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IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee.

v.

JOHN SANTOS ALDAN,
Defendant-Appellant,

Supreme Court No. 2017-SCC-0032-CRM

OPINION

Cite as: 2020 MP 20

Decided September 14, 2020

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLONA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Criminal Action No. 16-0011
Associate Judge Teresa Kim-Tenorio, Presiding

CASTRO, C.J.:

¶ 1 Defendant-Appellant John Santos Aldan ("Aldan") appeals his conviction for sexual assault. He contends that the trial court improperly admitted DNA evidence that should have been excluded under NMI Rule of Evidence 702(d). He argues that the jury verdict should therefore be reversed and the case remanded for a new trial. In the alternative, he requests that we vacate his sentence and the denial of his eligibility for parole. We agree that the court abused its discretion in admitting the DNA evidence but AFFIRM the conviction because the error was harmless. We AFFIRM the sentence in part but VACATE the denial of parole eligibility.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Aldan was charged with Sexual Assault in the First Degree under 6 CMC § 1301,[1] Disturbing the Peace, and Assault and Battery for the forcible penetration of the daughter of a family friend. She called him "uncle," though he is not her biological uncle. Aldan picked the victim up from Northern Marianas College and drove her to a remote jungle area, where he assaulted her. She told him "no" and he held her down. Afterward, he stopped at a store and bought food and drinks. The receipt from this purchase was admitted into evidence. Family members testified that Aldan drove the victim home from a different direction than usual, which raised their suspicions, and that the victim appeared upset and later described the assault.

¶ 3 An OBGYN physician performed a sexual assault examination. The victim sustained physical injuries consistent with being pinned down. Swabs from the sexual assault kit were submitted to Bode Cellmark Forensics for DNA analysis, along with swabs from the defendant. Bode Cellmark used the Y-STR counting method, which estimates how common the defendant's DNA profile is in the population. It used a database that consisted almost entirely of samples from mainland United States individuals.

¶ 4 At trial, the Commonwealth sought to introduce testimony from Christina H. Nash ("Nash"), a DNA analyst at Bode Cellmark, on the Y-STR analysis. Aldan filed a motion in limine to exclude the Y-STR analysis and testimony, and a *Daubert* hearing was held. The court heard testimony from Nash and the defense's expert witness, Dr. Philip B. Danielson ("Dr. Danielson"). The court denied the motion in limine and both Nash and Dr. Danielson testified at trial. The Assault and Battery charge was dismissed, but the jury convicted Aldan of Sexual Assault in the First Degree and the bench found him guilty of Disturbing the Peace. In addition to the disputed DNA evidence, the victim's testimony, the physical evidence of the sexual assault kit, and the testimony of the victim's family were brought to bear. The court sentenced Aldan to the maximum thirty years for sexual assault and the maximum six months for disturbing the peace, to

[1] "An offender commits the crime of sexual assault in the first degree if (1) the offender engages in sexual penetration with another person without consent of that person." 6 CMC § 1301(a)(1).

be served consecutively without the possibility of parole. Aldan appeals.

II. JURISDICTION

¶ 5 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 6 We review the admission or exclusion of evidence for an abuse of discretion. *Commonwealth v. Crisostomo*, 2018 MP 5 ¶ 12 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, (1999)). We also review mechanical sentencing for an abuse of discretion. *Commonwealth v. Falig*, 2019 MP 11 ¶ 8. Individualized sentencing and denial of parole eligibility are reviewed under the two-step process of *Commonwealth v. Babauta*, 2018 MP 14 ¶ 12. Unpreserved objections to procedural error are reviewed for plain error, whereas preserved objections to procedural error and all objections to substantive reasonableness are reviewed for an abuse of discretion. *Id.*

IV. DISCUSSION

A. Evidentiary ruling

¶ 7 Aldan argues that the trial court abused its discretion by failing to make "gateway determinations as to the relevance and reliability" of the Y-STR DNA evidence. *Crisostomo*, 2018 MP 5 ¶ 24. He asserts that the admission of the Y-STR analysis violates NMI Rule of Evidence 702(d), which requires that "the expert has reliably applied the principles and methods to the facts of the case," because the analysis used a database of DNA samples from the mainland U.S. that is not reflective of the CNMI population. Aldan argues that this erroneous evidentiary ruling is not harmless error because it is more probable than not that it materially affected the verdict.

¶ 8 The Commonwealth argues that the DNA evidence was admissible under 6 CMC § 1319, which was specifically intended to apply to sexual assault cases. *See* PL 12-82, § 1. It contends that, since the statute discusses population frequency comparisons but does not mandate a local population frequency comparison, the fact that the Y-STR analysis used a mainland database poses no problem.[2] The Commonwealth notes that in *Commonwealth v. Taitan*o, 2018 MP 12, we found that a non-CNMI specific DNA database did not render expert testimony inadmissible. *Id*. ¶¶ 24–27.

¶ 9 NMI Rule of Evidence 702 ("Rule 702") governs the admissibility of expert testimony. Rule 702 has four prongs, all of which must be met for expert testimony to be admissible:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

[2] Under 6 CMC § 1319(b)(2)(B), a DNA profile "includes statistical population frequency comparisons . . . ."

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

NMI R. Evid. 702. Our rule tracks the holdings of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993), and its successors, particularly *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

¶ 10 In a line of recent cases, including *Crisostomo*, 2018 MP 5, *Commonwealth v. Taitano*, 2018 MP 12, and *Indalecio v. Mobil Oil*, 2020 MP 1, we have interpreted Rule 702 in the context of the Commonwealth, where expert testimony in some specialties may be difficult to obtain without logistical challenges. "Accordingly, we interpret *Daubert* as a liberal standard and 'rejection of expert testimony is the exception rather than the rule.'" *Taitano*, 2018 MP 12 ¶ 22 (citing FED. R. EVID. 702 advisory committee note to 2000 amendment.). Still, though "courts have broad discretion in fulfilling their gatekeeping function under *Daubert*, . . . they must not abandon this function or perform it inadequately." *Crisostomo*, 2018 MP 5 ¶ 40 (citing *Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring)).

¶ 11 Nash, the prosecution's expert, was well-qualified as required by Rule 702(a). Bode Cellmark's analysis was based on swabs taken from the victim and the defendant, which is appropriate data on which to base expert testimony under 702(b). Courts generally regard the Y-STR analysis method as reliable under 702(c). *See, e.g.*, *People v. Stevey*, 148 Cal. Rptr. 3d 1, 10–13 (Cal. Ct. App. 2012); *Commonwealth v. Lally*, 46 N.E. 3d 41, 49–54 (Mass. 2016). The first three prongs of NMI Rule of Evidence 702 are met. However, the fourth prong, the "fit" of the method to the facts, poses a problem.

¶ 12 702(d) requires the expert to have "reliably applied the principles and methods to the facts of the case." Here, Bode Cellmark on behalf of the prosecution conducted Y-STR DNA analysis of swabs from a sexual assault kit. This method looks only at sites on the Y chromosome, which is inherited paternally in males. Bode Cellmark compared their sample with a representative database of mainland U.S. populations and found no matches in the database. App. 55. The defense's expert, Dr. Danielson, testified that the autosomal analysis method, which can be used on both male and female individuals, has much greater discrimination power, i.e., ability to rule out the possibility that someone other than the defendant produced a sample. Moreover, to his knowledge, there were no Micronesian populations represented in the database

used by Bode Cellmark. Aldan is Pohnpeian. Tr. 110–11. This lack of fit is cause for concern under Rule 702(d).

¶ 13 In this case, the experts discussed two different types of DNA testing, Y-STR and autosomal testing. Humans have 22 pairs of autosomal or body chromosomes. These are used in autosomal testing, which applies to both males and females. There is also one pair of allosomal or sex chromosomes, which in males consists of an X and Y chromosome. The Y chromosome is tested in Y-STR testing, which only applies to males. STR stands for short tandem repeat, which is a section of repetitive DNA strand that is highly variable between individuals. *Id*. at 28.

i. Y-STR Testing

¶ 14 Since the Y chromosome is passed from the father, it is nearly identical in the paternal line. Y-STR testing is accordingly used in paternity, forensic, and genealogical testing. *See People v. Pike*, 53 N.E. 3d. 147, 162–69 (App. Ct. Ill. 2017); *Taitano*, 2018 MP 12 ¶ 5 (using Y-STR testing to establish paternity). But in Y-STR testing it is difficult to distinguish between a suspect and his male cousins, uncles, etc. While Y-STR testing is useful for paternity tests or genealogical testing for forensic purposes, it is weaker than autosomal testing. Whereas Y-STR testing examines loci (areas of the DNA) only on the Y-chromosome, autosomal testing examines loci on several body chromosomes. An individual's autosomal STR samples are different from those of his or his or her parents, but a man's Y-STR sample will be very similar to that of his father. Because the victim and the perpetrator's DNA may be intermingled in different proportions in a sexual assault case, Y-STR testing can be used to clearly distinguish a male perpetrator from a female victim. App. 28. But whereas autosomal testing can sharply distinguish between two DNA samples by looking at several areas that vary independently, Y-STR testing has weaker discrimination power.

¶ 15 Y-STR analysis therefore uses the counting method, which compares a sample to a database to estimate the frequency with which the sample's Y-chromosome haplotype appears in the population. *See, e.g.*, *Stevey*, 148 Cal. Rptr. 3d at 5–6; *People v. Tunis*, 318 P.3d 524, 526–27 (Colo. Ct. App. 2013). A haplotype is a group of variant forms of genes that are inherited together from a single parent (in the case of Y-STR testing, the father). The Y-haplotype frequency, p, is calculated with the equation p=x/N. The variable x is the number of times the haplotype occurs in a database with N number of haplotypes. If a haplotype occurs once in a database with 1000 haplotypes, p is 0.001, 1/1000. A confidence interval is used to correct for database size and sampling variation in order to estimate the frequency of a Y-haplotype in the population. App. 30.

¶ 16 The problem here is that the database used had representative samples from mainland U.S. ethnic groups, including self-identified African-Americans, Asians, Caucasians, Hispanics, and Native Americans, but zero known Pohnpeian or Micronesian samples. *Id*. at 37. The probability generated by Bode Cellmark's database does not fit the facts of this case because the denominator

does not reflect the relevant population. In *United States v. Kootswatewa*, 2016 U.S. Dist. LEXIS 25936 (D. Ariz. 2016), the court held that testimony regarding Y-STR testing of a Hopi defendant was inadmissible under FRE 403 and potentially FRE 702 because the database used was not known to have any Hopi samples and "[w]ithout sound population frequency estimates, a jury cannot properly evaluate the weight" of the DNA evidence. *Id*. at *11. Cross-examination was not enough to cure the unrepresentative statistical interpretation because "there exists a substantial risk that a jury hearing the statistic might give it more weight than appropriate under the circumstances." *Id*. at *12. The court held that testimony concerning Y-STR testing based on unrepresentative data was unreliable under 702 and, further its probative value was substantially outweighed by the risk of unfair prejudice under Rule 403. *Id.* The same problem is present here; the mismatch between the database and the CNMI creates a danger of a misleading statistical inference regarding the rarity of Aldan's haplotype. *See* Daniel H. Faye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101, 137–139 (1993); *State v. Tucker*, 920 N.W. 2d. 680, 684 (Neb. 2018) (acknowledging problems with the application of Y-STR analysis to populations not well-represented in databases).

¶ 17 This mismatch goes to the "fit" prong of Rule 702(d). "Underrepresentation of persons of like ethnicity in the profile data bases . . . may inflate the odds against a random match with the defendant's sample. In such a situation the jury may be ill-suited to discount properly the probative value of DNA profiling statistics." *United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994). In *Taitano* we held that DNA analysis involving a non-CNMI database was admissible, but unlike in this case, the database included Pacific Islander samples. 2018 MP 12 ¶¶ 18, 21. Additionally, in *Taitano*, the Y-STR method was used for paternity testing, rather than, as here, to identify a criminal defendant on the basis of the frequency of his haplotype in the population, a context with greater danger of unfair prejudice. *Id*. ¶ 5. The court in *Crisostomo* appropriately excluded mitochondrial DNA analysis which used an unrepresentative database. *Commonwealth v. Crisostomo*, Crim. No. 13–0049 (NMI Super. Ct. Mar. 14, 2014) (Order Granting in Part Motion to Exclude Mitochondrial DNA Test Results and Expert Testimony at 10–14).

¶ 18 Here, the Y-STR analysis using a database of mainland samples yielded a misleading impression that Aldan's haplotype is rarer in the context of the CNMI than may in fact be the case. The profile from the vaginal swabs was seen zero times in the U.S. Y-STR database among the 5,259 individuals analyzed. Tr. 148. This evidence could have given the jury the misleading impression that, because the sample's haplotype was rare in mainland U.S. populations, it must also be rare in the CNMI population. Use of the U.S. Y-STR database may have given an inflated probability that the sample came from the defendant. Nash herself acknowledged that a larger database containing Micronesian profiles would have yielded a more accurate statistic. Tr. 151. A more representative database with Micronesian samples might have had many profiles with this haplotype. That is,

Aldan's profile may be more common in the CNMI population than Bode Cellmark's analysis would imply.

ii. Autosomal Testing

¶ 19 Autosomal analysis would have been feasible and would have had much greater power compared to Y-STR testing. Random matching occurs between pairs of chromosomes during fertilization. App. 23. As a result, autosomal chromosomes will differ between individuals, apart from twins. Autosomal analysis compares loci on up to eighteen different chromosomes which vary independently. This is the key to autosomal testing's discrimination power, under a principle called the product rule. This states that the probability of multiple independent events concurring is calculated by multiplying the individual probabilities of these events. If two DNA samples are identical at eighteen different independently varying loci, the probability that they come from different individuals can be as low as one in quadrillions. Suppl. Tr. 28. Y-STR analysis is appropriate where male and female DNA cannot be separated in the sample. Where, as here, the sperm fraction was successfully separated, autosomal analysis is appropriate and is much more probative evidence.

¶ 20 Bode Cellmark identified the presence of sperm in the vulva swab sample and separated the sperm from the female epithelial cell. Tr. 121–22. Nash acknowledged that the sperm cells were separated from the epithelial cells. Tr. 141. However, she stated that "[w]hen [Bode Cellmark] estimated the amount of DNA present . . . it showed that there would be a lot of female DNA present . . . in some of the samples" and that they used Y-STR testing as a result. *Id*. But Dr. Danielson read the bench notes underlying Nash's report, which contained the raw data of the tests, and concluded that the male DNA would have been sufficient for autosomal testing. Suppl. Tr. 30–34. The Commonwealth objected that these bench notes were not admitted into evidence and were therefore hearsay. The court sustained this objection. But under NMI Rule of Evidence 703, it would permissible for Dr. Danielson to base his expert opinion even on inadmissible data provided that they were of a kind relied upon by experts in the field.[3] *See Vann v. State*, 229 P.3d 197, 201–02 (Alaska Ct. App. 2010) (noting that Rule 703 analysis governs admissibility of an expert's opinion relying on another expert's bench notes regarding separation of sperm and epithelial cells

[3] NMI Rule of Evidence 703 reads:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. NMI R. EVID. 703.

for DNA analysis). Autosomal testing would have been feasible here, and could have yielded a relevant, probative, and admissible statistical interpretation.

¶ 21 Several courts hold that DNA matching evidence is "inadmissible in the absence of a statistical interpretation of the significance of the declared match." *Nelson v. State*, 628 A.2d 69, 75 (Del. 1993); *see also* George Bundy Smith and Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 FORDHAM L. REV. 2465, 2486–87 (1997). Here, the result that Aldan could not be excluded as the source of the Y-STR sample from the vulva swabs would have been admissible with a statistical interpretation normed to the *relevant* population. As it stood, however, the Y-STR evidence with an inapposite statistical interpretation violated Rule 702(d) and potentially NMI Rule of Evidence 403 as well. The misleading accompanying statistic runs the risk of unfair prejudice and may outweigh the considerable probative value in the non-exclusion of Aldan as a contributor to the samples. *See* NMI R. EVID. 403.

¶ 22 The confidence interval was not enough to compensate for the inappropriate database, as the Commonwealth asserts, because a confidence interval accounts only for variation in sampling from a pool, not for the absence of relevant data from the pool altogether. Dr. Danielson illustrated the principle with the example of fifty pennies and fifty dimes in a piggy bank. If ten are pulled out at random, there may be many combinations of the number of pennies and dimes; the sample may not be a perfectly representative distribution of exactly five pennies and five dimes. A confidence interval corrects for the sampling but says nothing about the absence of nickels from the piggy bank. Suppl. Tr. 40–41. The statistical interpretation of the Y-STR testing using the U.S. database was misleading in the context of the CNMI for the same reason—the absence of Micronesian samples. That is, the Commonwealth's expert did not "reliably appl[y] the principles and methods to the facts of the case." NMI R. EVID. 702(d).

¶ 23 Having found Nash's testimony otherwise inadmissible under Rule 702(d), we next examine whether it was rendered admissible by 6 CMC § 1319. The statutory interpretation of Section 1319 is an issue of first impression.[4] The language is modeled after Alaska Stat. § 12.45.035(a), passed in 1995. That legislation had "the effect of amending Rule 703, Alaska Rules of Evidence, to the extent that Rule 703 would limit the admissibility of DNA profile evidence as a result of the application" of the more restrictive pre-*Daubert* standard from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), adopted by the Alaska Supreme Court in *Pulakis v. State*, 476 P.2d 474 (Alaska 1970). S.B. 13, 19th

[4] 6 CMC § 1319(a) reads:

> In a criminal action or proceeding, evidence of a DNA profile is admissible to prove or disprove any relevant fact, if the court finds that the technique underlying the evidence is scientifically valid. The admission of the DNA profile does not require a finding of general acceptance in the relevant scientific community of DNA profile evidence.

Leg. (Alaska 1995). The *Frye* standard "requires a finding of general acceptance of scientific evidence in the relevant scientific community as a precondition of admission of scientific evidence." *Id*. That is, Alaska Stat. § 12.45.035(a) imposed the *Daubert*, rather than *Frye*, standard to DNA evidence in Alaska courts. But in *Crisostomo*, we held that our Rules of Evidence follow the more liberal *Daubert* standard and do not require a finding of general acceptance in the relevant scientific community. *See Crisostomo*, 2018 MP 5 ¶¶ 17–19. Section 1319 is therefore redundant post-*Crisostomo*, as *Daubert* rather than *Frye* now applies to our Rules of Evidence in general. The Y-STR testimony was accordingly inadmissible notwithstanding Section 1319. Admitting this misleading and potentially prejudicial evidence was an abandonment of the court's gatekeeping function and an abuse of discretion. *See id.* ¶¶ 20–28.

iii. Harmless Error

¶ 24 Having found that the court abused its discretion in admitting Nash's testimony, we must reverse "unless there is a fair assurance of harmlessness . . . ." *Id*. ¶ 35 (quoting *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997)). "When reviewing errors as to the admissibility of expert testimony, an error is harmless if 'it is more probable than not that the error did not materially affect the verdict.'" *Id*. (quoting *United States v. Cohen*, 510 F.3d 1114, 1127 (9th Cir. 2007). Here, the error in admitting the DNA evidence did not materially affect the verdict. Independent evidence, including the victim's testimony and that of her family as well as the physical evidence of bruises on the victim's body, was sufficient to secure a conviction.

¶ 25 The physician who conducted the sexual assault examination of the victim documented the victim's description of the assault in detail, including that she told Aldan "no" and he forcibly held her down. Suppl. App'x 105. The physician testified that the victim's account of the incident was consistent with her physical injuries. Tr. 326. These included bruises and scratches on the hip and swelling of the vaginal area. Suppl. App'x 109–16. The injuries are consistent with the trial testimony that Aldan held the victim down to assault her. Tr. 492. The victim's mother testified to the victim's account of the assault the night it occurred, including Aldan's excuse for driving her to the isolated jungle area that he was gathering materials to make the drink sakau (Pohnpeian for kava). Tr. 488–92. The victim's father testified to the close relationship of which Aldan took advantage; the two grew up together on Pohnpei. Tr. 499–500. He also testified to the fact that Aldan and the victim drove in from a different direction than usual the night of the assault, that the victim described the assault on the way home, and that she has been experiencing trauma and unable to return to school since the crime. Tr. 503–11.

¶ 26 Testimony of law enforcement officials further corroborated the victim's account of the assault. Detective Therese Kintoki recounted that the victim told her that Aldan had previously driven her to the same place and threatened to assault her. Tr. 363. The victim identified Aldan as the offender to Officer

Edward Cepeda, the preliminary officer who responded to her complaint. Tr. 272–74. Detective Myron Laniyo testified regarding several pieces of physical evidence found in Mr. Aldan's pickup truck, including the receipt from the store Aldan visited after the assault and the shirt that the victim testified he wore during the assault. Tr. 458-60. The pickup truck had a door that latched shut from the outside, which he used to lock the victim in. Tr. 343–44.

¶ 27 Though the admission of Nash's testimony was an abuse of discretion, it was harmless error. Even without the DNA evidence, there was compelling evidence to secure a conviction and it is not more probable than not that the DNA evidence materially affected the verdict. *See Deloney v. State*, 938 N.E.2d 724, 730 (Ind. 2010) ("There existed substantial independent evidence of [the defendant]'s guilt, and thus the trial court's error in admitting the DNA evidence was harmless."); *Nelson*, 628 A.2d at 77 (holding wrongly admitted DNA evidence was harmless error because other evidence in the record strongly supported conviction). The error was harmless and we therefore affirm the jury verdict.

B. Sentencing

i. Standard of Review

¶ 28 The Commonwealth presents several arguments regarding the applicable standard of review. It argues that, apart from 6 CMC § 4115's requirement to include findings as to why the sentence will serve the interests of justice, sentences within the statutory range should be unreviewable for substantive reasonableness. In the alternative, if the current standard is retained, the Commonwealth argues the Court should apply a rebuttable presumption that a sentence within the permissible range is reasonable. As to the applicable standard under *Babauta*, it argues that the plain error standard of review should apply to the sentencing issues, since Aldan did not object to any procedural error prior to filing a notice of appeal.

¶ 29 Aldan contends that the abuse of discretion standard of review should apply to his individualized sentencing and parole eligibility arguments even though he did not object below. This is because, he argues, the procedural mechanism for objecting at sentencing in federal court, after the judge has discussed enhancement but before pronouncing sentence, does not exist in the CNMI, and so filing a Notice of Appeal should count as an "objection" for purposes of the standard of review.

¶ 30 We have recently rejected several of the Commonwealth's arguments. *Commonwealth v. Falig*, 2020 MP 13 ¶¶ 7–18 (reaffirming the bifurcated standard from *Babauta*); *Commonwealth v. Martin*, 2020 MP 10 ¶¶ 13–17 (holding that we can rely on federal caselaw as persuasive authority in reviewing sentences for substantive reasonableness). Here, plain error is the appropriate standard of review for procedural error claims regarding individualized sentencing and parole eligibility because no objection was preserved. If filing a notice of appeal constitutes preserving an objection, that renders the idea of preservation meaningless because the point of preserving objections is to call the

trial court's attention to a potential error at the time, or close to the time, it is made. As we noted in *Falig*, defense counsel can object to procedural errors in the sentencing hearing after the pronouncement of sentence. 2020 MP 13 ¶ 13.

¶ 31 We also decline to apply a presumption of reasonableness to any sentence within the statutorily permissible range. Federal courts apply such a presumption precisely because federal judges have the ability post-*Booker* to impose a sentence outside the Federal Sentencing Guidelines. *See generally United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007). Our statutory range, by contrast, is a hard cap and a length of imprisonment outside the range is an illegal sentence.

ii. Mechanical and Individualized Sentencing

¶ 32 Aldan first argues that his sentence was imposed mechanically under *Woosley v. United States*, 478 F.2d 139, 140 (8th Cir. 1973) because the court's readiness to declare sentence immediately after the defense's closing argument at the sentencing hearing suggested a predetermined policy of imposing the maximum. As to individualized sentencing, Aldan contends that the court did not sufficiently weight his age and lack of a prior conviction and the victim's minimal physical injuries as mitigating factors. He also argues that the court's emphasis on the psychological suffering of the victim was impermissible because this will be present in nearly all assault cases, making it analogous to an element of the offense. *See Commonwealth v. Kapileo*, 2016 MP 1 ¶ 25 (holding that "an individualized sentence should not include essential elements of a crime as aggravating factors."). Aldan contends that the case should be remanded to a different sentencing judge. Finally, he argues that the court abused its discretion by giving no justification for denying eligibility for parole.

¶ 33 The Commonwealth contends that the sentencing was not imposed mechanically because there was no indication in the record of a general policy of giving a maximum sentence. Further, it contends that there were no impermissible aggravating factors and that the court chiefly relied on the victim's psychological suffering. It argues that the sentence was substantively reasonable because the court listed mitigating and aggravating factors and "a reasonable person could justify the sentence imposed." *Commonwealth v. Palacios*, 2014 MP 16 ¶ 13. The Commonwealth alleges that the court considered parole eligibility in its total evaluation, even though it did not specifically discuss reasons for lack of parole eligibility at the sentencing hearing.

¶ 34 As to mechanical sentencing, Aldan provides no evidence to support the three factors from *Woosley*, which we adopted in *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 10. These are: 1) the judge's record of imposing the maximum term for a specific offense; 2) the judge's comments indicating a predetermined policy of issuing the statutory maximum for a particular crime; and 3) the lack of reasons for the severity of the punishment other than the judge's reflexive attitude. *Id.* Here, the sentencing judge specifically stated in the sentencing order that aggravating factors, particularly the abuse of trust in the relationship of an older family friend and the psychological suffering of the victim, justified a long

sentence. App. 102. Aldan did not provide prior examples of the judge imposing the maximum term for this offense. We find that the sentence was not imposed mechanically.

¶ 35 With respect to individualized sentencing, while Aldan objects to the weight the court assigned to aggravating and mitigating factors, it did not rely on impermissible factors. Reliance on an impermissible aggravating factor constitutes a procedural defect, which we review for plain error where, as here, no objection was preserved. *Commonwealth v. Hocog*, 2019 MP 5 ¶ 13. The court emphasized the victim's suffering and the abuse of a position of trust and power as aggravating factors. It considered the Aldan's age and lack of a prior record as well as the victim's minimal physical injuries as mitigating factors but did not weight these heavily relative to the aggravating factors. *Id*. While it is true that psychological suffering will likely be present in most assault cases, it is not an element of the offense and thus not an impermissible aggravating factor. While the sentence may be harsh, the trial court did not fail to weigh factors and provide an individualized rationale. We find no error with respect to individualization of the sentence.

¶ 36 On the other hand, Aldan is correct that the court failed to justify its denial of parole eligibility. There is no discussion at all of parole eligibility in the sentencing order until the actual sentence is given. App. 103. The court must provide reasons for denial of parole eligibility beyond the statutory minimum. *Jin Song Lin*, 2016 MP 11 ¶ 23 ("The court may . . . in its discretion, designate a parole eligibility period greater than the statutory minimum, and should articulate on the record its reasons for doing so.") (quoting *Jackson v. State*, 616 P.2d 23, 25 (Alaska 1980)). This was an abuse of discretion and we therefore vacate the sentence as to parole eligibility. We do not remand and therefore need not consider whether reassignment would be warranted.

V. CONCLUSION

¶ 37 Y-STR analysis with the database of mainland samples yielded a statistical inference which is materially misleading in the context of this case. This was a failure to reliably apply the method to the facts of the case, and it was an abuse of discretion to admit this evidence. It was nonetheless harmless error because there existed substantial independent evidence of the defendant's guilt. We therefore AFFIRM the jury verdict. As to the sentence, we find it was not mechanically imposed or insufficiently individualized because the court provided individualized reasoning and weighed mitigating and aggravating factors. However, there was no rationale given for denial of parole eligibility as required under *Jin Song Lin*. We VACATE the denial of parole eligibility but otherwise AFFIRM the sentence.

SO ORDERED this 14th day of September, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

COUNSEL

J. Robert Glass, Jr., Saipan, MP, for Plaintiff-Appellee.

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NOTICE

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Supreme Court No. 2017-SCC-0032-CRM
Superior Court No. 16-0011

JUDGMENT

Defendant-Appellant John Santos Aldan appeals his conviction and sentence for Sexual Assault in the First Degree. For the reasons discussed in the accompanying opinion, the Court AFFIRMS the conviction and the sentence in part but VACATES the denial of eligibility for parole.

ENTERED this 14th day of September, 2020.

/s/
GRETCHEN A. SMITH
Clerk of the Supreme Court