruction regarding "no proof of exact time"; (3) whether the trial court erred by failing to reiterate jury instructions at the close of evidence; (4) whether the prosecution committed reversible *Doyle* error by eliciting testimony commenting on Monkeya's invocation of his Fifth Amendment right to remain silent; (5) whether the use of facts not in evidence during closing arguments was prosecutorial misconduct that prejudiced him; and (6) whether these errors, even if individually harmless, in the aggregate materially affected the verdict. For the following reasons, we AFFIRM Monkeya's conviction.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Monkeya was charged with one count of Sexual Abuse of a Minor in the First Degree in violation of 6 CMC § 1306(a)(3)(B). The charge arose out of allegations that sometime in November of 2008, Monkeya engaged in sexual penetration with a minor child ("alleged victim") who was a household member of Monkeya as defined under 6 CMC § 1461, was under sixteen years of age, and to whom he occupied a position of authority.

¶ 3 Trial in this matter was scheduled to begin on December 2, 2013. On May 29, 2013, Monkeya requested the alleged victim's medical records. On November 8, 2013, the Commonwealth of the Northern Mariana Islands ("Commonwealth") gave notice that the medical records would be delivered shortly. On November 20, 2013, Monkeya received twenty-nine pages of medical records. Two days later, on November 22, 2013, he requested the appointment of a medical expert,[1] which the trial court denied on November 27, 2013. Jury trial began on December 2, and Monkeya was convicted on December 4, 2013. He now appeals his conviction.

II. JURISDICTION

¶ 4 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

---

[1] During oral argument on the motion Monkeya requested a trial continuance should his request for expert assistance be granted. The trial court denied the request for a continuance as a result of its denial of the request for expert assistance.

III. STANDARDS OF REVIEW

¶ 5 There are six issues on appeal. We review the trial court's denial of a request for an expert for abuse of discretion. *Commonwealth v. Perez*, 2006 MP 24 ¶ 9. We review the "no proof of exact time" instruction, challenged as a misstatement of law, de novo to "determine[] whether the instructions contained all the legal elements of the statute." *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 11 (quoting *Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 25). We review the trial court's failure to read substantive jury instructions at the close of evidence for plain error, as Monkeya failed to object at trial. *Commonwealth v. Hocog*, 2015 MP 19 ¶ 11 (citing NMI R. CRIM. P. 52(b)). As a constitutional question, we review de novo whether the Commonwealth violated Monkeya's Fifth Amendment rights by eliciting testimony regarding his post-arrest silence. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 19. Because Monkeya raised contemporaneous objections at trial, we review de novo whether the Commonwealth violated Monkeya's constitutional right to a fair trial by arguing facts not in evidence in closing argument. *Id*. Finally, with regard to cumulative error, reversal is required if "it is more probable than not that, taken together, the errors materially affected the verdict." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 46.

IV. DISCUSSION

A. Denial of Monkeya's Request for a Medical Expert

¶ 6 An indigent defendant must be provided with effective assistance of counsel in order to satisfy the Fourteenth Amendment's due process clause. *Perez*, 2006 MP 24 ¶ 12. "Effective assistance of counsel includes furnishing the indigent defendant's counsel with all the basic tools of an adequate defense." *Id*. (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)) (internal quotation marks omitted). "Basic tools" include psychiatric experts, *Ake*, 470 U.S. at 83, mitigation experts, *Louisiana v. Craig*, 637 So.2d 437, 446–47 (La. 1994), and private investigators, *State v. Fletcher*, 481 S.E.2d 418, 420 (N.C. App. 1997), among other specialists. A defendant's right to access these "basic tools," however, must be balanced against the rights of taxpayers, who have an interest in avoiding abuses of the system, as the government is the source of funding for any expert services provided to an indigent defendant. *Perez*, 2006 MP 24 ¶ 12. To ensure such abuses do not occur, we determined a defendant requesting the assistance of an expert must present more than "[u]ndeveloped assertions offering little more than generalized statements claiming benefit . . . ." *Commonwealth v. Jin Xin Xiao*, 2013 MP 12 ¶ 52 (quoting *Perez*, 2006 MP 24 ¶ 13).

¶ 7 Under the standard we established in *Commonwealth v. Perez*, in order for a trial court to grant an indigent defendant's request for expert assistance, the defendant "must establish that there exists a reasonable probability that (1) an expert would be of assistance to the defense and (2) the denial of expert assistance would result in a fundamentally unfair trial." 2006 MP 24 ¶ 14. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Commonwealth v. Laniyo, 2012 MP 1 ¶ 22 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). The reasonable probability standard "is not a stringent one, it is less demanding than the preponderance standard." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (quoting *Baker v. Barbo*, 177 F.3d 149 (3d Cir. 1999)). Indeed, "'reasonable probability' is a less demanding standard than 'more likely than not.'" *Gonzalez v. United States*, 722 F.3d 118, 135 (2d Cir. 2013) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The question before us is whether the trial court abused its discretion when it determined Monkeya did not meet the *Perez* test, an analysis which "necessarily turns on the sufficiency of the petitioner's explanation as to why he needed an expert." *Moore v. Kemp*, 809 F.2d 702, 710 (11th Cir. 1987). We consider each *Perez* prong in turn.

1. Assistance to the Defense

¶ 8 There are two distinct stages during which an expert witness may be of assistance. An expert, as was requested in *Perez* and *Jin Xin Xiao*, may be called upon during trial to "provide opinion testimony to rebut prosecution evidence or to establish an affirmative defense . . . ." *Id*. at 709. In the alternative, in the pre-trial setting an expert "can gather facts, inspect tangible evidence, or conduct tests or examinations that may aid defense counsel in confronting the prosecution's case, including its expert witnesses, or in fashioning a theory of defense." *Id*.

¶ 9 Monkeya sought expert assistance in order to interpret medical records in the pre-trial setting, with the understanding that such assistance could potentially lead to the need for expert testimony at trial. We recognize, as the Eleventh Circuit did in *Moore*, a defendant "may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide." *Id*. at 712. However, a defendant is still "obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." *Id*. Thus, the question is whether the trial court abused its discretion when it determined Monkeya failed to make "the required showing of particularized need" an expert would be of assistance to his defense, which must go beyond a "mere hope or suspicion that favorable evidence is available . . . ." *Commonwealth v. Sanchez*, 597 S.E.2d 197, 199 (Va. 2004) (quoting *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996)). We examine the evidence available to the trial court at the time the motion was ruled on. *See Jin Xin Xiao*, 2013 MP 12 ¶ 53–56 (examining defendant's arguments to the trial court as to why an expert was necessary); *Moore*, 809 F.2d at 712–16 (examining the information provided to the trial judge in petitioner's motion to appoint an expert).

¶ 10 Monkeya asserted an expert was necessary because a lay person could not understand or evaluate the medical records without expert assistance. At the motion hearing, Monkeya argued "[W]hat I've been given is twenty pages of medical records that have impeachment and credibility written all over them and

I need to know what they say." Hearing Tr. 42.[2] Monkeya explained there were prescribed medications and psychological diagnoses in the medical record that could not be understood without the assistance of an expert. Monkeya's counsel represented she had done some research on the terms in the medical record, but indicated that she lacked the knowledge or training to adequately understand the meaning of the diagnoses in the report.[3] Monkeya further argued a medical expert could provide information as to the potential effects of the prescribed medications on the alleged victim's "ability to recollect, to remember, [or] to perceive."[4] Hearing Tr. 44. Monkeya indicated from what little he could understand from the medical record, it seemed to apply directly to the defense's theory of the case. As he argued:

> The theory of defense has always been that in an effort to get him out of the house and to take him away from his new family essentially, even though he's still married, um, is what precipitated the report. The missing link in that has always been why the victim was so easily manipulated or why the victim would be so willing to take part in it even if she does completely look up to her aunt, love her aunt, admire her aunt, and wanted to help her aunt with this. And now what we have is what I would consider very strong evidence that this provided this young girl an opportunity to finally explain her mental illness, to finally say you know why I'm – I'm – why I struggle? Because I'm a victim.

Hearing Tr. 42.

¶ 11 Monkeya argues the primary basis for the trial court's denial of the requested expert was a desire to avoid delay, both by preserving the trial date and by avoiding a "battle of the experts." While we agree the trial court did discuss the potential of a delay in the trial date, which is not a factor under the *Perez* test, we find the trial court permissibly found Monkeya failed to make a particularized showing of a reasonable probability the requested expert would provide assistance. The record before us does not indicate whether the medical records were presented to the trial court, nor are they included in the record provided to us. To show particularized need, Monkeya could have presented the trial court with the medical records, prescribed medications, or the healthcare professionals who had seen the alleged victim. Instead, as contained in the record before us, Monkeya offered the trial court a single medical term, "psychosomatic," and

---

[2] There are two transcripts in the record. The "Hearing Transcript" includes the arguments made at motion hearings, opening and closing statements, and sentencing hearing. The "Witness Transcript" includes witness testimony from trial.

[3] [Counsel]: A doctor would probably tell me that I didn't understand it. But I think I at least knew how to use it enough to tell you what I think it means. Hearing Tr. 39.

[4] [Counsel]: If – what kind of drugs was she taking or supposed to be taking. Does that bear on a person's ability to recollect, to remember, to perceive. Does that bear on a fabrication to (indiscernible)? Hearing Tr. 44.

mentioned generally the potential side effects of medications prescribed to the alleged victim.

¶ 12 "[U]ndeveloped assertions offering little more than generalized statements claiming benefit will not pass muster." *Jin Xin Xiao*, 2013 MP 12 ¶ 52 (citing *Perez*, 2006 MP 24 ¶ 13). "A trial court abuses its discretion when [its] decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Laniyo*, 2012 MP 1 ¶ 17 (quoting *Midsea Indus. V. HK ENG'G, Ltd.*, 1998 Guam 14 ¶ 4). The record reflects a rational basis for rejecting Monkeya's request for failure to make the required particularized showing of need. Therefore, we find the trial court did not abuse its discretion when it determined Monkeya failed to make a particularized showing of a reasonable probability the requested expert would provide assistance.

¶ 13 We note Monkeya presented evidence the medical records had only been provided on November 20, the hearing regarding his motion for expert assistance was held on November 26, and trial was scheduled for December 3. Monkeya had requested any medical records nearly six months earlier, and was unsure if any such records existed before they were delivered. While a competent attorney is expected to do some degree of research before seeking out an expert, the limited time between the delivery of the records, the request for expert assistance, and the forthcoming trial date is a factor the trial court should have considered when determining whether a party has made a sufficiently particularized assertion of a need for an expert to assist in the pre-trial setting. Severe time limits should provide some leeway for the extent to which a party must provide a detailed analysis of the assistance an appointed expert is expected to give. However, a party must still make a particularized showing of a reasonable probability the requested expert would provide assistance, and the trial court did not abuse its discretion when it concluded Monkeya failed to do so here.

2. Fundamentally Unfair Trial

¶ 14 "A fundamentally unfair trial is one that has been largely robbed of dignity due a rational process." *Allen v. Vannoy*, 659 Fed. App'x 792, 800 (5th Cir. 2016) (quoting *Gonzales v. Thaler*, 643 F.3d 425, 430 n.20 (5th Cir. 2011)). Here, the trial court rationally determined Monkeya had failed to make a particularized showing of a reasonable probability that the requested expert would provide assistance, and therefore did not abuse its discretion. Moreover, Monkeya asserted an expert was needed in large part because the medical records related to the credibility of the alleged victim, who testified at trial. But Monkeya was still able to impeach the alleged victim on the basis of the medical records. Indeed, at trial Monkeya relied on the information in the medical records to impeach the alleged victim's testimony. Therefore, the trial court's denial of Monkeya's request for an expert did not result in a fundamentally unfair trial, as Monkeya failed to demonstrate a particularized need for expert assistance, and was not precluded from using the medical records as a result of such denial. We

conclude the trial court did not abuse its discretion in denying the motion for expert assistance.

B. No "Proof of Exact" Time Jury Instruction

¶ 15 Monkeya argues time is a critical element of the crime, since a guilty verdict in a sexual abuse of a minor case requires finding the offender is at least eighteen and the victim is under sixteen years of age. Monkeya relies on *Commonwealth v. Sanchez*, 2014 MP 3, to argue the trial court committed reversible error when it gave the jury a "no proof of exact time" instruction that did not include a cutoff date. This instruction allows the jury to return a guilty verdict if the jury finds the government proved the incident happened near the alleged date, in this case during November 2008, not an exact date. We review his claim, challenging the instruction as a misstatement of law, de novo, to determine "whether the instructions contained all the legal elements of the statute." *Id*. ¶ 11 (quoting *Commonwealth v. Guerrero*, 2006 MP 26 ¶ 25).

¶ 16 In *Sanchez*, we found time to be an essential element of the first degree sexual abuse of a minor statute, the same statute at issue here. *Id*. ¶ 22. As the trial court did in *Sanchez*, the trial court here gave a "no proof of exact time instruction" and an instruction including the elements of sexual abuse of a minor. In *Sanchez*, we ruled that, even with the instruction detailing the elements of sexual abuse of a minor, the failure to include a cutoff date in the no proof of exact time instruction rendered the instruction an obvious error and one that affected Sanchez's substantial rights. *Id*. ¶ 24. We have firmly established that the failure to include a cutoff date when time is an essential element of the crime is an obvious error. *Id*.

¶ 17 *Sanchez*, however, is easily distinguishable from the case at bar. In *Sanchez*, the incident occurred near the victim's sixteenth birthday, and "the lack of a cutoff date in the instruction allowed the jury to find [the defendant guilty] . . . of sexual abuse of a minor in any degree even if it occurred during the first week of September 2009, which included the victim's sixteenth birthday." *Id*. Here, the victim was only fourteen at the time of the alleged incident in November of 2008, and would not even turn fifteen, let alone sixteen, until well after the date of the alleged incident. As such, the legal importance of establishing whether the act took place on a specific date in November 2008 or merely on or about November 2008 is significantly less critical here than it was in *Sanchez*. Additionally, the plain language of the instructions given by the trial court here differed from *Sanchez*. While neither set of instructions included a cutoff date, the instructions here did specify that the crime must have occurred "on or about November 2008" as opposed to the *Sanchez* court, which merely stated that the jury can find that "[w]hen . . . it is alleged that the crime charged was committed 'on or about' a certain date, . . . it is sufficient if the proof shows that the crime was committed on or about that date." *Id*. ¶ 20 n.8. In *Sanchez*, the instruction left open the possibility a jury could find the defendant guilty despite determining the events happened after the victim's sixteenth birthday,

failing to contain all the legal elements of the statute. Here there is no such possibility. The dates "on or about November 2008" were all dates during which the victim was still under sixteen years of age, thus the instruction "contained all the legal elements of the statute." As the lack of a specific cutoff date, other than the month of November of 2008, did not affect the legal elements of the sexual abuse of a minor statute in these circumstances, we find reversal is not warranted on the basis of the trial court's failure to include a cutoff date in its "no proof of exact time" instruction.

C. Jury Instructions at the Close of Evidence

¶ 18 Monkeya failed to object at trial, therefore we review the trial court's failure to reiterate substantive jury instructions at the close of trial for plain error. *Commonwealth v. Hocog*, 2015 MP 19 ¶ 11 (citing NMI R. CRIM. P. 52(b)). Under plain error review, "an appellant must show that: (1) there was error; (2) the error was 'plain' or 'obvious'; (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29 (quoting *United States v. Olano*, 5007 U.S. 725, 732–34 (1993)). Because the trial court failed to reiterate substantive jury instructions at the close of trial, the first two prongs of this standard are satisfied. *Hocog*, 2015 MP 19 ¶ 26; *Commonwealth v. Santos*, 2014 MP 20 ¶ 10. Thus, the question for this Court is whether the failure to reiterate the substantive jury instructions at the close of evidence affected Monkeya's substantial rights.

¶ 19 The substantial rights of a party are affected "if there is a 'reasonable probability' [the error] affected the outcome of the proceeding." *Hocog*, 2015 MP 19 ¶ 27 (quoting *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 11). The appellant bears the burden of demonstrating there is a reasonable probability the trial court's failure to read jury instructions at the close of evidence affected the outcome. An appellant must show "why the jury would be more inclined to find him not guilty if the instructions had been read after the close of evidence." *Hocog*, 2015 MP 19 ¶ 27. Our analysis turns on whether any of the reasons Monkeya offers convincingly explain how the jury would have been more inclined to find him not guilty had the instructions been read at the close of evidence.

¶ 20 Monkeya presents three reasons the jury would have been more inclined to find him not guilty had the instructions been read at the close of evidence. He argues the Commonwealth's evidence was underwhelming, the jury expected more instructions to be forthcoming, and the exact contents of the written instructions provided to the jury are unknown. We find his arguments unavailing, as they are not supported by evidence and are merely speculative. The Commonwealth presented adequate evidence to convict Monkeya, the written instructions provided, while not preserved in their entirety in the record on appeal, were sufficiently substantive, and Monkeya fails to show "why the jury

would be more inclined to find him not guilty" had they been provided with the instructions orally.

¶ 21 Monkeya further argues a *sua sponte* instruction, given by the trial court following a *Doyle* violation of his Fifth Amendment right to silence, was insufficiently curative, and should have been reiterated at the close of trial. He relies heavily on an Arizona Supreme Court opinion, *State v. Johnson*, a split decision in which the majority held that a "clearly wrong" *sua sponte* instruction given by the trial court was grounds for reversal. 842 P.2d 1287, 1290 (Ariz. 1992). His only evidence that the trial court erred is that "the *sua sponte* instruction had not been approved by counsels. He offers no further argument that the trial court's *sua sponte* instruction was erroneous, nor that the failure to restate the instruction at the close of evidence affected his substantial rights. Therefore while the failure to give substantive jury instructions at the close of evidence was erroneous, because Monkeya has failed to show it affected his substantial rights, reversal is not warranted.

D. Doyle Violation of Monkeya's Fifth Amendment Right

¶ 22 A *Doyle* violation occurs when a prosecution's witness testifies about a defendant's silence after arrest and after being provided with *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). We review potential *Doyle* violations de novo. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 19. However, there is "no automatic reversal of conviction for constitutional errors . . . of such unimportance that they may be deemed harmless. Under the harmless error standard, the aim is to determine whether allegedly improper behavior, considered in the context of the entire trial . . . affected the jury's ability to judge the evidence fairly." *Id.* (quoting *United States v. De Cruz*, 82 F.3d 856, 862 (9th Cir. 1996)). Thus, even if the questions did constitute prosecutorial misconduct, the critical question is whether the Commonwealth can adequately show the error was harmless.

¶ 23 There is a presumption that even a cautionary mention of defendant's silence is error, and it is the Commonwealth's burden to show this error was harmless "beyond a reasonable doubt." *Id*. ¶ 78 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). In determining harmless error, we weigh the following factors: "(1) the extent of the comments made, (2) whether inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence implicating the defendant's guilt." *Id*. ¶ 79. Mitigating factors, including curative jury instructions, may also be taken into account. *Id*. (citing *United States v. Tarazon*, 989 F.2d 1045, 1052 (9th Cir. 1993)).

¶ 24 The challenged portion of the prosecution's questioning was preserved in the trial transcript as follows:

> [PROSECUTOR]: I'll ask the question again. How was it that you came to take the Defendant into custody?

[DETECTIVE]: I was told that he was coming in to Saipan.

[PROSECUTOR]: And did he in fact come in to Saipan?

[DETECTIVE]: Yes.

[PROSECUTOR]: And where was he arrested?

[DETECTIVE]: In Chalan Kanoa.

[PROSECUTOR]: Did you all give him an opportunity to make a statement?

[COUNSEL]: Objection, Your Honor.

THE COURT: What is the objection?

[COUNSEL]: I - I don't wanna make the offer of proof in front of the jury. I would have to approach, Your Honor.

THE COURT: This in reference to his constitutional right? Is that what we're tal -

[COUNSEL]: That's correct, Your Honor.

THE COURT: All right. Sustain. Defendant has a constitutional right to not give a statement. Go ahead [prosecution].

[PROSECUTOR]: Ahh, were - were you ever able to speak with the Defendant?

[DETECTIVE]: He exercised his rights.

[COUNSEL]: Objection, Your Honor. She just . . . did the very thing that you sustained.

THE COURT: Yeah, sustain, again. I'm - -

[COUNSEL]: And - and motion to strike.

Witness Tr. 261–62. The trial court responded by striking the testimony and giving an immediate curative instruction to the jury. Specifically, the trial court told jurors:

> THE COURT: Okay. Motion to Strike is granted, the last statement by the officer is stricken. Again, I'll instruct the jurors, and I think they understand that anyone charged with a crime, is entitle [sic] to the constitutional rights not to give a statement. The fact that you exercise your right is not indicative of - of guilt, or - or otherwise.

Id. at 262.

¶ 25 In *Commonwealth v. Camacho,* we found the prosecution's two comments during closing arguments regarding defendant's silence were harmless beyond a reasonable doubt. We found the comments "were made only twice," there was

no evidence that the jury relied on the statements to convict the defendant, and the trial court's instruction to the jury that the defendant had no obligation to testify on his own behalf or to produce exculpatory evidence was sufficiently curative. 2002 MP 6 ¶ 80. As in *Camacho*, here we conclude that the extent of the comments was minimal. There were two questions, asked in sequence, as a minimal portion of an extensive direct examination of the lead detective in the investigation of Monkeya, and the extent of the comments was minimal, as with the comments this Court found harmless in *Camacho*.

¶ 26 Turning to the second factor, we consider whether any inference of guilt was stressed to the jury from Monkeya's silence. Here the trial court's curative instruction is particularly relevant. The curative instruction struck the offending testimony, and the trial court explained "that anyone charged with a crime, is entitle[d] to the constitutional rights not to give a statement. The fact that you exercise your right is not indicative of - of guilt, or - or otherwise." Witness Tr. 262. The United States Supreme Court in *Greer v. Miller* found a similar curative instruction sufficient. 483 U.S. 756, 759 (1987). In *Greer*, the trial court immediately sustained an objection to a prosecutor's questioning regarding the defendant's silence, instructed the jury to "ignore [the] question, for the time being" and at the close of trial, instructed the jury to "disregard questions . . . to which objections were sustained." *Id.* (internal quotation marks omitted). The *Greer* Court found such instructions, when coupled with sufficient evidence prove the defendant's guilt beyond a reasonable doubt, were sufficient to render the prosecutor's error harmless. *Id.* at 766. We conclude the trial court's curative instruction, made immediately after sustaining two objections and striking the offending testimony from the record, was sufficient to render any potential inference of guilt by the jury harmless.

¶ 27 Under the third factor of the harmless error test, we consider the extent of other evidence offered to prove Monkeya's guilt. The Commonwealth called multiple other witnesses, including the alleged victim, the alleged victim's sister, and an unrelated victim, all of whom testified about similar abuse by Monkeya. We conclude there was sufficient other evidence offered to prove Monkeya's guilt. Because all three factors weigh in favor of finding the error harmless, we find the prosecutor's error harmless beyond a reasonable doubt, the trial court's instruction sufficiently curative, and reversal unwarranted.

E. Prosecutorial Misconduct During Direct Examination and Closing Argument

¶ 28 Monkeya argues three instances of prosecutorial misconduct—the first during the direct examination of the lead detective in the case, discussed above, the second during closing argument when the prosecution argued facts not in evidence with regard to witness and victim hesitation in reporting sexual assault, and third during the rebuttal in closing arguments when the prosecution introduced hearsay testimony from the alleged victim's sister.

¶ 29 In *Jin Xin Xiao*, we laid out the framework for considering prosecutorial misconduct issues. First, "we must determine whether the prosecutor's conduct

was improper; and if so, whether the Defendant suffered prejudice." *Jin Xin Xiao*, 2013 MP 12 ¶ 18 (citing *United States v. Stinson*, No. 07-50408, No. 07-50409, 2011 U.S. App. LEXIS 17979, at 33–34 (9th Cir. 2011)). If we deem a prosecutor's conduct improper, the question is then "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. (quoting *Parker v. Matthews*, 567 U.S. 37, 45 (2012)). To answer this question, we apply a three factor analysis: "(1) the efficacy of any cautionary instruction by the judge; (2) the context's effect upon the prosecutor's remarks; and (3) the strength of the evidence supporting the conviction." *Jin Xin Xiao*, 2013 MP 12 ¶ 19 (citing *United States v. Ruiz*, 710 F.3d 1077, 1082, 1084 (9th Cir. 2013); *Runningeagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012)). We consider each challenged statement individually.

1. Statement One

¶ 30 Monkeya first contends that the prosecution's questioning of the Detective impermissibly violated his Fifth Amendment right to silence. As discussed above, the occurrence of a *Doyle* error, which involves a prosecutor commenting on a defendant's post-Miranda silence, is not inherently a harmful error. Indeed, the United States Supreme Court has repeatedly held that once a *Doyle* error has been established, a court should then apply a harmless error test to determine whether the *Doyle* error was prejudicial. *Chapman v. California*, 386 U.S. 18, 21 (1967); *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993). We conclude the prosecution's questioning of the Detective was, while a *Doyle* error, harmless, and thus not grounds for reversal.

2. Statement Two

¶ 31 Monkeya next argues that the prosecution introduced facts not in evidence during closing argument when it argued:

> [PROSECUTOR]: (Victim) started trying to hint to one of the people who cares about her the most, her sister []. Her big sister . . . . And she was looking for a way to speak up about it. She said[], um, did you know [Monkeya] is handling rape cases? And right then [she] knew. What? Huh? What you mean? Oh, yeah.[Monkeya] handles – he handles rape cases. Did he touch you? [She] knew…..
>
> [COUNSEL]: Objection. Your Honor, I'm – I'm sorry, none of that was in evidence.
>
> THE COURT: Overruled.
>
> Hearing Tr. 67.

¶ 32 In characterizing these remarks as prosecutorial misconduct, Monkeya alleges that the statement contained facts not in evidence and inadmissible hearsay. He argues the underlying testimony had been excluded at trial, and therefore the prosecutor's statement contained facts not in evidence. In *Camacho* we held "it is improper for the prosecutor to refer to evidence not admitted at trial." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 97. However, "prosecutors are

given reasonable latitude to fashion closing arguments, and they may argue reasonable inferences drawn from the evidence . . . ." *Id*. ¶ 86.

¶ 33 During trial, the prosecution called both the alleged victim and her sister. While the trial court sustained multiple hearsay objections during both witnesses' testimony, the prosecution was still able to solicit admissible testimony, including the testimony of the alleged victim's sister questioning the alleged victim about Monkeya, Witness Tr. 190–91, and the alleged victim confiding in her sister about the alleged incidents, Witness Tr. 83. On review, we find the statements made by the prosecution during closing argument were reasonable inferences from admitted testimony. Thus, we do not need to reach the *Jin Xin Xiao* three factor analysis, as Monkeya has failed to show adequate evidence of prosecutorial misconduct in this instance.

3. *Statement Three*

¶ 34 The third statement Monkeya argues constituted prosecutorial misconduct occurred during the prosecution's rebuttal in closing arguments. He argues the prosecution's statements regarding victims' reluctance to testify constitutes impermissibly introduced expert testimony.[5] The prosecution argues the statement was based on reasonable inference from witness testimony. While testimony was introduced highlighting the hesitation of some witnesses in the instant case to report the sexual assault, the sweeping nature of the prosecution's statement ("every single victim who doesn't have the nerve to report sexual abuse or a sexual assault fears this very thing") raises some concerns. Therefore we apply the three *Jin Xin Xiao* factors.

¶ 35 Under the first factor, we consider any remedial jury instructions issued by the trial court. *Jin Xin Xiao*, 2013 MP 12 ¶ 19. It is unclear from the record whether a remedial instruction was given. However, the parties agree the jury was provided with written jury instructions and the record includes a "What is Not Evidence" instruction. A "What is Not Evidence" instruction educates jurors

---

[5] Specifically, the prosecution argued:

> [PROSECUTION]: ….Ladies and gentlemen, every single victim who doesn't have the nerve to report sexual abuse or a sexual assault fears this very thing, that every issue they have, if they talk slow, if they don't have a good command of English. . . .If they're not as smart as the next person, if they've done something bad in the past, if they've ever told a lie, if they've skipped school, if they were mean to a co-worker, that when they come to court the blame will be put on them. The focus will be put on them. And instead of looking squarely at the defendant the attorneys will blame them for having anxiety disorders. That the attorney will blame them for being in a position that they need medication. The attorney will blame them for being scared to report. That they will blame them for not coming forward for fear that [their] uncle who's a detective will get away with it.

Hearing Tr. 77.

on what information they may have heard that should not be considered as evidence, including "statements and arguments of the attorneys." We conclude the "What is Not Evidence" instruction was provided to the jury, and the first factor of the *Jin Xin Xiao* analysis weighs in favor of the Commonwealth.

¶ 36 Under the second factor, we consider the context of the remarks. *Id*. The challenged statement came during the Commonwealth's rebuttal, and was one of the final statements the jury heard. It directly attacked one of the primary pillars of Monkeya's defense—the long delay in reporting the assault. While the second factor weighs in Monkeya's favor, "we observe not simply the immediate surroundings of this phrase, but also the remainder of the trial." *Id*. ¶ 38. In the broader context of the remarks, we find it unlikely such a broad generalization greatly influenced the jury, particularly when it was immediately followed by a permissible focus on the specific characteristics of the alleged victim.

¶ 37 Under the third factor, we consider the strength of evidence supporting the conviction. *Id*. ¶ 19. There was ample evidence to convict Monkeya. As such, while the prosecution's comments may have been improper, or at least inadvisable, they did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. ¶ 40 (quoting *Parker*, 567 at 45).

¶ 38 We conclude these statements, even if constituting prosecutorial misconduct, were harmless and do not warrant vacating Monkeya's conviction. As in *Jin Xin Xiao*, while we do "[not] approve of these statements, or [conclude] that the same errors in a different trial would not merit a new trial," we find "only that it is *not* more probable than not, given the strength of the evidence, that the . . . improper statements . . . affected the outcome . . . ." in this case. *Id*. ¶ 83.

¶ 39 As a final consideration, while we conclude none of the errors individually warrant reversal, under the cumulative error standard we must determine whether the errors, in the aggregate, were enough to undermine our confidence in the verdict. *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 46.

F. Cumulative Error

¶ 40 We agree with Monkeya there were at least three errors at trial: 1) the trial court's failure to read jury instructions at the close of evidence; 2) the prosecution's questioning of the lead detective regarding Monkeya's silence upon arrest; and 3) the prosecution's improper statement in closing arguments While we find each error individually harmless, under the *Cepeda* standard, we must consider the effect these errors have in aggregate.

¶ 41 "Reversal is required under the cumulative error doctrine if it is more probable than not that, taken together, the errors materially affected the verdict." *Id*. In *Cepeda* we found that improperly admitted testimony, coupled with an improper robbery jury instruction, unfairly prejudiced the defendant's overall fair trial right, and was grounds for reversal. 2009 MP 15 ¶ 47. In the alternative, in *Jin Xin Xiao*, we applied the *Cepeda* standard and found that two harmless errors, even taken in conjunction, were insufficient to create "such prejudice that it is

probable they materially affected the verdict because of the strength of the evidence against [the defendant], which he did not effectively rebut." 2013 MP 12 ¶ 83 (citing *Cepeda*, 2009 MP 15 ¶ 64–65). There, the two errors were "the trial court's decision to allow the prosecution to: (1) urge the jury to consider how a guilty verdict might assist in addressing the drug problem; and (2) suggest that the jury convict [the defendant] on the basis of 'the confession.'" *Id.* However, our holding in *Commonwealth v. Camacho* cautions that when considering a claim of cumulative error, we must be particularly considerate of "the portions of the trial most critical to fair deliberations, the presentation of evidence and jury instructions . . . ." 2002 MP 6 ¶ 123.

¶ 42 Distinguishing this case from *Cepeda* is the degree of admitted testimony. In *Cepeda* the court admitted the prejudicial testimony. Here, the trial court struck the lead detective's improper testimony and immediately issued a remedial jury instruction. Thus we find the instant case more analogous to *Jin Xin Xiao*. Considering the failure to read substantive jury instructions at the close of trial and the prosecution's improper statement during closing argument, even when coupled with the detective statements, does not convince us it is more probable than not the errors materially affected the jury's verdict. In *Commonwealth v. Lucas* we echoed the determination of the United States Supreme Court in concluding "no litigant is assured of a perfect trial, but only a fair one." 2003 MP 9 ¶ 13 n.10 (citing *United States v. Hasting*, 461 U.S. 499, 508–09 (1983); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)). There is no question errors occurred that rendered Monkeya's trial imperfect. However, when viewed together, it is not more probable than not these errors materially affected the verdict, or rendered Monkeya's trial unfair. As such, we conclude reversal is not warranted under the cumulative error doctrine.

V. CONCLUSION

¶ 43 For the foregoing reasons, we AFFIRM Monkeya's conviction.

SO ORDERED this 5th day of September, 2017.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice